

UPDATE FROM THE COURTS RECENT CASES IN THE U.S. SUPREME COURT AND ELSEWHERE

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***House v. Bell* 547 U.S. (2006)**

Paul House was convicted of a 1985 murder in which the State of Tennessee relied heavily upon what was said to be his semen found on the clothing of the female victim. The State further argued, at the penalty phase of his trial, that this evidence proved that the murder had been committed during either a rape or kidnapping which amounted to aggravating circumstances which, in turn, led the jury to vote for the death penalty. The latest of a long series of post-conviction appeals had led to the U.S. Court of Appeals for the Sixth District, which had affirmed a decision of the Federal District Court to deny *habeas corpus* relief on the basis not only that House's claims were procedurally defaulted, but also that the evidence of actual innocence was not so strong as to bring him within the exception to procedural fault recognized in *Schlup*¹ v. *Delo* and *Sawyer v. Whitley*.²

In a five-three decision the U.S. Supreme Court held that House had satisfied the stringent test required by the actual-innocence exception and that his Federal *habeas* action can proceed. Since the trial, further testing has established that the semen on the clothing was not from the petitioner but from the victim's own husband. This was the key forensic evidence which linked House to the murder. In addition there was now serious doubt about the validity of the blood tests which, although by no means conclusive, had also been relied upon by the State at trial. There was now clear evidence of contamination during transport to the laboratory.

The majority of the Supreme Court decided that this was not a case of conclusive exoneration because there was still evidence which tended to support the conviction. However they considered that, if the jury had heard all of the conflicting evidence, "it was more likely than not that no reasonable juror viewing the record as a whole would lack reasonable doubt." The majority did not consider that House had shown "freestanding innocence" which would render his execution

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unconstitutional under *Herrera v. Collins*.³ In that case the Supreme Court assumed without deciding that "in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant Federal *habeas* relief if there were no such State avenue open to process such a claim."⁴ The Court had also said in that case that the threshold for showing such a right would be "extraordinarily high," and House had not satisfied that test. However, because of the concerns about the state of the evidence and doubt as to whether jurors would now convict on that evidence, House had satisfied the test in *Schlup* for obtaining Federal relief despite a State procedural default. The judgment of the Court of Appeals would therefore be reversed and the case remanded for further consideration of his claim.

***Holmes v. South Carolina* 547 U.S. (2006)**

On 31st December 1989, eighty six year old Mary Stewart was beaten, raped and robbed in her own home. A few weeks later she died of complications related to her ordeal. In due course Bobby Lee Holmes was charged with her capital murder. The principal evidence on which the State relied was forensic evidence. A crucial part of the defence case was that another man, Jimmy McCaw White, had actually carried out the crimes. At a pre-trial hearing Holmes sought to introduce this evidence at trial. A number of witnesses put White in the vicinity at about the time of the assault and other witnesses claimed that White had either admitted the offence himself or had at least exonerated Holmes. There was also evidence of police corruption and an attempt to fit up Holmes. The trial court refused to allow this third-party guilt evidence to be adduced on Holmes's behalf, citing the decision of the State Supreme Court in *State v. Gregory*.⁵ This case held that such evidence is admissible if it raises a reasonable inference as to the defendant's own innocence, but inadmissible if it merely casts a bare suspicion or raises a conjectural inference as to the guilt of a third

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party. The State Supreme Court upheld the decision of the trial court,⁶ again citing *Gregory*, but also relying on *State v. Gay*.⁷ In that case the State Supreme Court had held that where there is strong evidence of an appellant's guilt, especially where there is strong forensic evidence, evidence about a third party's alleged guilt does not raise a reasonable inference as to the appellant's own innocence. Applying this standard the court held that the petitioner could not overcome the forensic evidence against him.

In a unanimous decision the U.S. Supreme Court held that a defendant's rights under the Federal Constitution are violated by an evidence rule under which the defendant may not introduce evidence of the guilt of a third party if the prosecution has introduced forensic evidence which, if believed, strongly supports a guilty verdict. Whilst State lawmakers have a wide latitude under the Constitution to establish rules which exclude evidence from criminal trials,⁸ there are limits, and the Due Process Clause of the Fourteenth Amendment and the Compulsory Process or Confrontation Clauses of the Sixth Amendment guarantee a criminal defendant "a meaningful opportunity to present a complete defence."⁹

In *Gregory* the South Carolina Supreme Court adopted and applied a rule of evidence which is common amongst the States and of which no complaint was made in this case.¹⁰ However in *Gay* and again in the instant case the court had radically changed and extended the *Gregory* rule by holding that where there is strong evidence of a defendant's guilt, especially strong forensic evidence, proffered evidence about a third party's alleged guilt is inadmissible. By so doing the U.S. Supreme Court held that the trial judge did not focus on the probative value of the defence evidence of third party guilt and instead only focussed on the strength of the prosecution evidence, thereby possibly excluding evidence which had great probative value in the trial. There was also little if any examination of the credibility of the prosecution witnesses or the reliability of their evidence despite strenuous claims by the defendant of a plot to frame him and of mishandling of forensic evidence.

By evaluating the strength of only one party's evidence, no logical conclusion could be reached regarding the strength of the contrary evidence offered by the other side. The rule was therefore arbitrary and did not serve the end which the *Gregory* rule and other similar third party guilt rules were designed to further. "It follows", concluded the Court, "that the rule applied in this

case by the State Supreme Court violates a criminal defendant's right to have 'a meaningful opportunity to present a complete defence.'" For these reasons the decision of the State Supreme Court would be vacated and the case would be remanded for further proceedings.

