

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 BOBBY LEE HOLMES, :

4                      Petitioner                      :

5 v. : No. 04-1327

6 SOUTH CAROLINA. :

7 - - - - -X

8 Washington, D.C.

9 Wednesday, February 22, 2006

10           The above-entitled matter came on for oral  
11   argument before the Supreme Court of the United States  
12   at 11:19 a.m.

13      APPEARANCES:

14 JOHN H. BLUME, ESQ., Ithaca, New York; on behalf of the  
15 Petitioner.

16 DONALD J. ZELENKA, ESQ., Assistant Deputy Attorney  
17 General, Columbia, South Carolina; on behalf of  
18 the Respondent.

19 STEFFEN N. JOHNSON, ESQ., Washington, D.C.; on behalf  
20 of Kansas, et al., as amici curiae, supporting the  
21 Respondent.

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P R O C E E D I N G S

(11:19 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument  
next in Holmes v. South Carolina.

Mr. Blume.

ORAL ARGUMENT OF JOHN H. BLUME  
ON BEHALF OF THE PETITIONER

MR. BLUME: Mr. Chief Justice, may it please  
the Court:

In this case, the South Carolina Supreme  
Court took the second of two recent steps that  
dramatically curtail a defendant's ability to create a  
reasonable doubt as to his innocence by presenting  
evidence that another individual committed the crime.

The first step came in 2001 when, in State v.  
Gay, the court held that the admissibility of third  
party guilt evidence was dependent on the strength of  
the prosecution's case.

The second step, which occurred in Mr.  
Holmes' case, holds that third party guilt evidence is  
inadmissible whenever the prosecution has presented  
strong forensic evidence of the defendant's guilt.

JUSTICE SCALIA: Now, there's some dispute as  
to whether that -- that is really what -- what it held.

And there's a big difference. If -- if you just say

1       whenever you -- whenever the prosecution has a strong  
2       case, you can't introduce other guilt, or whether all  
3       that the court is saying is that one of the elements  
4       that you consider in determining whether to admit this  
5       -- this third party is not just -- it's the comparative  
6       weakness of the third party case. You don't blind  
7       yourself to -- to the strength of the prosecution's  
8       case.

9               Will you say it was bad even if it was the  
10       latter that the court was -- was referring to? Are you  
11       saying you cannot consider the strength of the  
12       prosecution's case at all in determining whether to  
13       allow in third party guilt evidence?

14              MR. BLUME: Yes, Justice Scalia, I am. It's  
15       not necessary for a ruling in our favor in this case.  
16       It's not contingent here because at a minimum, the  
17       South Carolina Supreme Court rule here in describing  
18       it, they said in State v. Gay we held that in cases  
19       where there is strong evidence of guilt, including  
20       strong forensic evidence, evidence that a third party  
21       committed the crime is not admissible. That is a  
22       categorical rule of exclusion no matter how you cut it.

23              But even if you deemed that there is some  
24       discretion left in the system, it is still  
25       unconstitutional because what the South Carolina system

1 requires is a reasoning backwards, that the  
2 admissibility of evidence of the defendant's innocence  
3 is conditioned on the judge's assessment of the  
4 likelihood of the defendant's guilt.

5 JUSTICE KENNEDY: Well, I -- I suppose that  
6 in a purely discretionary system -- I -- I can't quite  
7 think of the hypothetical -- the strength of the  
8 prosecution's case may bear on the assessment of  
9 relevance and materiality as to the evidence the  
10 defense wants to introduce. If -- if the evidence of  
11 identification is -- is quite clear -- is quite clear  
12 -- and then there's some witness of marginal  
13 credibility that says he was in another city, I think  
14 that may affect the trial court's balance.

15 I -- I take the thrust of your point, that  
16 the strength of the case makes it more important to  
17 introduce the third party evidence, not -- not less. I  
18 -- I take that point. But just as -- as an absolute  
19 rule, I'm not sure that the strength of the case is  
20 always irrelevant. That's what I'm saying.

21 MR. BLUME: I think that it is possible that  
22 under some circumstances not the strength of the  
23 State's case but the evidence as a whole may shed some  
24 light on whether the third party guilt evidence is  
25 relevant. For example, if the uncontested evidence is

1 the crime occurred on Tuesday, January 3rd, and the  
2 third party guilt evidence shows that the third party  
3 was in Acapulco on January 3rd and had no possibility  
4 to be there, that's not a strength issue. That is  
5 relevance.

6 But when the touchstone for admissibility is  
7 whether the defense evidence overcomes the  
8 prosecution's case -- and in the South Carolina rule  
9 for -- just to be clear, it's not even considered that  
10 you consider the evidence of guilt. The defense  
11 evidence of third party guilt has to overcome the  
12 prosecution's forensic evidence.

13 JUSTICE BREYER: Suppose that everything in  
14 this case were the same. Everything is identical  
15 except what the court of appeals or the State supreme  
16 court holds is that we think under rule 403, which  
17 happens to be the rule in our State, the probative  
18 value doesn't warrant admissibility in light of the  
19 risk of prejudice. But everything else is the same.

20 MR. BLUME: If the South Carolina --

21 JUSTICE BREYER: Now, in your opinion is that  
22 constitutional?

23 MR. BLUME: Just to make sure I understand  
24 it, if the South Carolina Supreme Court in this case on  
25 these facts had said this was a 403.

