

OPD Death Penalty Report Third Quarter 2007

1. Executions

There were no executions in Ohio during the third quarter of 2007.

2. Scheduled Executions

No Ohio death row inmates who have exhausted their federal habeas review are presently facing an execution date.

Several inmates who have exhausted habeas review have obtained stays pending the outcome of the federal civil rights lawsuit challenging Ohio's lethal injection protocol. This includes **Rommell Broom** (Cuyahoga County), who was granted a stay of his October 18 execution date. And it is unlikely that any Ohio prisoner will be executed by lethal injection until the United States Supreme Court resolves the merits of a Kentucky prisoner's claim that lethal injection is a cruel and unusual form of punishment. (See section 6.2, below.)

Additionally, **John Spirko** was granted a reprieve from Governor Ted Strickland until January 24, 2008, so that additional DNA testing can be conducted on trace evidence collected from the crime scene. If favorable, the results of the DNA testing could exculpate Spirko for the aggravated murder of post office clerk Mary Jane Mottinger in 1983 (Van Wert County). This is the seventh reprieve granted to Spirko. He received his first reprieve from Governor Bob Taft in 2005.

3. Capital Trials

3.1 New Death Sentences Imposed

Unfortunately, the first death sentence of 2007 was imposed in this quarter. A total of three persons were sentenced to death between July and September, including the first death sentence imposed in Hamilton County since 2003.

Lamont Hunter (Hamilton County) was sentenced to death by a three-judge panel on September 20. Hunter was sentenced to death for the aggravated murder of a child under age 13. He was represented by attorney Clyde Bennett, who was retained as counsel. The Ohio Public Defender will represent Hunter on state post-conviction review.

Edward Lang III (Stark County) was sentenced to death on July 25 for a double homicide committed during a felony. The jury acquitted Lang of the death penalty for the count related to one of the victims; however, it recommended the death penalty on the count for the other victim. He was represented by attorneys Frank Beane and Anthony Koukoutas. The Ohio Public Defender was appointed by the trial court for Lang's direct appeal to the Ohio Supreme Court. The Ohio Public Defender will also represent Lang on state post-conviction review.

Wayne Powell (Lucas County) was sentenced to death on September 12 for a double homicide. Powell was tried by a jury. He was represented by attorneys John Thebes and Ann

Baronas, and mitigation specialist Dorian Hall of the Ohio Public Defender's office. The Ohio Public Defender will represent Powell on state post-conviction review.

3.2 Death Sentences Avoided

Despite three additions to death row in this quarter, the Ohio defense bar successfully avoided the imposition of the death penalty in the majority of capitally-indicted cases that were resolved at trial.

Lavar Angelen (Cuyahoga County) pleaded guilty to murder on September 10. He was represented by attorneys Stephen McGowan and James Shannon.

Antonio Clifford (Jefferson County) pleaded guilty to aggravated murder on August 6. He was represented by attorneys Peter Olivito and Francesca Carinci.

Leconte Clifton (Cuyahoga County) pleaded guilty to aggravated murder and was sentenced from 33 years to life on September 12. He was represented by attorneys Ralph Defranco and Thomas Condosta.

Ryan Driggins (Cuyahoga County) pleaded guilty to murder on August 14. He was represented by attorney Jeffrey Saffold and the Cuyahoga County Public Defender.

Michael Gaughan (Cuyahoga County) was acquitted of the death penalty in a jury trial and sentenced from 28 years to life on September 18. He was represented by attorneys Walter Camino and Tom Shaughnessy.

Shane Gault (Fayette County) avoided a possible death sentence for killing a child under age 13 when he pleaded guilty to aggravated murder on July 27. Gault was represented by Assistant State Public Defenders Bill Mooney and Jerry McHenry, and mitigation specialist Dorian Hall of the Ohio Public Defender's office.

Jonathan Gravely (Franklin County) pleaded guilty to aggravated murder and was sentenced from 25 years to life on September 20. He was represented by attorneys Kort Gatterdam and Joseph Scott.

Justin Lucas (Stark County) was acquitted of the death penalty by a jury and sentenced to life/30 on September 21. He was represented by attorneys Frank Beane and Anthony Koukoutas.

Arif Majid (Cuyahoga County) was acquitted of the death penalty by a jury and sentenced to 43 years to life on August 30. He was represented by attorneys Douglas Glen and Donald Butler.

