

OPD Death Penalty Report Fourth Quarter 2007

1. Executions

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

Two Ohio prisoners were executed during 2007: **James Filiaggi** (Lorain County) and **Christopher Newton** (Richland County).

2. Execution Alerts

A de facto moratorium on the death penalty appears to be in effect in Ohio while the U.S. Supreme Court reviews the merits of a Kentucky prisoner's claim contesting the legality of the procedures used during lethal injections (see section 6, below).

3. Capital Trials

The capital trial bar in Ohio achieved excellent success in this quarter as no new death sentences were imposed. Sixteen capitally-indicted defendants avoided the death penalty through successful pleas or jury trials (see section 3.1, below).

Unfortunately, one of the two women on Ohio's death row, **Donna Roberts** (Trumbull County), was resentenced with the death penalty on October 29. Roberts was resentenced following a remand from the Ohio Supreme Court based on sentencing errors committed by the trial court. State v. Roberts, 110 Ohio St. 3d 71, 850 N.E.2d 1168 (2006).

A total of four new death sentences were imposed in Ohio during 2007: **Charles Maxwell** (Cuyahoga County), **Wayne Powell** (Lucas County), **Lamont Hunter** (Hamilton County), and **Edward Lang** (Stark County).

3.1 Death Sentences Avoided

Aaron Addison (Cuyahoga County) was sentenced to LWOP on October 25, 2007. He was represented by attorneys David Rowthorn and Donald Butler.

Ryan Baker (Franklin County) pleaded guilty to aggravated murder with capital specifications. He was sentenced to LWOP on December 14. Baker was represented by attorneys Diane Menashe and Scott Weisman, and OPD mitigation specialist Kelly Heiby.

Craig Daniels (Wood County) pleaded guilty to aggravated murder for a double homicide. He was sentenced to LWOP on October 22. Daniels was represented by attorney David Klucas and Scott Hicks.

Edmund Davis (Cuyahoga County) was sentenced to 30 years to life on October 10. He was represented by James McDonnel and Vicki Ward.

Ryan Dieterle (Hamilton County) was sentenced to LWOP on October 12, after the jury deadlocked during the mitigation phase deliberations. Dieterle was represented by attorney Scott Croswell.

Michael Howard (Cuyahoga County) was sentenced to 23 years to life on October 31. His attorneys were David Grant and Fernando Mack.

Gregg Jenkins (Mahoning County) pleaded guilty to aggravated murder and was sentenced to 26 years to life on December 7. Jenkins was represented by attorneys James Gentile and Ronald Yarwood.

Edward Longmire (Hamilton County) pleaded guilty to aggravated murder and was sentenced to LWOP by a three-judge panel on November 14. Attorneys Perry Ancona and Norman Aubin represented him.

Fernando Newcomb (Cuyahoga County) was sentenced to life with the possibility of parole on October 16 following a jury trial. Newcomb was represented by attorneys Mark Stanton and Tom Shaughnessy.

Shane Ramey (Clark County) was acquitted of the death penalty by a jury and sentenced to life with the possibility of parole on November 6. He was represented by attorney Jon Rion.

Andre Thompson (Cuyahoga County) was sentenced on October 15 to 25 years to life for aggravated murder. Thompson was represented by James McDonnell and Kevin Spellacy.

Kevin Tucker (Franklin County) pleaded guilty to aggravated murder and was sentenced to LWOP on October 22 by a three-judge panel. His attorneys were Gregg Slemmer and Joe Edwards.

John White (Franklin County) was sentenced to LWOP for aggravated murder by a three-judge panel on December 7. He was represented by attorneys Kevin Mulrane and Scott Wiesman.

Nicholas Winters (Cuyahoga County) was sentenced to 20 years to life on November 15. James McConnell and Charles Morgan represented Winters.

Archie Wooden (Summit County) avoided the death penalty after he was found guilty of murder by a jury on October 16. Wooden was represented by attorneys John Greven and Brian Pierce.

Walter Young (Scioto County) was sentenced to 18 years to life on October 9. He was represented by attorneys William Eachus and Charles Knight.