1 JUSTICE BREYER: Yes.

2 MR. BLUME: No. I think that would be  
3 unconstitutional --

4 JUSTICE BREYER: Because?

5 MR. BLUME: -- under this Court's decision in  
6 Olden v. Kentucky that this Court has recognized that  
7 evidentiary rulings, based on the strength of the  
8 evidence in this case, can be arbitrary and capricious  
9 and deprive a defendant of --

10 JUSTICE BREYER: Well, what they'll say --

11 MR. BLUME: -- his right to defense.

12 JUSTICE BREYER: -- if they want to build it  
13 out, is they'll say, look, there -- there is DNA  
14 evidence here. It's absolutely conclusive, and all  
15 that the light -- the -- the only doubt of the -- the  
16 defense has cast on it is they found that there was  
17 some opportunity that the police could have tampered  
18 with it. That's true of 60 percent or so of all chain  
19 of custody cases, and that is not sufficient to  
20 overcome what it shows. And therefore, it's not worth  
21 the jury's time and it'll prove very confusing to the  
22 jury.

23 Now, why would that ruling under 403 be  
24 unconstitutional?

25 MR. BLUME: Well, that ruling in this case

1 would be unconstitutional because it would be a  
2 mischaracterization of what Mr. Holmes' evidence was.

3 JUSTICE BREYER: Good. Now, that's what I  
4 want you to get to.

5 MR. BLUME: Challenging the DNA evidence.  
6 That is not the -- the state of the evidence in this  
7 case, but --

8 JUSTICE BREYER: And the key points that  
9 suggest that what I just said is not a fair  
10 characterization or a correct characterization are?

11 MR. BLUME: That the evidence in this case --  
12 that even the FBI agent who testified for the  
13 government admitted the DNA could have been placed  
14 through the incompetent handling of the evidence by  
15 Officer Mobley, that without gloves and with all the  
16 evidence in his possession, he inventoried the items,  
17 including Mr. Holmes' clothing and the victim's  
18 clothing, stuck his hands in the bag, determined what  
19 was in there without washing them or gloves, stuck his  
20 hand in another bag, determined what was in there. And  
21 even they admitted that due to the very small amount of  
22 DNA that was recovered, that Officer Mobley's actions  
23 could have been the source of the DNA on the clothing.

24 In addition to that, there were a number of  
25 other suspicious activities, including Officer Mobley



1     locked everyone else out before he inventoried,  
2     processed the scene. And then there were problems with  
3     contamination there.

4             And then at the bottom -- at the end of the  
5     day, the defense presented a DNA expert, the only non-  
6     forensic scientist, but the most qualified scientist in  
7     the case from the New York University Medical School,  
8     and he said, look, this DNA doesn't mean anything.  
9     There are things that science cannot explain. There  
10    are dye globs here which should not be present.  
11    There's also a spike that does not belong to Mr. Holmes  
12    or --

13            CHIEF JUSTICE ROBERTS: Counsel, where --  
14    where in the record is the testimony of the FBI agents  
15    that you were referring to?

16            MR. BLUME: It's -- it's in the joint  
17    appendix. The -- the agent which admitted this was  
18    Agent Baechtel. I think it's actually in the joint  
19    appendix, page 249, but I'm not positive of that, and  
20    counsel will look for it.

21            But there was also their defense expert who  
22    said that the bottom-line results were unreliable. So  
23    at the --

24            JUSTICE GINSBURG: What about -- what about  
25    the DNA -- the exclusion of the alleged perpetrator, of

1 White? There -- there was no trace of White's DNA.

2 And that was a FBI officer who testified to that.

3 MR. BLUME: Yes, Justice Ginsburg. I don't  
4 find that surprising at all, given the facts of this  
5 case. It's, you know, seek and ye shall find, or don't  
6 seek and ye shall not find. In this case, they took  
7 none of Jimmy White's clothing to test to see if there  
8 was any incriminating DNA on that. They didn't take  
9 his shoes, even though they had the shoe print.

10 This was not a case in which the DNA pointed  
11 to a single perpetrator. There were no vaginal swabs  
12 or rectal swabs which contained any information of any  
13 value whatsoever.

14 And by the time they finally got around to  
15 doing the DNA testing in 1996, numerous items of  
16 clothing, including several items belonging to the  
17 victim, had disappeared and no one could explain where  
18 they had went. So the fact that they didn't find Jimmy  
19 White's DNA on Bobby Holmes' clothing I think is of no  
20 significance whatsoever.

21 The main -- one of the main thrusts of the  
22 defense case here was because of the incompetence or  
23 the malfeasance of the police officers in this case,  
24 that the evidence against Holmes was unreliable.

25 MR. BLUME: Mr. Blume, I -- I know you're

1 more concerned about -- about what result you get in  
2 this case and -- and whether your client gets another  
3 trial or not. I am more concerned about -- about the  
4 rule of law that we're going to apply in the case which  
5 will affect a whole lot of other trials, and I -- I  
6 frankly think we're playing with fire. I -- I worry  
7 about criminal trials turning into circuses in which --  
8 in -- in which the police are put on trial, which is  
9 part of what is happening here and what has happened in  
10 -- in a famous recent American case. I worry that --  
11 that that will be the -- the result if -- if we take  
12 your suggestion, which is to prescind from any  
13 consideration of the strength of the prosecution's case  
14 and simply look at the -- at the alleged third party  
15 guilt evidence on its own without -- without any  
16 consideration of its relative -- its relative strength.  
17 Just -- you want us to do it just absolutely.