James Mills (Hamilton County) pleaded guilty to aggravated felony murder and was sentenced to 87 years to life on September 26. Mills, a former death row inmate, received a new trial based on his claim of false testimony and undisclosed favorable evidence under Brady v. Maryland, 373 U.S. 83 (1963). On remand, the State dismissed the capital specifications. Mills was represented by Assistant State Public Defenders Greg Meyers and Melissa Callais.

Darius Myrick (Hamilton County) was capitally indicted for the aggravated murder of a child under age 13 during a kidnapping. A three-judge panel found him not guilty by reason of insanity on September 26. He was represented by Michael Strong and William Welsh.

Ashland County common pleas Judge Deborah Woodward ruled on July 12 that **Maxwell White** is not eligible for the death penalty on a resentencing remand. White was sentenced in July 1996 of the aggravated murder of a law enforcement officer. His death sentence was vacated on federal habeas review based on the service of a juror who was predisposed toward the death penalty.

On remand, the State sought a new mitigation phase under O.R.C. §2929.06(B) in which the death penalty could be imposed. The trial court agreed with the argument made by White's trial attorneys, Richard Ketchum and Andy Hyde, that this provision of the Revised Code—effective on October 16, 1996—could not be applied retroactively on remand. Accordingly, White could not receive the death penalty without a valid sentencing recommendation from his original trial phase jury. See State v. Penix, 32 Ohio St. 3d. 369 (1987), and State v. Williams, 103 Ohio St. 3d. 112 (2004) (holding that O.R.C. §2929.06(B) could not be applied retroactively).

The State has filed an interlocutory appeal challenging this decision. White is represented in this appeal by Assistant State Public Defenders Kelly Culshaw and Steve Hardwick.

4. Direct Appeal Decisions

There were no direct appeal decisions issued in the third quarter of 2007.

5. Federal Habeas Decisions

5.1 Sixth Circuit Decisions with Relief Granted

Three Ohio habeas petitioners obtained relief from their convictions or death sentences in this quarter on appeal to the Sixth Circuit.

Abdul Haliym, aka Wayne Frazier v. Mitchell: The Sixth Circuit vacated this death sentence out of Cuyahoga County on July 13. The opinion was authored by Judge Clay and was joined by Judge Merritt. Judge Siler dissented.

The court granted Haliym relief on his ineffective assistance of counsel claim because “counsel failed to follow up with obvious avenues of investigation that would have produced valuable mitigation evidence. The evidence that [Haliym’s] counsel failed to produce [included] (1) evidence of [his] abusive and violent childhood; (2) evidence that [Haliym] suffered intense grief over the loss of his family; and (3) evidence that [he] potentially suffered from a mental defect.”

Haliym was represented in this appeal by attorneys Jeffrey Kelleher and Robert Dixon.

William Garner v. Mitchell: The Sixth Circuit reversed the convictions in this case out of Hamilton County on September 11. The opinion was authored by Judge Moore and joined by Judge Martin. Judge Rogers dissented.

The court ordered a new trial for Garner on the ground that the waiver of his rights under Miranda v. Arizona, 384 U.S. 436 (1966) was involuntary and his confession was thus inadmissible. Under a “totality of the circumstances” test, the court noted that Garner’s “young age, indeterminate prior experience with the legal system, poor education, significant limitations in intellectual functioning [76 IQ], and un rebutted expert evidence [showing that Garner did not

fully comprehend his waiver], all tend to show that Garner's Miranda waiver was not made knowingly and intelligently."

The court reviewed this claim de novo, rather than under the deferential AEDPA standard, because the state courts did not adjudicate the merits of the claim. The court also noted that the State waived any argument on appeal regarding whether this error was not harmless. The State also waived its procedural default argument by not raising it in the district court.

Judge Rogers dissented on the grounds that this claim was procedurally defaulted, not entitled to de novo review, and meritless.

Garner was represented in this appeal by Assistant State Public Defenders Kyle Timken and Kelly Culshaw.

Kenneth Richey v. Bradshaw: On August 10, the Sixth Circuit ordered a new trial in this case out of Putnam County. The opinion was authored by Judge Cole and joined by Judge Daughtrey. Judge Siler dissented.

