2007

Holmes v. South Carolina Upholds Trial by Jury

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HOLMES v. SOUTH CAROLINA UPHOLDS TRIAL BY JURY

By Samuel Gross

Bobby Lee Holmes was convicted of a brutal rape-murder and sentenced to death. The only evidence that connected him to the crime was forensic: a palm print, and blood and fiber evidence. (Biological samples taken from the victim for two rape kits were compromised and yielded no identifiable evidence.)

Holmes claimed that the state's forensic evidence was planted and mishandled, and that the rape and murder were committed by another man, Jimmy McCaw White. At a pretrial hearing three witnesses testified that they saw White near the victim's house at about the time of the crime, and four others testified that they heard White admit his guilt. White testified at the hearing and denied that he had committed this crime or made the statements to which the defense witnesses had testified. The trial judge excluded all evidence about Jimmy White from Holmes's trial.

The South Carolina Supreme Court upheld the trial court, and the U.S. Supreme Court granted certiorari on the claim that this ruling violated Holmes's Sixth Amendment right to compulsory process, and his due process right to present a defense. (The Court denied cert on a related due process claim: After successfully objecting to all this evidence of White's guilt, the prosecutor argued to the jury, in effect, "If Holmes didn't commit this atrocious crime, who did?")

I filed an amicus brief in support of the defendant on behalf of 40 evidence law professors. We argued that the exclusion of the defendant's evidence violated his Sixth Amendment right to trial by jury. Here's why:

The trial court excluded all testimony about White's admissions as hearsay on the ground that they didn't qualify for the exception for statements against penal interest. (The trial judge then excluded the other evidence about White as insufficiently probative, given that hearsay ruling.) This hearsay ruling was insupportable. For one thing, the exception for statements against penal interest—codified as South Carolina Rule of Evidence (SCRE) 804(b)(3)—had no application to the case since it requires that the witness be unavailable, and White testified at the

hearing. More important, the South Carolina rule on inconsistent statements, SCRE 801(d)(1)(A), is broader than its federal counterpart; it excludes from the definition of hearsay *any* statement by a testifying witness that is inconsistent with his or her testimony. Since White testified and denied involvement in the crime, his prior statements to the contrary were not hearsay under South Carolina law.

The South Carolina Supreme Court ignored the trial court's hearsay ruling entirely. Instead, it affirmed under South Carolina's "third-party-guilt evidence rule," which it modified for the occasion. It upheld the exclusion of the defendant's evidence of innocence because, in its view, the prosecution's evidence of guilt was overwhelming: "[Holmes] simply cannot overcome the forensic evidence against him to raise a reasonable inference of his own innocence. . . . Given the overwhelming evidence of appellant's guilt, the circuit court did not err by excluding the evidence of third party guilt." (*State v. Holmes*, 605 S.E.2d 19, 24 (S.C. 2004).)

That's quite a holding: A criminal defendant is not entitled to present evidence of innocence to the jury if the judge (or in this case, the state supreme court) decides the defendant is clearly guilty. It's a frontal attack of the right to trial by jury. It's one thing to exclude evidence because it's unduly prejudicial or has low probative value, or to serve some extrinsic policy. Evidence that someone else did it is often excluded on some such traditional basis, typically because it's too remote or speculative. It's another thing altogether to allow a judge (or court) to decide that a defendant is so clearly guilty that he or she doesn't get to present defense evidence of innocence that is, if believed, direct and powerful.

The common law of evidence is in large measure a set of rules that governs the circumstances under which judges may keep evidence from juries. This power must be carefully bounded. Just as "the power to tax involves the power to destroy," *McCulloch v. Maryland*, 17 U.S. 316, 431 (1819), the power to exclude is the power to decide. The South Carolina Supreme Court not only stepped way over that line, but failed to articulate any limiting principle. Alibi evidence, like third-party guilt evidence, is sometimes troublesome or misleading. If this rule were constitutional, it could as easily apply to alibi evidence, or evidence of eyewitness error, or any other defense evidence. Once the judge decides the defendant is guilty—that "he simply cannot . . . raise a reasonable inference of his own innocence"—why let the jurors hear evidence to the contrary? It would just confuse them.

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The Supreme Court opinion

The U.S. Supreme Court reversed in a unanimous opinion by Justice Alito, his first. The Court did not address the jury trial issue, although Holmes's lawyers did pick it up in their brief. That might be because the right to jury trial is not mentioned in the question on which cert was granted. More likely it was simply that the Court was not interested in doing more than necessary to knock out the South Carolina precedent. In any event, as one might expect from a unanimous decision, the opinion says relatively little.