4. Direct Appeal Decisions

The Supreme Court of Ohio decided three death penalty appeals in the fourth quarter. The court affirmed the convictions and death sentence in two appeals but the court reversed and remanded for a new trial in State v. Vernon Brown. The three opinions issued in this quarter were the only appeals decided by the Ohio Supreme Court in 2007.

State v. Vernon Brown (Cuyahoga County). In a unanimous opinion authored by Justice Lanzinger on October 3, the court found that Brown's trial was made unfair by the State's failure

to disclose favorable evidence—and because defense counsel failed to contest the competency of Brown’s wife, Jillian Wright, to testify against him.

Brown was charged with a double homicide. The State charged Brown with committing one murder with prior calculation and design, and it charged him with a felony murder count for the other victim. The State offered Wright’s testimony to gain Brown’s convictions.

The Ohio Supreme Court found merit to Brown’s claim that the State withheld evidence favorable to Brown at his trial. Two police reports that implicated another suspect named Donley in the murders were not disclosed to Brown. Although the police reports contained hearsay statements, “they are material [to the defense], and even if the defense could not directly introduce them at trial, the [S]tate’s failure to turn them over was highly prejudicial. The defense was deprived of the opportunity to call the original declarants at trial. They were also deprived of the ability to use the statements to cross-examine Donley when he testified at trial.”

Additionally, the court found reversible error because Brown’s trial counsel failed to challenge Wright’s competency to testify against Brown due to the spousal privilege under Evidence Rule 601. Wright denied that she was married to Brown. However, there was “evidence supporting the conclusion that [Brown and Wright] were married ... Had the existence of a marriage been undisputed, the judge would have erred by not informing Wright of her right not to testify. However, because there was a question as to whether Brown and Wright were married, it was Brown’s trial counsel’s obligation to request a formal decision on whether Wright and Brown were actually married.”

The court reasoned that Wright’s testimony was important to the State’s case because, “Wright was the only eyewitness to the murders ... Had she been properly advised that it was her choice whether to testify, and had she known not to testify, the case against Brown would have been significantly weakened.” The court also explained that Wright’s testimony was important to Brown’s defense for the purposes of death penalty eligibility and sentencing. Accordingly, Brown was prejudiced by his counsels’ error.

Brown was represented by attorneys John Parker and Thomas Rein.

State v. Frederick Mundt (Noble County). The Ohio Supreme Court affirmed Mundt’s convictions and death sentence on October 3, in a unanimous opinion authored by Justice O’Donnell. The court found no merit to Mundt’s principal claim that his trial counsel rendered ineffective assistance.

Mundt was charged with the aggravated felony murder of a nine-year-old child. The capital specifications included rape, kidnapping, that Mundt committed the murder to escape another offense, and the status of the victim as a child under age thirteen. At trial, Mundt presented a defense that he was not the principal offender in the murder but rather he was a lesser participant in the crime. In the mitigation phase, however, the jury learned through the testimonies of two witnesses that Mundt had taken responsibility for personally causing the girl’s death. Despite that evidence, defense counsel still argued that Mundt’s lesser degree of participation in the crime was a mitigating factor under O.R.C. §2929.04(B)(6). On appeal, Mundt argued that his trial counsel were ineffective by presenting inconsistent and contradictory theories to the jury.

The court held that Mundt’s counsel were not ineffective because “[i]n a capital case, conceding guilt in the penalty phase can be a valid strategy, even when such a concession is inconsistent

with the defense guilt-phase position ... Moreover, it is not necessarily deficient performance for defense counsel to present inconsistent alternative theories to the jury.” The court also surmised that “it may well be a valid strategy to present any and all possible evidence and arguments in mitigation, even if they conflict...” because one juror can prevent the death penalty by finding that the aggravating circumstances do not outweigh the mitigating factors beyond a reasonable doubt.

Mundt was represented in this appeal by Assistant State Public Defenders Richard Vickers and Linda Prucha.

State v. James Frazier (Lucas County). The Ohio Supreme Court affirmed Frazier’s convictions and death sentence on October 10. The unanimous opinion was written by Justice Lundberg Stratton.