Richey was convicted of a aggravated murder during an aggravated arson in 1986. The Sixth Circuit granted him habeas relief from his convictions in his first habeas appeal on two claims: (1) there was insufficient evidence to convict Richey on his specific intent to kill the victim based on a theory of transferred intent; and (2) his trial counsel were ineffective based on their failure to contest the State's evidence of arson. Richey v. Mitchell, 395 F.3d 660 (6th Cir. 2005). The Supreme Court summarily vacated the Sixth Circuit's ruling on the sufficiency of the evidence claim, since that court failed to give proper deference to the Ohio Supreme Court's decision that the doctrine of transferred intent applied to Richey's case. The Supreme Court remanded the case back to the Sixth Circuit to determine if "the arguments and evidence that formed the basis for [the court's] ruling on Richey's ineffective-assistance-of-counsel-claim were procedurally barred."

On remand, the court found that Richey defaulted his claim of trial counsel's failure to challenge the qualifications of an expert. But Richey's claim of ineffective counsel based on counsel's failure to challenge the evidence of arson was properly before the habeas court. The court found that Richey diligently requested, and was denied, fact-development on state post-conviction review. The new evidence that Richey developed was therefore properly before the court on habeas. Nor did Richey present a new substantive claim on habeas that had not been fairly presented in the state courts. Richey instead more fully developed his Sixth Amendment claim on habeas with new facts that he could not present during state post-conviction review without discovery or an evidentiary hearing.

Regarding trial counsel's deficient performance, the court reasoned that "[t]he scientific evidence of arson was...fundamental to the State's case. Yet Richey's counsel did next to nothing to determine if the State's arson conclusion was impervious to attack." And Richey was prejudiced by counsel's omission. "Confronted with evidence debunking the State's scientific conclusions, the trial court might have had a reasonable doubt about Richey's guilt, especially where the prosecution's case depended on a cast of witnesses whose lives revolved around drinking and partying and some of whom might have had their own motives for implicating Richey."

Richey was represented in this appeal by attorneys Ken Parsigian and Paul Nemser of Goodwin Proctor, Boston, Massachusetts.

Following this appeal, the State chose to proceed on a retrial, rather than challenging this decision in the Supreme Court. Richey will be represented on retrial by Mr. Parsigian (appointed counsel) and his firm, as well as Assistant State Public Defenders Greg Meyers (appointed counsel) and Kelly Culshaw, along with mitigation specialist Dorian Hall and investigator Kelly Heiby, of the Ohio Public Defender's office.

5.2 Sixth Circuit Decisions with Relief Denied

Five Ohio prisoners lost their habeas appeals in this quarter.

Gregory Bey v. Bagley: The Sixth denied relief to Bey (Lucas County) on September 25. Judge Batchelder authored the unanimous opinion of the court, which was joined by Judges Rogers and Sutton.

The single issue reviewed in this appeal was Bey's claim that he was denied a fair trial by the admission of evidence of a prior crime in his capital trial. The court ruled that this "other acts" evidence of the prior crime had been properly admitted as highly probative of Bey's identity for the capital murder. In reaching this conclusion, the court applied a "modified" analysis of Bey's claim under the AEDPA: "Because the Ohio Supreme Court's prejudice inquiry into Bey's state-law claim bears at least 'some similarity' to a determination of his current due process claim, we review this claim under Maldonado's modified AEDPA standard, which 'requires [the court] to conduct a careful review of the record and applicable law, but nonetheless bars [the court] from reversing unless the state court's decision is contrary to or an unreasonable application of federal law...'"

Bey was represented in this appeal by Richard Kerger and Ann Baronas.

Jason Getsy v. Mitchell: The en banc court denied habeas relief to Getsy (Trumbull County) on July 25. Judge Gilman wrote the opinion for the court, joined by Judges Boggs, Batchelder, Gibbons, Rogers, Sutton, McKeague, and Griffin. Judges Merritt, Martin, Daughtrey, Moore, Cole, and Clay dissented.

Getsy was sentenced to death at age 20 as the principal offender in a murder-for-hire. But the older offender who hired Getsy to kill the victim eluded the death penalty. The Sixth Circuit granted habeas relief to Getsy by finding that his death sentence was unconstitutionally disproportionate to the life sentence imposed on the older, arguably more culpable, offender. The original panel found that Getsy's death sentence had to be vacated under the Eighth Amendment because it was imposed arbitrarily in view of the life sentence imposed on the older offender.