The Court held that the exclusion of Holmes's evidence violated his constitutional right to present a defense: "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.' " (126 S. Ct. 1731, quoting *Crane v. Kentucky*, 476 U.S. 683, 690 (1986).) That right is violated by "evidence rules that 'infringe upon a weighty interest of the accused' and are " 'arbitrary' or 'disproportionate to the purposes they are designed to serve.' " (*Id.*, quoting *United States v. Scheffer*, 523 U.S. 303, 308 (1998).)

Holmes does not define the contours of the right to "a meaningful opportunity to present a complete defense"—unless you think you know what will be considered "arbitrary" and "disproportionate" next time around. But the Court did endorse that right again, and it reaffirmed its commitment to the scattering of earlier cases that reversed state court convictions for exclusion of defense evidence: *Washington v. Texas*, 388 U.S. 14 (1967) (testimony by accomplice); *Crane v. Kentucky*, 476 U.S. 683 (1986) (circumstances of confession); *Rock v. Arkansas*, 483 U.S. 44, 58, 56 (1987) (hypnotically refreshed testimony by defendant); and especially *Chambers v. Mississippi*, 410 U.S. 284 (1973).

Chambers, like *Holmes*, concerned a murder defendant who was not allowed to present substantial evidence that another man had confessed to the killing with which he was charged. The Supreme Court held that this violated

due process. (410 U.S. at 302-03.) *Holmes* could have been decided simply as an application of *Chambers*, except that the Court said in *Chambers* itself, and repeated in *Scheffer*, *supra*, 523 U.S. at 316, that the decision in *Chambers* was limited to "the facts and circumstances" of that case. If nothing else, *Holmes* may remove that unfortunate asterisk from the rule, however vague, if not from the *Chambers* opinion. In fact, *Holmes* was a stronger case for reversal than *Chambers* in two respects. First, Chambers's jury did hear a considerable amount of evidence about the other suspect; Holmes's jury heard none. Second, the exclusion in *Chambers* was based on rules of general application—Mississippi's hearsay rule, and its prohibition against impeachment by the party that called a witness—while the exclusion in *Holmes* was based on a special rule for criminal defendants who are determined to be clearly guilty.

Which brings me back to the holding of the South Carolina Supreme Court. Judge Alito points out that in order to conclude, as the South Carolina Supreme Court did, that the evidence against Holmes is "overwhelming" a court must evaluate that evidence,

> and where the credibility of the prosecution's witnesses or the reliability of its evidence is not conceded, the strength of the prosecution's case cannot be assessed without making the sort of factual findings that have traditionally been reserved for the trier of fact and that the South Carolina courts did not purport to make in this case.

(126 S. Ct. at 1734.)

This is a peculiar statement. I would have said that the South Carolina Supreme Court *did* assess the reliability of the state's evidence and found it "overwhelming," but I don't sit on the U.S. Supreme Court. More important, does Alito mean that it would have been *unconstitutional* for a state court to base the exclusion of critical defense evidence on a finding that has "traditionally been reserved for the trier of fact" (i.e., the jury)—to wit, a finding that the defendant is clearly guilty? That was the position of the evidence professors' amicus brief, and one could interpret the Court to agree, by implication. Or does Alito just mean that if state courts want to make this sort of decision they have to do it more explicitly than the South Carolina Supreme did here?

I think he means something in between. I think the intended message is something like this: "Everybody knows that this sort of decision is the core function of criminal juries. So please guys, don't make life hard for us by ignoring such a basic common-law rule. If you do, we might have to spell out the constitutional limits on your power to exclude defense evidence, and you wouldn't want us to do that, now would you?"

The right to present a defense

The path to *Holmes* begins with *Chambers v. Mississippi*, 410 U.S. 284 (1973), which, as I mentioned, also involved the exclusion of evidence that another man committed the murder for which the defendant was convicted. The Court could have held that Mississippi violated Chambers's Sixth Amendment Compulsory Process Clause right to call witnesses. Instead it applied a vague due process standard, and added the intriguing observation that, "In reaching this judgment, we establish no new principles of constitutional law." (410 U.S. at 302.) *Holmes* is the latest of several cases that apply this fuzzy due process right to "a meaningful opportunity to present a full defense."

