

OPD Death Penalty Report Second Quarter 2008

1. Executions

There were no executions during the second quarter of 2008.

2. Execution Alerts

Motions to set execution dates for **Richard Cooley** (Summit County), **Gregory Bryant-Bey** (Lucas County), **Jerome Henderson** (Hamilton County), and **Kenneth Biros** (Trumbull County) were filed by the State in this quarter.

3. Capital Trials

The capital defense bar successfully avoided the imposition of any new death sentences in this quarter.

Luke Adkins (Morrow County) avoided a possible death sentence by pleading guilty to aggravated murder on June 26, 2008 and was sentenced to 42 years to life. He was represented by attorneys Bruce Davis and Chris Heckert.

William T. Allen (Delaware County). The capital indictment against Mr. Allen was dismissed on April 22, 2008 and he was re-indicted without the capital specifications. Assistant State Public Defenders Melissa Callais, Greg Meyers, and Bill Mooney represent Allen.

William Calhoun (Cuyahoga County) was sentenced to life with no chance of parole on April 3, 2008, after a jury trial. Calhoun was represented by attorneys John Gibbons and Rufus Sims.

Charles Carter (Hamilton County) was sentenced, on April 3, 2008, to life with the possibility of parole after 30 years after pleading guilty to aggravated murder. Attorneys Norman Aubin and Massimino Ionna represented Carter.

Carlos Christopher (Cuyahoga County) was spared a death sentence when a three-judge panel sentenced him to life with no chance of parole on May 28, 2008. He was represented by attorney John Pyle.

John G. Cline (Licking County) avoided a possible death sentence by pleading guilty to murder on April 15, 2008 and was sentenced to 46 ½ years. Cline was represented by attorneys Brian Rigg and Kirk McVay.

Rufus O. Gray (Cuyahoga County). On April 16, 2008, a jury acquitted Gray of all charges involving the deaths of two victims. Harvey Bruner and James Kersey were Gray's attorneys.

Terrance M. Hough (Cuyahoga County) was spared a death sentence following a jury trial. On June 6, 2008 he was sentenced to life without parole. Attorneys John Hildebrand and John (Jake) Hildebrand were Hough's attorneys.

Harvey G. Johnson, Jr. (Butler County) was sentenced to life without parole on June 6, 2008 following his jury trial. Attorneys Greg Howard and Melynda Cook-Reich represented him.

Shawn Kelly (Cuyahoga County) avoided the possibility of a death sentence by pleading guilty to voluntary manslaughter and was sentenced on June 5, 2008 to life with a chance of parole after 10–25 years. Kelly's attorneys were David Grant and Mark Stanton.

Timothy C. Pettway (Cuyahoga County) was sentenced on May 20, 2008, following a jury trial, to life with the possibility of parole after 18 years. Pettway was represented by attorneys James Kersey and Brian McGraw.

Michel Veillette (Warren County) committed suicide on April 15, 2008. His attorneys were Timothy J. McKenna and Greg Howard.

4. Direct Appeal Decisions

State v Clifton White (Summit County). In a unanimous opinion issued on April 9, the Ohio Supreme Court held that Clifton White is mentally retarded and thus ineligible for the death penalty. Justice Cupp wrote the opinion with Judge O'Toole of the Eleventh Appellate District sitting for Justice O'Connor.

White was sentenced to death for a 1995 aggravated murder. Following the United States Supreme Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), White filed a post-conviction petition asserting that he is ineligible for the death penalty because he is mentally retarded. The trial court held an evidentiary hearing on White's claim. Psychologists appointed for both White and the State found that he met all three criteria for a mental retardation claim under *Atkins* (significantly subaverage intelligence, adaptive skills deficits in two or more areas, and the onset of these by age 18). Significantly, White obtained an IQ score of 52 on the WAIS-III when he was tested by both appointed psychologists. According to the psychologist retained by the State, "White's overall adaptive skills [are] comparable to those of an average person age 11 years, ten months." Despite overwhelming expert testimony supporting White's claim, the trial court denied relief by finding that White did not have significant adaptive skills deficits. The trial court found that White did not have adaptive skills deficits because he could perform several menial tasks, according to a lay witness for the State. The trial court also rejected White's claim that his mental retardation onset was by age 18. The Ninth Appellate District affirmed, finding no abuse of discretion.

The Ohio Supreme Court accepted White's discretionary appeal. It held that the trial court abused its discretion when it rejected the uncontroverted expert testimony supporting White's mental retardation claim: "[T]he trial court abused its discretion when it determined that White had failed to prove the existence of significant adaptive-skills limitations. ... [T]he trial court failed to set forth any rational basis grounded in the evidence for rejecting the uncontradicted testimony of two qualified expert witnesses in the field of psychology." Likewise, "the trial court, by rejecting well-supported expert opinion regarding pre-18 onset without any evidence to the contrary, abused its discretion."

White was represented in his appeal to the Ohio Supreme Court by Assistant State Public Defenders Kathy Sandford and Dick Vickers.