The en banc court reversed. The court reasoned that Getsy's death sentence did not conflict with Supreme Court precedent on proportionate sentencing. The court found that clearly-established federal law did not require a case-by-case comparison to determine if a capital defendant had been sentenced disproportionately to a life-sentenced co-defendant. Rather, the court explained that a disproportionate penalty under the Eighth Amendment is one that is excessive based on the type of offense committed (for example, a prison sentence for a litterbug). The court also found that Getsy was not entitled to discovery on his claim that the trial judge was biased.

In dissent, Judge Merritt argued that Getsy's death sentence violated the principle of inconsistent verdicts set out in Morrison v. California, 291 U.S. 82 (1934). He also wrote that the Supreme Court's body of capital jurisprudence since 1972 required vacation of this death sentence because it is disproportionate to the life sentence imposed on Getsy's co-defendant.

Judge Martin added a separate dissent to note the fundamental unfairness inherent in the disparate sentences imposed on Getsy and his co-defendant.

Judge Moore argued in her dissent that Getsy was also entitled to discovery on his claim of judicial bias under Bracy v. Gramley, 520 U.S. 899 (1997), in addition to his Eighth Amendment claim of disproportionate sentencing.

Getsy was represented in this appeal by attorneys Michael Benza and David Stebbins.

Brett Hartman v. Bagley: The court denied habeas relief to Hartman (Summit County) on July 10. The opinion was authored by Judge Gilman and joined by Judge Daughtrey. Judge Clay dissented.

The court rejected Hartman's claim that his trial counsel failed to present available mitigation evidence. The court also found no error in his claim that the jury was improperly instructed to acquit Hartman of the death penalty before considering a life sentencing option. Moreover, the court found that the Ohio Supreme Court was not unreasonable when it found that a "separate animus" existed to find that Hartman caused the victim's death during a kidnapping—because the restraint of his victim was not merely incidental to the commission aggravated murder. *But see State v. Hartman*, 93 Ohio St. 3d 274, 307 (2001) (Pfeifer, J., dissenting) ("In this case, the alleged kidnapping was in reality a series of actions that were incidental to the crime of murder.")

In dissent, Judge Clay wrote that Hartman was entitled to relief on his ineffective assistance of counsel claim based on the failure to present mitigation evidence and the "acquittal first" jury instruction.

Hartman was represented in this appeal by attorneys Michael Benza and David Stebbins.

Lawrence Reynolds v. Bradshaw: The court denied habeas relief to Reynolds (Summit County) on August 16. The unanimous opinion was authored by Judge Martin and joined by Judges Cole and Sutton.

Reynolds claimed that he was entitled to an evidentiary hearing on his claim of ineffective counsel. During state post-conviction review, the original trial judge granted Reynolds a hearing. His case was reassigned, however, and the new judge revoked the order granting a hearing. The Sixth Circuit stated "[t]he point is that [for Reynolds to be entitled to a hearing] he must make an *initial* evidentiary showing—through affidavits and the like—that he has grounds for relief. And here the state judge determined that this initial showing was insufficient, especially in light of the fact that Reynolds had been given ample discovery time since the termination of his direct appeal to make the showing... Since we do not find that [the state judge] unreasonably denied the evidentiary hearing back then, it almost goes without saying that the district court did not abuse its discretion in denying effectively the same evidentiary hearing now."

The court also denied Reynolds's claim that the state sentencing judge evinced bias when the judge filed the O.R.C. §2929.03(F) sentencing opinion in advance of the sentencing hearing.

Reynolds was represented in this appeal by Assistant State Public Defenders Pamela Prude-Smithers and Robert Lowe.

Daniel Wilson v. Mitchell: The Sixth Circuit denied habeas relief to Wilson (Lorain County) on August 15. The opinion was authored by Judge Cole and joined by Judge Clay, with Judge Rogers concurring.

Wilson claimed that a violation of Brady v. Maryland, 373 U.S. 83 (1963), resulted from the prosecutor's failure to make a timely disclosure of juvenile records to the defense. In particular, the prosecutor cross-examined a mitigation expert based on a report prepared by a psychologist who had evaluated Wilson as a youth. However, the court found that the State's untimely disclosure of the report in the mitigation phase was not material under Brady because Wilson's mitigation expert had been given "an opportunity to review [the] report" before he was cross-examined on it and Wilson's expert "stated that he generally agreed with the conclusions in the report." Additionally, the jury had been informed that the author of the report had not been a licensed psychologist when the report was prepared. Thus, "Wilson has not demonstrated that even if the State had timely disclosed the records that there is a reasonable probability that the outcome of the proceeding would have been different."