18 MR. BLUME: Well, I would say, Justice  
19 Scalia, that that's the way the 49 other States do it.  
20 South Carolina is the only State which has a rule  
21 which requires a defendant to overcome the  
22 prosecution's case. And in South Carolina, not only do  
23 you have to overcome the prosecution's case, the only  
24 thing that counts is the prosecution's evidence. They  
25 completely dismiss --

1 CHIEF JUSTICE ROBERTS: Where -- where do you  
2 think it says you have to overcome the prosecution's  
3 case?

4 MR. BLUME: In the Holmes opinion.

5 CHIEF JUSTICE ROBERTS: It's a -- it's a  
6 factor that's considered in weighing the admissibility  
7 and relevance of the third party guilt. They don't --  
8 you don't have to prove and rebut and overcome, as  
9 you've said a couple of times, the prosecution's case.

10 MR. BLUME: The -- the holding in Mr. Holmes'  
11 case is Holmes simply cannot overcome the forensic  
12 evidence against him.

13 JUSTICE SOUTER: No. But with respect, I --  
14 isn't the -- the term that they use -- and I was going  
15 to ask essentially the same question. The term that  
16 the court uses is raise a reasonable inference of his  
17 innocence. And I will -- I will grant you this. When  
18 I read that, it said -- I thought to myself it sounds  
19 as though they are saying he must present evidence or  
20 make a showing, a preliminary showing, that it is more  
21 probable than not that he is innocent despite the  
22 State's evidence. But they never spell that out, and  
23 is it spelled out anywhere?

24 MR. BLUME: Well, there has not been a -- a  
25 decision since then. But I think if you read the

1 sentence before that in the opinion where it says --  
2 they describe the Gregory rule, which was the old rule,  
3 with which we have no quarrel. The rules are similar  
4 to that in other jurisdictions. It says, further, we  
5 held in State v. Gay that in cases where there is  
6 strong evidence of guilt, especially forensic evidence,  
7 evidence of third party guilt simply is not admissible.

8 CHIEF JUSTICE ROBERTS: Well, you say you  
9 don't object to the -- the Gregory standard, and the  
10 Gregory standard is the one Justice Souter just quoted,  
11 raise a reasonable inference as to his own innocence.  
12 Now, how can you tell whether it raises a reasonable  
13 inference in a vacuum without regard to the evidence on  
14 the other side? If the evidence on the other side is  
15 -- I understand you dispute it in this case, but let's  
16 say unobjectionable DNA evidence that your client was  
17 the person there, and his third party guilt evidence is  
18 it wasn't me. How can you tell whether that creates a  
19 reasonable inference or not without looking at what's  
20 on the other side?

21 MR. BLUME: Well, I -- I think because, one,  
22 if you do that, you could supplant -- you -- you have  
23 made the judge the jury, and the defendant, in order to  
24 present evidence of his innocence, have to -- has to  
25 win a trial before the trial -- before the judge.

1 CHIEF JUSTICE ROBERTS: No, not at all. What  
2 you're saying is that the evidence has to be -- the  
3 admissibility of evidence has to be assessed in light  
4 of the circumstances. If your claim of innocence is,  
5 as it may be in this case, that the DNA evidence  
6 doesn't show what you think it shows, fine, that  
7 evidence comes in. If the evidence you're trying to  
8 get in is somebody in the jailhouse said he heard that  
9 somebody else did it, and the -- and you don't  
10 challenge the DNA evidence that places your client  
11 there, then maybe that doesn't create a reasonable  
12 inference, while it might in a different case,  
13 depending on the nature of the prosecution's evidence.

14 MR. BLUME: I -- first of all, there is no  
15 other State that does it that way. No State considers  
16 that. They look at the third party guilt evidence on  
17 its own terms and consider does it raise a reasonable  
18 inference. And even in your hypothetical, the --

19 JUSTICE KENNEDY: Well, I'm -- I'm just not  
20 sure that's the case. We're asking about 403. In  
21 order to completely exclude and prescind, in Justice  
22 Scalia's word, that the -- the nature of the  
23 prosecution's case just doesn't seem to me right.

24 MR. BLUME: 403 --

25 JUSTICE KENNEDY: Now -- now, if you want to

1 say there's a more wooden rule and a -- and a more iron  
2 rule here that was prejudicial, I think that's  
3 something else.

4 MR. BLUME: There -- there is, and I think  
5 the South Carolina rule is a categorical rule based on  
6 the description. I think it also requires a defendant  
7 to overcome, and it does so in an unfair way. Footnote  
8 8 in the opinion makes clear that in establishing  
9 whether the third party guilt evidence overcomes the  
10 State's evidence, you look only at the State's  
11 evidence, and the defendant's counter forensic evidence  
12 is deemed irrelevant. So you have to overcome it with  
13 a stacked deck.

14 JUSTICE ALITO: But is it your argument that  
15 the State's evidence can't be considered at all, or  
16 that it can't be given more than a certain amount of  
17 weight? And if it's the latter, where do you draw the  
18 line?

19 MR. BLUME: I think that you cannot -- that  
20 as a general matter, a State cannot require a defendant  
21 to persuade a judge of his likely innocence before he  
22 can present evidence to the jury that he's innocent.  
23 That is -- that is putting the judge in the role of the  
24 jury, and that's what the South --

25 JUSTICE ALITO: Yes, but the State doesn't go

1     that far.  If it doesn't require the defendant to  
2     persuade the judge of the defendant's likely innocence,  
3     then there's no constitutional violation.  If the -- if  
4     the rule of State law simply requires a consideration  
5     of the strength of the prosecution evidence in relation  
6     to the defense evidence, that's -- that's all right?

7             MR. BLUME:  I think it depends what  
8     consideration means.  Consideration, for example, in  
9     terms of is the third party guilt evidence relevant in  
10    some way, that is not constitutionally objectionable.  
11    But when you have a weighing procedure like South  
12    Carolina does and the admissibility of the evidence of  
13    innocence depends on a judge's assessment of the  
14    credibility of the defendant's case and the  
15    prosecution's case, that is what juries do.