Frazier was charged with the aggravated murder of a Toledo woman during an aggravated robbery. The victim was Frazier’s neighbor in an apartment complex for low income and elderly residents. The State offered DNA evidence and a hair found on the victim as evidence of Frazier’s guilt.

Frazier argued in his appeal that the State violated his right to equal protection by removing two African-Americans from the jury on account of their race. The Ohio Supreme Court analyzed his claim under several factors set out in Miller-El v. Dretke, 545 U.S. 231 (2005). The court concluded that those factors did not support Frazier’s claim of purposeful discrimination. Two of the Miller-El factors were absent as the State did not shuffle the jury to bring more prospective white jurors to the forefront. Moreover, the court found no evidence of historical discrimination in the selection of juries in Lucas County. The court also found that “bare statistics” failed to support Frazier’s claim in light of the number of African-Americans in the jury pool and the number of peremptory challenges that the prosecutor used against African-Americans. The also court found “no evidence of disparate questioning of African-American and non-African-American jurors.” The prosecutor’s reasons for exercising peremptory strikes against two African-American jurors also failed to establish purposeful discrimination. The court found no major inconsistencies when it compared the reasons offered by the prosecutor for these peremptory strikes against the responses of some non-African-American jurors.

Frazier also claimed that his death sentence violated the Eighth Amendment because he is mentally retarded. However, the court held that Frazier had waived his mental retardation claim in the trial court because the defense withdrew a motion raising the claim. Thus, Frazier was not entitled to relief unless he could demonstrate plain error. The court then rejected Frazier’s claims as unsupported by the evidence, in light of two IQ scores above 70, and based on the opinions of two experts who concluded Frazier is not mentally retarded.

Frazier is represented in this appeal by attorneys Spiros Cocoves and Ann Baronas.

5. Federal Habeas Decisions

No decisions were issued by the Sixth Circuit in capital habeas appeals in this quarter. One habeas appeal was reviewed by the Supreme Court in this quarter (see section 5.1, below).

The Sixth Circuit decided eleven new Ohio capital habeas appeals in 2007. Four prisoners won some form of relief from the Sixth Circuit during 2007: **Von Clark Davis** (Butler County), **Abdul**

Haliym, aka, Wayne Frazier (Cuyahoga County), **William Garner** (Hamilton County), and **Kenneth Richey** (Putnam County).

Twice in 2007, the en banc panel of the Sixth Circuit issued opinions—reversing the award of the writ both times: **Jason Getsy** (Trumbull County) and **Robert Van Hook** (Hamilton County).

5.1 Habeas Decision From Supreme Court

The Supreme Court reversed a resentencing order from the Sixth Circuit in **Frank Spizak's** habeas appeal. Hudson v. Spisak, 128 S.Ct. 373 (2007). Spisak was sentenced to death in Cuyahoga County in 1983 for the shooting death of three victims. The Sixth Circuit granted relief to Spisak after finding that his counsel were ineffective in representing him in the mitigation phase. The Sixth Circuit also decided that the mitigation phase instructions impermissibly required the jury to unanimously acquit Spisak of the death penalty before considering a life sentence, contrary to O.R.C. §2929.03(D)(2). Spisak v. Mitchell, 465 F.3d 684 (6th Cir. 2006).

On October 9, the Supreme Court granted the State's petition for certiorari, summarily reversed the decision of the Sixth Circuit, and remanded the case to the Sixth Circuit for further consideration of the issues in light of Supreme Court precedent.

6. Special Issues In Capital Cases

6.1 Mental Retardation

The Ohio Supreme Court decided one mental retardation claim on appeal in this quarter. The court ruled that **James Frazier** (Lucas County) is not mentally retarded under the Ohio Supreme Court's plain error review of Frazier's claim (see section 4, above).

Two Ohio prisoners had their death sentences vacated in 2007 as the result of being found mentally retarded: **Kevin Yarbrough** (Shelby County) and **Darryl Gumm** (Hamilton county).