State v. James Were (Hamilton County). Were was sentenced to death for his role in the aggravated murder of a prison guard during the riot at the Southern Ohio Correction Facility in

1993. The Ohio Supreme Court unanimously affirmed Were's convictions and death sentence on June 17. Justice Pfeifer authored the court's opinion.

The court rejected Were's claim that the trial court abused its discretion when it found Were competent for trial. The court noted that "[a] defendant may be emotionally disturbed or even psychotic and still be capable of understanding the charges against him and of assisting his counsel. ... The trial court's findings were based on the state's two witnesses, consideration of the defense evidence, and its own observations of the defendant. Thus, reliable and credible evidence supports the trial court's decision."

Were also claimed that the trial court abused its discretion when it found that he was not mentally retarded. However, the court found no abuse of discretion because the trial court had been presented with conflicting expert testimonies and "[t]he weight to be given the evidence and the credibility of the expert witnesses are primarily for the trier of fact."

Additionally, the court rejected Were's argument that he was entitled to a jury verdict on the issue of whether he was in fact mentally retarded. "The fact that a capital defendant is not mentally retarded ... is not an aggravating circumstance that increases a defendant's punishment. Rather, the failure to find mental retardation simply means that the defendant remains eligible to be sentenced to death. Such a finding can affect a sentence only by mitigating it."

Were was represented in this appeal by attorneys H. Fred Hoefle and Chris McEvilley.

5. Federal Habeas Decisions

The Sixth Circuit issued opinions in five Ohio capital habeas appeals in this quarter and granted relief in two cases.

5.1 Sixth Circuit

Mark Brown v. Bradshaw (Mahoning County). The court affirmed the district court's denial of habeas relief on June 26. The opinion was authored by Judge Siler and joined by Judges Batchelder and Sutton. The court reviewed only one claim in this appeal. Brown argued that that an instruction following an impasse in the penalty phase deliberations coerced the jury into a death penalty verdict. However, the court found that no violation of clearly established federal law resulted from the instruction because it "merely encouraged the jurors to consider each other's views and to ask themselves whether their own views were reasonable under the circumstances. ... The trial court, in short, did not order the jury to reach a verdict."

Brown was represented in this appeal by attorneys George Pappas and Donald Malarcik.

Joe D'Ambrosio v. Bagley (Cuyahoga County). On June 5, the court affirmed the district court's order granting habeas relief based on the prosecutor's suppression of favorable evidence. The opinion was authored by Judge Rogers and joined by Judge Gibbons.

D'Ambrosio was sentenced to death for an aggravated murder committed in 1988. During habeas proceedings in 2002, D'Ambrosio "moved to amend his petition to add a *Brady* claim based on newly-discovered evidence." However, the court concluded "that the warden expressly waived the exhaustion requirement...."

On the merits, the court categorized the non-disclosed evidence into two categories. “First, there is evidence that would have contradicted or weakened the testimony of the prosecution’s only eyewitness to the murder Second, there is evidence that demonstrates a [criminal] motive on the part of another individual Because the evidence that the prosecution suppressed would have had the effect of both weakening the prosecution’s case and strengthening the defense’s position that someone else committed the murder, there is a reasonable probability that the outcome of D’Ambrosio’s trial would have been different.”

In dissent, Chief Judge Boggs argued that the warden had not expressly waived the exhaustion requirement under 28 U.S.C §2254(b)(3).

D’Ambrosio was represented in this appeal by attorneys John Q. Lewis and Edward Sebold of Jones Day, Cleveland.

Marvallous Keene v. Mitchell (Montgomery County). The court affirmed the denial of habeas relief in this appeal on April 25. The opinion was authored by Judge Siler and joined by Judges Merritt and Sutton.

Keene, who is African-American, asserted that he was selectively prosecuted for a death penalty offense on the basis of his race. Keene argued that similarly situated white offenders had not been prosecuted for the death penalty in Montgomery County. This included one of Keene’s white co-defendants. The court, however, found that Keene’s claim failed because “[t]here were significant differences between Keene’s prosecution and the allegedly similar case where the prosecution did not seek the death penalty against three white defendants.” The court also dismissed the disparity in sentencing between Keene and one of his potentially death-eligible white co-defendants. The court noted that the white codefendant played a relatively minor role in the murders as compared to Keene who had been “the triggerman in four of the five aggravated murders.”

Keene was represented in this appeal by Assistant State Public Defenders Pamela Prude-Smithers and Kelly Schneider.

Abdullah Sharif Kaazim Mahdi (formerly Vernon Smith) v. Bagley (Lucas County). In this case, the court of appeals affirmed the district court’s denial of habeas relief. The unanimous opinion of the court was authored by Judge Gibbons and joined by Chief Judge Boggs and Judge Moore. The court’s opinion was issued on April 11.