16            JUSTICE ALITO:  But where is the line?  
17    That's what I'm trying to get at.  If it's -- if the  
18    rule is that the defendant has to raise a reasonable  
19    inference of innocence and you take into account the  
20    strength of a prosecution's case in making that  
21    determination, you don't just accept the defense  
22    evidence and -- and see whether -- how -- how strong an  
23    inference of innocence it would raise if it's believed.  
24    I mean, where is the line?

25            MR. BLUME:  I think that would be -- because



1       that is implicitly weighed. Your hypothetical to me is  
2       implicitly weighed, and I think that's --

3               JUSTICE ALITO: And that would be  
4       unconstitutional as well.

5               MR. BLUME: I think that's unconstitutional.

6               All these cases where you indicate, well, you  
7       know, what if it's conclusively -- that the evidence is  
8       conclusive and the defendant didn't contest the DNA,  
9       should it be let in --

10              JUSTICE ALITO: That makes it sound like it  
11      can't be considered at all.

12              MR. BLUME: That -- well, only for relevance  
13      and possibly for some 403's because that's looking at  
14      the 403 part. But in that --

15              JUSTICE SOUTER: What if the -- what if the  
16      court says, we will weigh it to the extent of  
17      determining whether, in light of the State's case, the  
18      proffered evidence, if accepted, would pass the laugh  
19      test? That's weighing. Is -- is that -- is that  
20      legitimate?

21              MR. BLUME: I think that that is problematic.

22      And -- but the -- the point I think is no other State  
23      does it. Now, they would -- if it didn't pass the  
24      laugh test, it wouldn't pass the laugh test on its own  
25      terms. If you read the cases of exclusion, it's where

1 the defendant wanted to present evidence that some dude  
2 named Duke that nobody can find had a motive to kill  
3 the person. And the courts say, well, no, you can't do  
4 that. Or the -- someone is on trial and they want to  
5 prove that the -- for killing a man's wife, and they  
6 want to show, well, the husband had \$1 million in life  
7 insurance policy. And courts said, no, you can't do  
8 that. If all you've got is motive, if all you've got  
9 is propensity, if all you've got is opportunity, that's  
10 not in this -- they're -- in all the other 49 States,  
11 they're looking at it on their own terms. Nothing this  
12 Court will do in Mr. Holmes' case will disturb the law  
13 in the other 49 jurisdictions.

14 JUSTICE SOUTER: But that does go -- somehow  
15 that goes beyond mere relevance. You can't say that  
16 the -- I don't think you can say that the existence of  
17 the million dollars in life insurance is irrelevant.  
18 It's just that it doesn't prove much unless it can be  
19 combined with certain other kinds of evidence. And  
20 when you say you've got a standard that looks into  
21 that, then you have crossed the line from mere  
22 relevance to probative force, haven't you?

23 MR. BLUME: Yes, but you're not considering  
24 how strong the government's case is and conditioning  
25 admissibility --

1 JUSTICE SOUTER: No. I -- I grant you that.

2 But to say that the only test is relevance seems to be  
3 too strong.

4 MR. BLUME: I'm sorry. I -- I didn't mean to  
5 suggest that. I was sort of just describing how other  
6 States do it and the relevance. Then they also -- many  
7 of them have -- they articulate it different ways, but  
8 it's basically relevance with a 403 type of exclusion,  
9 that if the evidence doesn't meet the third party guilt  
10 evidence on its own terms, doesn't meet a certain  
11 quantum, back -- doesn't get over the laugh test, then  
12 it's not admissible. Other States do it and they say,  
13 well, it's got to create a reasonable inference of  
14 innocence. That's fine. Or it must create a  
15 reasonable likelihood about the defendant's guilt.  
16 That's fine too.

17 JUSTICE SCALIA: You think -- you think  
18 there's no difference where really very questionable  
19 evidence about some third party's guilt is -- is  
20 produced in a case where -- where the State's case  
21 barely makes it over the -- over the line to get to the  
22 jury and you think it's -- it's the same call where  
23 that barely questionable third party evidence is -- is  
24 put in in opposition to a State's case that is -- is  
25 watertight -- I mean, you know, forensic evidence, all

1       sorts of proof.  You -- you think the two have to be  
2       treated the same.

3               MR. BLUME:  Yes, well, I do for the following  
4       reason.  The -- that case may make it an easy call, but  
5       it's still the jury's call, just for the same reason  
6       that a judge couldn't, in a very strong case like that,  
7       say, I'm not allowing the defendant's alibi witnesses  
8       to testify.

9               CHIEF JUSTICE ROBERTS:  But that's the --  
10       that's the problem.  That's why this is a special  
11       category of evidence.  It's not any evidence.  It's  
12       third party guilt evidence because that's evidence that  
13       any defendant could try to introduce in any case.  In  
14       any case, the defendant can say somebody else did it  
15       and compile whatever kind of evidence he can get,  
16       whether it's jailhouse informants or -- or whatever,  
17       where the person who did it was often somebody who's  
18       just recently died and -- and is not there to present  
19       an alibi of his own.  In every case the defendant can  
20       come up with this evidence, and so you have a special  
21       rule that's designed to deal with that.

22               And all, it seems to me, that the State court  
23       decision is saying, when you look at the prosecution's  
24       case, is if -- if the prosecution's case makes that an  
25       -- unreasonable under the Gregory test that you agree

1 with, the reasonable inference, if it's unreasonable to  
2 suggest that somebody else did it, doesn't mean that  
3 you're guilty. You may have all sorts of other claims  
4 that you can make, but you just don't get to present  
5 that type of evidence because of the susceptibility of  
6 prejudice and the susceptibility of fraud and all that  
7 kind of stuff.