6.2 Lethal Injection Litigation

A de facto moratorium on the death penalty is in place in Ohio while the United States Supreme Court reviews the merits of a Kentucky prisoner's claim that lethal injection is a cruel and unusual form of punishment. The high court granted review in Baze v. Rees, Case No. 07-5439 (9/25/07), to determine the following questions about lethal injection as a method of execution:

- Does the Eighth Amendment to the United States Constitution prohibit means for carrying out a method of execution that create an unnecessary risk of pain and suffering as opposed to only a substantial risk of the wanton infliction of pain?
- Do the means for carrying out an execution cause an unnecessary risk of pain and suffering in violation of the Eighth Amendment upon a showing that readily available alternates that pose less risk of pain and suffering could be used?
- Does the continued use of sodium thiopental, pancuronium bromide, and potassium chloride, individually or together violate the cruel and unusual punishment clause of the Eighth Amendment because lethal injections can be carried out by using other chemicals that pose less risk of pain and suffering?

A decision on the merits of these claims is expected from the Supreme Court by June 2008. Until then, the Supreme Court has signaled its intention to stay any executions by lethal injection until it determines these issues. On October 30, the Supreme Court stayed the execution of Mississippi prisoner Earl Berry only 19 minutes before his scheduled execution. Only Justices Scalia and Alito dissented when the court granted Berry's request for a stay.

One federal court in Tennessee has already ruled that a lethal injection protocol—similar to the one used in Ohio—violates the Eighth Amendment. See Harbison v. Little, No. 3:06-01206 (M.D. Tenn. 9/19/07).

Even without review of the Baze case, however, an execution by lethal injection in Ohio would be unlikely until the Supreme Court rules on a petition for certiorari filed by Ohio death row inmate **Richard Cooley** (Summit County). Cooley v. Strickland, et al., Case No. 07-6234, docketed 9/5/07. Before the high court took the Kentucky case, several Ohio prisoners were able to get stays based on Cooley's pending appeal.

The issue raised in Cooley's appeal addresses only a procedural issue—rather than the substantive merits of lethal injection as a form of punishment as in the Kentucky case. The United States Court of Appeals for the Sixth Circuit held that Cooley's federal civil rights challenge to lethal injection under 42 U.S.C. §1983 was time-barred by a two-year statute of limitations. The court held that a death row prisoner must file his or her §1983 challenge within two years of the conclusion of the prisoner's direct appeal to avoid the statute of limitations from barring a federal court's review. See Cooley v. Strickland, 479 F.3d 412 (6th Cir. 2007). However, since Ohio adopted lethal injection as its method of execution more than two years after Cooley's direct appeal concluded, the Sixth Circuit decided that Cooley should have filed his §1983 claim within two years from when Ohio switched to lethal injection.

Judge Gilman dissented in Cooley. He agreed with District Judge Gregory Frost that a death row prisoner's §1983 challenge does not become ripe for review until the prisoner exhausts his or her federal habeas appeal to the Supreme Court on certiorari. Judge Gilman recognized that dilatory tactics by prisoners who file §1983 claims can be remedied through the application of equitable principles when the district court decides whether to stay an execution. In other words, a stay should depend on whether a prisoner promptly filed his or her §1983 claim or whether a prisoner waited too long to file it.

By the end of 2007, twenty-two Ohio prisoners were given leave by Judge Frost to join the lawsuit initiated by Cooley. Most of them have exhausted their first round of federal habeas appeals. Accordingly, several Ohio inmates would face a final execution date but for the procedural and substantive battles over lethal injection.

Cooley is represented on his appeal to the Supreme Court by Assistant State Public Defenders Kelly Culshaw, Greg Meyers, Kim Rigby, and Joseph Wilhelm.

New information about Ohio's process for carrying out executions by lethal injection was recently disclosed to the public as the result of a court order in State v. Ruben Riveria (Lorain County). Common pleas Judge James Burge ordered the Ohio Department of Rehabilitation and Corrections to turn over 632 pages of documents to the defense team in Rivera's case. These documents contain information relevant to the members of the execution teams and their training. The documents included recommendations from the warden at SOCF to develop procedures for injecting prisoners with hard-to-find veins.

The lethal injection documents from the Rivera case may be accessed at http://opd.ohio.gov/dp_Rivera/dp_Rivera.htm.

Rivera is represented by Jeff Gamso, Legal Director, Ohio ACLU.