Wilson was represented in this appeal by attorneys Alan Rossman and David Doughten.

5.3 District Court Decisions

Steven Smith v. Bradshaw: On September 27, Judge Kathleen O'Malley of the Northern District denied Smith the writ. Smith was sentenced to death in Richland County for causing the death of a child under age 13 during the commission of a rape. A certificate of appealability was granted on Smith's claim that his trial counsel were ineffective because they failed to request an instruction in the mitigation phase that a solitary juror could reject the death penalty.

Smith was represented in the district court by Assistant State Public Defender Joseph Wilhelm and attorney Henry DeBaggis.

Gregory Lott v. Bagley: On September 28, Judge Kathleen O'Malley found that Lott failed to satisfy the requirements for filing a second habeas petition under 28 U.S.C §2244. Lott was sentenced to death in 1987 by a three-judge panel for aggravated felony murder. The Sixth Circuit previously denied Lott habeas relief. Lott v. Coyle, 261 F.3d 594 (6th Cir. 2001). But the court of appeals granted leave for Lott to return to the district court in 2004 for review of his successor habeas petition. In re Lott, 366 F.3d 431 (6th Cir. 2004). In his second habeas petition, Lott claimed that evidence of his "actual innocence" permitted the court to reach the merits of his claim that exculpatory evidence had been withheld at trial by the Cuyahoga County prosecutor. The district court found, however, that Lott's evidence of innocence was insufficient to show that, by clear and convincing proof, no reasonable juror would have found Lott innocent of the capital offense. Additionally, the court reasoned that Lott could not satisfy the diligence requirement for presenting a new claim under the successor habeas statute, since the evidence Lott relied on to argue a constitutional violation had been obtained by his state post-conviction counsel by October 1991.

Lott was represented in the district court by Assistant State Public Defenders Gregory Meyers and Melissa Callais.

6. Special Issues in Capital Cases

6.1 Mental Retardation Claims

On September 11, the Trumbull County common pleas court found that **Andre Williams** is not mentally retarded. The court granted the State's motion for summary judgment. Williams has an appeal of right to the 11th Appellate District.

Williams is represented by attorney John Juhasz.

6.2 Lethal Injection Litigation

Richard Cooley (Summit County) has filed a petition for writ of certiorari in the Supreme Court. Cooley seeks review of the Sixth Circuit's ruling that his challenge to Ohio's lethal injection protocol is time-barred under federal civil rights law set out in 42 U.S.C. §1983. Cooley's petition was placed on the court's docket on September 5.

Cooley is represented in this appeal by Assistant State Public Defenders Kelly Culshaw, Gregory Meyers, Kimberly Rigby, and Joseph Wilhelm.

Richard Biros (Trumbull County) also filed a petition for certiorari in the Supreme Court to challenge the same ruling from the Sixth Circuit on the §1983 procedural issue.

Biros is represented by attorneys Tim Sweeney and John Parker.

On September 12, Judge Frost granted motions to intervene in Cooley's lawsuit for the following death row inmates: **Grady Brinkley** (Lucas County), **Marvin Johnson** (Belmont County), **Daniel Wilson** (Lorain County), **James Conway** (Franklin County), **Darryl Durr** (Cuyahoga County).

It is unlikely that any Ohio prisoners will be executed by lethal injection until the Supreme Court rules on the appeal of a Kentucky death row inmate. The court granted certiorari in **Baze v. Rees** to decide the merits of whether the lethal injection drugs offend the Cruel and Unusual Punishment Clause of the Eighth Amendment.

The fight over the merits of the lethal injection drugs is also being waged in an Ohio trial court. Lorain County common pleas Judge James Burge has ordered an evidentiary hearing on the constitutionality of lethal injection in **State v. Ruben Rivera**. The Ohio Attorney General has filed a writ of prohibition in the Ohio Supreme Court to stop Judge Burge from holding the hearing.

Judge Burge appointed Jeffrey Gamso, Legal Director, Ohio ACLU, to represent Rivera.

7. Benjamin Zober Joins Death Penalty Division

The Ohio Public Defender's office is pleased to announce that attorney Benjamin Zober joined the Death Penalty Division in October. Mr. Zober was previously in private practice in Cleveland.