8 MR. BLUME: Well, Chief Justice Roberts, I  
9 submit that that is, one, not correct factually. I  
10 mean, I think if anything, it's more like --

11 CHIEF JUSTICE ROBERTS: You mean on -- in  
12 your case.

13 MR. BLUME: Well, it's not -- it's certainly  
14 not true on the facts of this case. But even as a  
15 general proposition, I think defendants are more likely  
16 to get alibi witnesses to lie for them than other  
17 people. But we still allow the jury, the ultimate lie  
18 detector, to make that decision.

19 And if you read the hundreds of criminal  
20 appeals that come out each year, this is not a big  
21 problem. It doesn't come up a lot, and the law in the  
22 49 other jurisdictions seems to handle it. South  
23 Carolina is the State --

24 JUSTICE SCALIA: Does the other side agree  
25 with that? I -- I'd be surprised if that were the law

1 in the other 49 jurisdictions, that the judges just  
2 blind themselves to the -- to the prosecution's case  
3 when they make these calls.

4 MR. BLUME: I think --

5 JUSTICE SCALIA: What's your authority for --  
6 for the -- for opposition that every other jurisdiction  
7 does it that way?

8 MR. BLUME: I think if you go through the  
9 cases, even in the amicus brief, filed by the State of  
10 Kansas, they were able to come up with two decisions:  
11 one, an unreported decision from the D.C. Circuit; and  
12 the other, an intermediate decision by the California  
13 Court of Appeal, which took into account the strength  
14 of the State's case. If you read all the other cases  
15 from all the other States or you read the articulation  
16 of the rules, it doesn't do that. So a judgment in Mr.  
17 Holmes' favor will leave the law of those States  
18 intact.

19 But even if --

20 JUSTICE KENNEDY: Well, I -- I guess my -- my  
21 point -- maybe it's some of my colleagues' point -- is  
22 that really the strength of the government's case is  
23 subsumed within the general calculus of whether or not  
24 this would cause a delay of -- of time, whether it  
25 would get into extraneous issues, et cetera.

1 MR. BLUME: Well, it's -- it's not --

2 JUSTICE KENNEDY: It's a way of phrasing it.

3 MR. BLUME: That's not the way the decisions,  
4 if you read them and read the evidence, that they work.

5 But it's -- I mean, it -- it does -- if the judge  
6 weighs and conditions the admissibility of evidence of  
7 innocence on the ability to overcome -- and that's the  
8 South Carolina rule, overcome the prosecution's case  
9 and overcome it with a stacked deck where any of the  
10 defendant's counter-evidence is irrelevant, it's  
11 impossible. A defendant could never overcome it.

12 JUSTICE SCALIA: We're not arguing about  
13 that. I -- I don't think anybody has asked you that  
14 question. The question is whether you can consider it  
15 at all, and -- and you say no.

16 MR. BLUME: Well, you don't have to -- you  
17 can't consider it the way South Carolina is. But I  
18 think it would have the -- the place -- the strength of  
19 the government's case has some bearing. Or the  
20 government's case may have some bearing -- not the  
21 strength of it -- on whether the third party guilt  
22 evidence is relevant to some, you know, issue in the  
23 trial. But it also would have some significance on the  
24 back end if a judge excluded it in determining whether  
25 any error was harmless or not. And that's traditionally

1 the place on appeal where you consider the strength of  
2 the government's case.

3 There's no other category of evidence in our  
4 system where we take into account the overall strength  
5 of the case to admit it. If that were true, then why  
6 don't we allow judges to direct verdicts? Why don't we  
7 allow judges to exclude defendant's testimony? Look,  
8 the government's evidence is strong. The DNA evidence  
9 here is overwhelming. Anything this defendant says,  
10 when he gets up there, is going to be a lie. I'm not  
11 allowing it. We don't do that.

12 Juries in our system make credibility  
13 determinations and that's what the rule, which requires  
14 you to -- where you have to weigh the defendant's  
15 evidence against the government's evidence, usurps the  
16 function of the jury.

17 Finally, in this case the -- there is a  
18 contention that the error was harmless, and I wanted to  
19 briefly respond to that. Now -- and then if the Court  
20 has no further questions, I will save the remainder of  
21 -- of my time for rebuttal.

22 But there are three principal reasons the  
23 error in this case was harmless. First -- and part of  
24 this I've already discussed with Justice --

25 JUSTICE SCALIA: Not -- not harmless you



1 mean.

2 MR. BLUME: I'm sorry. Was not harmless.

3 And the first one I've discussed with Justice  
4 Breyer in response to your questions previously, that I  
5 think any fair review of the record here is that the  
6 forensic evidence was a jump ball. Now -- and while we  
7 do not contest that the evidence was sufficient to  
8 convict, it certainly was not overwhelming and a  
9 reasonable juror could have entertained a reasonable  
10 doubt as to Mr. Holmes' guilt based solely on the  
11 evidence at trial.

12 JUSTICE ALITO: But there wasn't much  
13 evidence against him other than the forensic evidence.

14 Isn't that right? There's just some people who saw  
15 him nearby.

16 MR. BLUME: There wasn't even -- yes, there  
17 was some evidence that he was within a mile --

18 JUSTICE ALITO: Right.

19 MR. BLUME: -- or so at the time. There was  
20 much stronger evidence that Mr. White was in the area  
21 where the crime occurred, near where the crime  
22 occurred.

23 JUSTICE ALITO: So the jury must have found  
24 that forensic evidence to be very convincing.

25 MR. BLUME: Well, they found him guilty based

1 on it, yes.