Mahdi, an African-American man, was tried for the aggravated murder of an Arab store clerk during an aggravated robbery. Mahdi argued on habeas that his trial counsel performed ineffectively during voir dire because they failed to explore issues of racial and religious bias with the prospective jurors. The court found no Sixth Amendment violation, explaining that “the content of questions during *voir dire* are typically left to the discretion of the trial counsel. ... Conducting *voir dire* on racial and religious grounds could have emphasized the possible role of racial and religious animus in the commission of the crime, bolstering the prosecution’s claim that the murder had been intentional.”

Mahdi was represented in this appeal by Assistant State Public Defenders Robert Lowe and Kimberly Rigby.

Frank Spisak, Jr. v. Hudson (Cuyahoga County). The court vacated Spisak’s death sentence in an Amended Order, granting habeas relief on two claims on April 11. The Amended Order

was joined by Judges Martin and Clay, with Judge Moore concurring in part and dissenting in part.

In October 2006, the court granted habeas relief to Spisak based on two sentencing errors. First, the jury was improperly instructed that it had to unanimously acquit Spisak of the death penalty before proceeding to consider a life verdict. Second, Spisak's trial counsel rendered ineffective performance because counsel disparaged Spisak during argument, sounding more like the prosecutor than Spisak's advocate. However, the Supreme Court granted certiorari in this case and remanded for the court of appeals to consider whether habeas relief was warranted in light of *Carey v. Musladin*, 127 S. Ct. 649 (2006) and *Schiro v. Landrigan*, 127 S. Ct. 1933 (2007). On remand, the court issued its April 11 Amended Order granting habeas relief on both sentencing phase claims.

Judge Moore agreed that Spisak was entitled to habeas relief on both sentencing claims. However, she dissented on the ground that the state courts violated the Constitution by precluding Spisak from presenting evidence to support an insanity defense.

5.2 District Court

Ulysses Murphy v. Bradshaw (Franklin County). Chief Judge Beckwith granted habeas relief in the form of a new trial to Murphy on April 11. Murphy won relief on his claim that law enforcement officers violated his Fifth Amendment right to counsel during custodial interrogation.

Murphy was represented by Assistant State Public Defender Ruth Tkacz.

6. Special Issues In Capital Cases

6.1 Mental Retardation

Three Ohio death row inmates won relief from their death sentences after they were found mentally retarded in this quarter. **Clifton White** (Summit County) was ruled ineligible for the death penalty by the Ohio Supreme Court on direct appeal. (See section 4, above.)

Raymond Smith (Lorain County) and **Paul Greer** (Summit County) were found mentally retarded after evidentiary hearings were held in the trial courts. Smith was represented by attorneys Alan Rossman and Jeff Kelleher. Greer was represented by attorneys Mike Benza and Jill Davis.

A fourth inmate, **James Were**, lost on his mental retardation claim in his direct appeal to the Ohio Supreme Court. (See section 4, above.)

6.2 Lethal Injection Litigation

The United States Supreme Court rejected a challenge to Kentucky's lethal injection protocol on April 16, in **Baze v. Rees**. In the plurality opinion written by Chief Justice Roberts, the court explained that an execution method may violate the Eighth Amendment if it creates a substantial risk of serious harm to the prisoner (apart from the act of causing death). Additionally, when a method of execution is challenged under 42 U.S.C. §1983, the opponent must proffer an alternative procedure that is feasible, readily implemented, and significantly

reduces the substantial risk of severe pain to the prisoner. Applying these principles, the court found that “petitioners have not shown that the risk of an inadequate dose of the first drug [sodium thiopental] is substantial. And [the court rejected] the argument that the Eighth Amendment requires Kentucky to adopt the untested alternative procedures petitioners have identified.”

The United States Supreme Court also denied **Richard Cooley’s** (Summit County) petition for certiorari in this quarter. Cooley sought review of the Sixth Circuit’s ruling that he was time-barred from raising a §1983 civil rights suit to challenge Ohio’s lethal injection protocol by a two-year statute of limitations. Cooley’s petition for certiorari was denied on April 21, and his petition for rehearing was denied on June 9. Cooley was represented by Assistant State Public Defenders Kelly Schneider, Greg Meyers, and Kim Rigby.

Success on the lethal injection front was achieved by capitally-indicted defendants at the trial level in this quarter in **State v. Ruben Rivera** and **State v. Ronald McCloud**. On June 10, Lorain County Common Pleas Judge James Burge ruled that the three drug cocktail used by ODRC violates the statutory requirement under O.R.C. §2949.22 that each execution must be “quick and painless.” According to Judge Burge, the use of the second and third drugs (pancuronium bromide and potassium chloride) are unnecessary to extinguish the prisoner’s life and may create and mask significant pain and suffering during lethal injection. Thus, “[i]f pancuronium bromide and potassium chloride are eliminated from the lethal injection protocol, a sufficient dosage of sodium thiopental will cause death rapidly and without the possibility [of] causing pain to the condemned.” Judge Burge ordered ODRC to “employ the use of a lethal injection of a single, anesthetic drug [sodium thiopental].”

Attorneys Kreig Brushnahan, Daniel Wightman, and Jeffrey Gamso represented the defendants.

#280988