It's no secret why the Court took this minimalist approach. It reflects the justices' regard for "the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures." (*Chambers*, 410 U.S. at 302-03.) The Court is not about to generate a constitutional evidence code for criminal prosecutions. Extreme antidefendant rules, as in *Holmes*—or extreme applications of conventional rules, as in *Chambers*—may get lobbed off, but only if the Court concludes that they have produced injustice. *Chambers* set the pattern on that as well. It's widely believed that Chambers won because the Supreme Court (or at least Justice Powell, who wrote the opinion) thought he was innocent. As the Court explained 23 years later, "*Chambers* was an exercise in highly case-specific error correction." (*Montana v. Egelhoff*, 518 U.S. 37, 52 (1996).)

Convicting the innocent

Recently, that last issue—the danger of convicting the innocent, and especially of putting innocent defendants to death—has been making waves in the Supreme Court. From the look of it, there are more to come.

Bobby Lee Holmes was not the only death row defendant to come before the Supreme Court last term and ask for an opportunity to present evidence of innocence to a

jury. There was also Paul Gregory House, but his case requires a slight detour.

In 1993, in *Herrera v. Collins*, 506 U.S. 390, a fractured majority of the Court agreed that "in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional" even in the absence of any constitutional error in obtaining the conviction. (*Id.* at 417.) The Court also agreed that Herrera did not truly persuade them of his actual innocence; nor has any capital defendant done so since, in any court.

A few defendants, however, have met the stringent but less extreme requirements of a 1995 Supreme Court case, *Schlup v. Delo*, 513 U.S. 298. Under *Schlup* a defendant can get relief by persuading a federal court that if new evidence of innocence were considered "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." (*Id.* at 327.) That finding permits them to pursue federal habeas corpus claims that would otherwise be procedurally barred, alleging constitutional error at trial.

House v. Bell, 126 S. Ct. 2064 (2006) is an application of *Schlup*. House, also sentenced to death for a rape-murder, assembled enough new evidence of innocence to persuade six judges on the Sixth Circuit sitting en banc that he had met the standard of *Herrera v. Collins* of "actual innocence." In fact (with no direct support for this remedy in *Herrera* itself), they concluded that he must be released forthwith. (*House v. Bell*, 386 F.3d 668 at 686-709 (6th Cir., en banc, 2004).) One judge found that House had satisfied *Schlup* but not *Herrera*, and was entitled to a new trial (*id.* at 709-10), and a majority of eight judges saw no constitutional problem with putting House to death. (*Id.* at 670-86.)

House arrived in Washington with an air of controversy. It was considered by the Court at five separate conferences before cert was granted. Ultimately, House won five to three, with Justice Kennedy writing for the Court that House had satisfied *Schlup*, and Chief Justice Roberts dissenting. Decisions applying *Schlup* tend to be fact-intensive—that's what *Schlup* is about, the strength of the evidence of innocence in the particular case—and these opinions are no exceptions. Much of the division on the Court was expressed as a polite legalistic disagreement over the degree of deference the Supreme Court should attach to a district court's decision on whether, in light of the new evidence, "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." There were no fireworks.

And then, in *Kansas v. Marsh*, 126 S. Ct. 2516 (2006), three days before the end of the term, there was an eruption. *Marsh* presented an apparently unrelated question: Is it constitutional to instruct a capital sentencing jury that if it finds that the aggravating and mitigating circumstances of a murder are in balance, it must sentence the defendant to death? Five justices, in a majority opinion by Thomas, said yes. But a four-justice dissent and solo concurrence go off in another direction.

Justice Souter, in dissent, pointed out that "the period starting in 1989 has seen repeated exonerations of convicts under death sentences, in numbers never imagined before the development of DNA tests." He concludes that given "the hazards of capital prosecution" a preference for death when "the evidence pro and con . . . [is] in equipoise is obtuse by any moral or social measure." (*Id.* at 2544-46.) This drew a blistering response from Justice Scalia, who, anticipating "sanctimonious criticism of America's death penalty" from Europeans, felt compelled to "take the trouble to point out"—at length—that the dissent "has nothing substantial to support it" and "is willing to accept anybody's say-so" about crucial facts. (*Id.* at 2531-39.)

What was that all about? A leftover fight from *House v. Bell*, which (unlike *Marsh*) really *was* about the danger of executing an innocent man? Or the opening shots in a new battle—a battle over whether the 120-plus death row exonerations since 1973 amount to, as the dissent says, "a new body of fact [that] must be accounted for" in deciding what sort of death penalty the Constitution permits?

For now, *Holmes v. South Carolina* settles an easier point. A unanimous Court held that a capital defendant really is entitled to a fair chance to prove innocence in the first instance, at trial. Concretely, if you're charged with capital murder, and if you're lucky enough to have a lawyer who gathers powerful evidence of your innocence, unless there is a really good reason to the contrary, your jury must be allowed to hear that evidence.

As for the rest, stay tuned. ■