2 But, of course, that can't be the touchstone  
3 of whether the error was prejudicial. The State has  
4 the burden of demonstrating beyond a reasonable doubt  
5 that the exclusion of the third party guilt evidence  
6 could not have contributed to the verdict. In this  
7 case, the forensic evidence was, I submit, a jump ball.  
8 The defense had --

9 CHIEF JUSTICE ROBERTS: What do you say in --  
10 you cited us to footnote 8 in the court's opinion, and  
11 it says that your claims do not eliminate the fact that  
12 99.99 percent of the population, other than your client  
13 and the victim, were excluded as contributors to the  
14 DNA evidence that was found. Do you -- is -- is the  
15 court wrong in saying that?

16 MR. BLUME: The court is right, to the extent  
17 that it is citing one expert's opinion. It is wrong in  
18 that it ignores that even that agent admitted that the  
19 DNA could have been produced through the contamination  
20 of Officer Mobley, through his -- through the bags. So  
21 that could explain the results.

22 And it also ignores the fact -- the footnote  
23 does -- that a defense expert, Dr. Peter D'Eustachio  
24 said that that's not a fair and accurate  
25 representation. In my opinion, in my expert opinion,

1       there -- you cannot do any DNA calculations on this.  
2       These charts are completely unreliable.  So that's all  
3       it is, and it's -- it has, I think, no significance  
4       here in light of the evidence as a whole.  It's a  
5       factually inaccurate statement of the record as a  
6       whole.

7               But in addition to the evidence, the most --  
8       a very significant factor in determining whether this  
9       error was harmless or not is having succeeded in  
10      convincing the trial judge to exclude the evidence, the  
11      prosecutor in his closing argument said, look, they've  
12      indicated that this evidence was planted.  They've  
13      indicated this evidence was contaminated.  If Bobby  
14      Holmes didn't do it, who is -- where is the raping,  
15      murdering thing that did?  So he took complete and  
16      unfair advantage of the absence of evidence in the  
17      trial court's ruling in securing the conviction here.  
18      And this Court has said on a number of other occasions,  
19      in Satterwhite and Clemons, that a prosecutor's  
20      argument is an important factor in determining whether  
21      an error was harmless.

22               And finally --

23               JUSTICE GINSBURG:  That's a question on which  
24      we didn't grant cert.

25               MR. BLUME:  You did not.  I mean, we do

1 believe it was an independent constitutional error, but  
2 even apart from that, it's still a factor in gauging  
3 harmlessness. This Court has said that on a number of  
4 occasions, that what is in the argument is a factor in  
5 harmless error.

6 And then finally, excluding -- not allowing  
7 the evidence deprived Mr. Holmes of presenting an  
8 alternative counter-theory. You can see a jury saying,  
9 well, you know, we've heard all this. This is a bunch  
10 of contesting evidence, but almost asking the questions  
11 the prosecutor did, which certainly they would have  
12 asked after it was, well, you're right. We didn't hear  
13 any evidence of that. Bobby Holmes had a powerful  
14 counter-story. He should have been allowed to tell it.

15 The South Carolina rule is unconstitutional.  
16 The judgment should be reversed.

17 CHIEF JUSTICE ROBERTS: Thank you, Mr. Blume.  
18 Mr. Zelenka.

19 ORAL ARGUMENT OF DONALD J. ZELENKA  
20 ON BEHALF OF THE RESPONDENT

21 MR. ZELENKA: Mr. Chief Justice, and may it  
22 please the Court:

23 The Constitution guarantees criminal  
24 defendants under the Due Process Clause, Compulsory  
25 Process, and Confrontation Clauses a meaningful

1 opportunity to present a defense. A defendant's right  
2 to present relevant evidence is not unlimited, however,  
3 but is rather subject to reasonable restrictions.

4 State courts as rulemakers have broad  
5 latitude to establish rules excluding evidence so long  
6 as they are not arbitrary or disproportionate.

7 JUSTICE SOUTER: Mr. Zelenka, do you -- do  
8 you agree with the characterization that your brother  
9 has given, largely by way of quotation from the opinion  
10 in this case, that the rule of admissibility that --  
11 that the -- that the court followed in -- or that the  
12 supreme court approved in this case would have required  
13 the defendant to show to a degree of probability, in  
14 light of all the evidence, including the forensic  
15 evidence, that he was innocent as a condition of -- of  
16 admitting the evidence?

17 MR. ZELENKA: No, I do not. I think it was  
18 merely an application of the original opinion that  
19 relied upon the straight -- State v. Gregory, that in  
20 fact it must raise a reasonable inference as to the  
21 defendant's innocence.

22 JUSTICE SOUTER: But, well, what do you -- I  
23 mean, your -- your brother's strongest point is this  
24 statement, and I'm quoting from page 365 of the joint  
25 appendix where the -- where the opinion is set out, at

1 -- at the top of the page, the second sentence. He  
2 simply cannot overcome the forensic evidence against  
3 him to raise a reasonable inference of his own  
4 innocence. What could that mean other than a  
5 probability that he is innocent in light of all the  
6 evidence, including the forensic evidence?

7 MR. ZELENKA: I think that -- that language  
8 was basically a review determination as to what exactly  
9 happened. I don't think that the court --

10 JUSTICE SOUTER: Yes, but what does it mean?

11 I mean, I've given you a suggestion as to what it  
12 seems to mean on a straightforward reading, and -- and  
13 I take it you disagree with that. But can you explain  
14 how it could mean something else?

15 MR. ZELENKA: No, I don't disagree with the  
16 fact that, in fact, that is what the supreme court said  
17 in its analysis, looking at the particular evidence in  
18 this case, that he was unable to overcome that. But I  
19 think State v. Gregory didn't require that to be the  
20 ultimate threshold that it had to meet, rather that it  
21 raise a reasonable inference as to his innocence.