On a different point there have been a number of recent important challenges to the constitutional propriety of the lethal injection as the chosen method of execution.

***Hill v. McDonough* 547 U.S. ____ (2006)**

The U.S. Supreme Court ruled unanimously that Florida death row inmate Clarence Hill should be allowed to proceed with a Federal "civil rights" action under 42 U.S.C. section 1983, in which he claims that the lethal injection procedure could cause him severe pain and thereby violate the Eighth Amendment's prohibition of cruel and unusual punishments. The Court said the case was controlled by its decision in *Nelson v. Campbell*¹¹ in which the Court had allowed a similar claim to proceed. The Court observed that if the action were successful it would not necessarily prevent the State from carrying out the execution of Hill and that in these proceedings Hill was not challenging the validity of his sentence as a general matter but rather was seeking to prevent his execution in a manner that allegedly would cause a foreseeable risk of gratuitous and unnecessary pain. Under these circumstances the grant of injunctive relief could not be seen as barring Hill's execution.

The Court overruled the decision of the U.S. Court of Appeals for the Eleventh Circuit which had held that Hill's claim under section 1983 was the equivalent of a *habeas* petition, which was already procedurally barred. The Supreme Court also rejected the arguments of the State of Florida and other States which joined the proceedings as *amici* that Hill's claim was invalid because he had failed to identify an alternative, authorized method of execution and secondly that Hill's action, if successful, would imply the invalidation of an existing sentence.

The Court held that filing a section 1983 action does not entitle the complainant to an automatic stay of execution. A stay is an equitable remedy and an inmate seeking a stay must satisfy all the requirements, including showing a significant possibility of success on its merits.

Elsewhere Federal courts in two more States have allowed further challenges to the death penalty process.

Noonerv. Norris, No. 05-06-CV-00110-SWW

In this case before the U.S. District Court for the Eastern District of Arkansas two death row inmates sought a declaration that the protocol for carrying out executions by lethal injection in Arkansas violates the Fourth, Eighth and Fourteenth Amendments of the U.S. Constitution. They also sought an injunction to prevent the State from carrying out future executions in accordance with the protocol.

The inmates claimed that the protocol creates a substantial risk that the administration of the first drug, an anaesthetic, might still allow them to experience intense pain and agony when the other two chemicals are administered. The District Court considered medical expert testimony and eye witness accounts of executions in Arkansas which suggested that inmates remain conscious during their executions. Despite applying a strict equitable assumption against the grant of a stay the court found that one of the inmates had shown that: “he was personally under a threat of irreparable harm,” and that an evidentiary hearing of the claims would serve the “public interest in the humane and constitutional application of the State’s lethal injection statute.” Accordingly the U.S. District Court granted the motion for a preliminary injunction and granted a stay of execution.

Taylor v. Crawford, No. 05-4173-CV-C-FJG

In this case before the U.S. District Court for the Western District of Missouri, Michael Taylor sought a declaration that Missouri’s method of execution violates the Eighth, Thirteenth and Fourteenth Amendments.

The Court noted that, whilst in *Gregg v. Georgia*¹² the Supreme Court had held that the Eighth Amendment prohibits “the unnecessary and wanton infliction of pain” in the course of executions, the cruelty against which the Constitution protects a convicted man is cruelty “inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely.”¹³

The Court found many problems with the way executions are carried out in Missouri after reviewing the chemical dispensary logs, the videotape of the execution chamber, and answers given in interrogatories by State officials. The Court was evidently very concerned that there was no written protocol to describe which drugs should be administered and in what dosage, and that the protocol was not carried out consistently and was subject to change at a moment’s notice. There was

also no system of auditing the execution procedure at any stage despite the fact that the dosage had been changed in several recent executions. The Court also expressed its surprise at the lack of qualifications of the doctor who was responsible for mixing the drugs. He had admitted that he was dyslexic and often transposed numbers and he was not an anaesthetist. Despite this he claimed that he was able to monitor the level of unconsciousness of the inmate by visual observation, a claim the Court viewed as practically impossible given the layout of the execution chamber.

The Court concluded that Missouri’s lethal injection procedure subjects condemned inmates to an unnecessary risk that they will be subjected to unconstitutional pain and suffering when the lethal injection drugs are administered. The Court ordered the State to prepare a written protocol for the implementation of lethal injections and stayed all executions in the State pending approval of the protocol.

¹ 513 U.S.298.

² 505 U.S. 333.

³ 506 U.S. 390.

⁴ *Ibid* at 417.

⁵ 198 S.C. 98; 16 S.E. 2d 532 (1941).

⁶ 361 S.C.333; 605 S.E. 2d 19 (2004).

⁷ 343 S.C. 543; 541 S.E. 2d 541 (2001).

⁸ *U.S. v. Scheffer* 523 U.S. 303, 308 (1998).

⁹ *Crane v. Kentucky* 476 U.S. 683, 690 (1986).

¹⁰ The Court cited examples from Texas, Mississippi, Kentucky and Arkansas.

¹¹ 541 U.S. 637 (2004).

¹² 428 U.S. 153, 173 (1976).

¹³ *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 464.