22 JUSTICE SOUTER: Well, it's -- it's true.  
23 When they -- on the -- on the previous page, the bottom  
24 of 364, they -- they cite -- they first quote Gregory  
25 and then they cite Gay and they characterize, I guess,

1 the two together as -- well, they say, in Gay, we held  
2 that where there is strong evidence of an appellant's  
3 guilt, especially where there is strong forensic  
4 evidence, the proffered evidence about a third party's  
5 guilt does not raise a reasonable inference as to the  
6 appellant's own innocence. It doesn't use the word  
7 overcome which it uses on the other page.

8 MR. ZELENKA: No, it doesn't.

9 JUSTICE SOUTER: But even without the word  
10 overcome, what -- what can reasonable inference of  
11 innocence mean, considered in light of the other  
12 evidence in the case, if it doesn't mean something like  
13 a probability of -- of innocence?

14 MR. ZELENKA: It's raising a possibility. I  
15 don't know what level of possibility it is other than a  
16 reasonable inference level, which is a level which --  
17 which means that it's subject to some belief.

18 JUSTICE KENNEDY: But quite apart from that,  
19 it seems to me that the statement is questionable as an  
20 empirical matter. Why is it that forensic evidence  
21 somehow should be used to exclude third party guilt  
22 evidence as -- as a universal proposition? Maybe in  
23 some cases yes, maybe in some -- but this is a  
24 universal proposition.

25 MR. ZELENKA: It reads certainly like a

1 universal proposition, but I think it is merely an  
2 application of what happened in State v. Gregory and  
3 State v. Gay when they were presented at that time in  
4 those situations with what they determined to be strong  
5 evidence of forensic guilt --

6 JUSTICE KENNEDY: Well, if I were the trial  
7 court, in a subsequent case in South Carolina, I would  
8 -- I would have to read this instruction of the South  
9 Carolina Supreme Court as saying I simply could not  
10 admit this evidence when there's forensic evidence.  
11 And that's a very strange proposition.

12 MR. ZELENKA: I would agree that would be a  
13 strange proposition because it suggests that they would  
14 ignore the merits of -- of the proffered evidence  
15 itself. And I don't think that's what happened in this  
16 case, and I don't think that's what the South Carolina  
17 Supreme Court --

18 JUSTICE BREYER: Your point is that we're  
19 quibbling with the language. Certainly the language  
20 can't be right. I mean, Gregory is quoting America --  
21 Am.Jur. It's totally right. And I don't -- in my  
22 opinion. I don't see how there's a problem. It's  
23 simply a way to prevent the defendant from confusing  
24 the jury with evidence that's not -- doesn't have high  
25 probative value. That's -- so we --



1 MR. ZELENKA: I think that's correct.

2 JUSTICE BREYER: They don't agree with that  
3 necessarily, but I'm taking that as a premise.

4 MR. ZELENKA: I think that's --

5 JUSTICE BREYER: Now, he describes this, the  
6 writer of the opinion, and if I hadn't been guilty of  
7 this sin myself, I couldn't criticize others, but he  
8 uses language that's absolute. He says, where there is  
9 strong evidence of an appellant's guilt, especially  
10 where there's strong forensic evidence, the proffered  
11 evidence about a third party's alleged guilt does not  
12 raise a reasonable inference as to the appellant's own  
13 innocence. I took that to mean doesn't tend to show  
14 that the appellant is innocent. And you do have to  
15 have when faced with guilt. It's not relevant if it  
16 doesn't tend to show he's innocent. So that wasn't the  
17 problem.

18 The problem is that this sentence is wrong.  
19 You could have incredibly strong evidence that this  
20 person is guilty and it could be incredibly strong  
21 evidence that the other person did it.

22 MR. ZELENKA: Absolutely.

23 JUSTICE BREYER: And so it should come right  
24 in. So what should have been there is the word  
25 automatically, but the word doesn't automatically show,

1 but the word isn't there. It doesn't say automatic.

2 MR. ZELENKA: It doesn't --

3 JUSTICE BREYER: And he goes on to write as  
4 if it isn't that automatic. And he then favors you  
5 because he says the standards set out in Gregory and  
6 Gay, as if they aren't different.

7 MR. ZELENKA: That's correct.

8 JUSTICE BREYER: But the language says they  
9 are different. So what do we do?

10 MR. ZELENKA: And I think we also have to  
11 remember that the -- the South Carolina Supreme Court  
12 was viewing this simply as a matter of State common  
13 law. They weren't looking at it as a matter of Federal  
14 constitutional law.

15 JUSTICE BREYER: And so what do we do? We  
16 get the -- we read the opinion literally, and moreover,  
17 that's why I asked it. If you look into the evidence,  
18 it looks -- you know, maybe it's closer than you might  
19 think. And if we start looking at the evidence of  
20 every case in the United States, it's going to be a  
21 problem for everybody. But -- but -- so what do we do?  
22 That's my question.

23 MR. ZELENKA: I -- I think we can look at a  
24 much narrower approach that also evolves out of this  
25 particular judgment as determined by the trial court.

1     There was essentially a -- a lack of persuasive  
2     assurances of trustworthiness in the statements that  
3     were, in fact, given. They lacked corroboration, the  
4     particular statements that were alleged to have been  
5     given by Jimmy McCaw White, in ways similar to  
6     situations where evidence should not be deemed  
7     relevantly admissible because of that lack of  
8     reliability and trustworthiness.

9             JUSTICE SCALIA: It's not what the court  
10    said, though. The court didn't -- did -- whatever the  
11    court said, it clearly did not say just looking at the  
12    third party guilt evidence by itself, it's not -- it's  
13    not trustworthy. Whatever else it said, it didn't say  
14    that.

15            MR. ZELENKA: No, it didn't say that.

16            JUSTICE SCALIA: Okay. Yes. Now, you say  
17    that's true. Now, it may well have been true, but that  
18    -- we're -- we're --

19            MR. ZELENKA: The trial judge said that. The  
20    trial judge said it lacked the type of corroboration.

21            JUSTICE SCALIA: That's right.

22            JUSTICE SOUTER: Well, the trial judge also  
23    kept it out, didn't he, because he believed there was  
24    -- there was no penal interest exception to the hearsay  
25    rule?

1           MR. ZELENKA: He was -- he -- he did that  
2 also, but ultimately he blended both concepts together  
3 and said both as a matter of substantive law and as a  
4 matter of evidentiary law in the -- the final  
5 conclusion at the end of the State's case, when he made  
6 the ultimate determination --

7           JUSTICE SOUTER: But -- but then you get to  
8 the --

9           MR. ZELENKA: -- that it would be  
10 inadmissible.

11          JUSTICE SOUTER: I'm sorry. Then you get to  
12 the -- the South Carolina Supreme Court, and they don't  
13 keep it out on -- on grounds of -- of threshold  
14 reliability.

15          MR. ZELENKA: They didn't specifically  
16 address that. They went to their ultimate  
17 determination viewing the evidence.

18          JUSTICE SCALIA: And as I recall, the trial  
19 court did say that this was pretty persuasive evidence  
20 but for the fact that you had to exclude some of it  
21 because that there was no exception to the hearsay  
22 rule. Didn't he say that?

23          MR. ZELENKA: It -- they said that the  
24 evidence existed, that the statements --

25          JUSTICE SCALIA: He said more than that. I

1 think he said it was --

2 MR. ZELENKA: -- there was some evidence --

3 JUSTICE SCALIA: Well --

4 MR. ZELENKA: -- that allowed for --

5 JUSTICE SCALIA: Your friend will tell us  
6 what he said.

7 MR. ZELENKA: -- that allowed for a jury to  
8 make the determination. That information was there.  
9 But also, it's -- the judge found that there wasn't  
10 other evidence other than the statement that clearly  
11 pointed to the defendant -- excuse me -- that clearly  
12 pointed -- pointed to Jimmy McCaw White --

13 JUSTICE STEVENS: May I ask you this  
14 question?

15 MR. ZELENKA: -- as being guilty of the  
16 crime.

17 JUSTICE STEVENS: Supposing -- I've written a  
18 fair number of opinions involving criminal cases where  
19 I've had to say that we take all the inferences  
20 favorable to the prosecution, and based on that rule,  
21 we find there's sufficient evidence to justify the  
22 jury's verdict. How we would have decided it is not  
23 before us. We accept the jury's verdict.

24 What if the -- on the merits of the  
25 underlying crimes, the South Carolina Supreme Court had

1 written that kind of an opinion rather than there's  
2 overwhelming evidence of guilt? Do you think they  
3 would have held the third party evidence admissible or  
4 inadmissible?

5 MR. ZELENKA: I think they would have still  
6 held the third party evidence inadmissible because of  
7 the lack of corroboration. It lacked that requirement  
8 of reliability to get over --

9 JUSTICE STEVENS: But it's odd that they  
10 didn't say that. Their -- the reasons they gave were  
11 that the evidence of guilt was overwhelming.

12 MR. ZELENKA: And they gave that immediately  
13 after they had issued their prior opinion in -- in  
14 State v. Gay where they looked at a case where, again,  
15 they found overwhelming forensic evidence of guilt as  
16 defeating the probative value of the defendant's  
17 presentation. And trial counsel --

18 JUSTICE SCALIA: Mr. Zelenka, do you agree  
19 that all 49 other States do not look at the -- at the  
20 weight of the prosecution's case when making this  
21 decision?

22 MR. ZELENKA: No, I -- I do not agree with  
23 that. And -- and we've cited in our brief Kansas v.  
24 Adams. We -- we do not analyze those cases to make a  
25 determination as to what the trial judges and the other

1 State courts did not look at. We think it's implicit,  
2 in fact, in most situations, that you have to consider  
3 to some extent the State's evidence to determine the  
4 reliability of the nature of the third party guilt  
5 evidence which comes in. You have to have --

6 JUSTICE GINSBURG: Could you use --

7 MR. ZELENKA: -- some understanding of that  
8 evidence.

9 JUSTICE GINSBURG: Could -- could you use the  
10 same rule with respect to alibi evidence? The trial  
11 judge would say this evidence for the prosecution is so  
12 strong, I'm not going to let any alibi evidence in. Is  
13 there -- is there anything special about third party  
14 guilt? Couldn't -- couldn't you use -- use it for  
15 other defenses?

16 MR. ZELENKA: I think there is something  
17 special about third party guilt. Alibi is merely the  
18 defendant saying I didn't do it and I wasn't there when  
19 the crime was done. I think in third party guilt  
20 evidence you're diverting the case off in another  
21 direction that requires some special attention by the  
22 courts, and I think most States recognize it requires  
23 special attention by the court because it's hitting on  
24 a collateral issue requiring the State to prove or, to  
25 some extent, disprove that another individual did it,

1 an individual that might not be subject to notice  
2 requirements, an individual that might not even be  
3 alive. We look at -- you can look at the -- this  
4 Court's decision in Donnelly v. the United States, a  
5 1911 decision, that recognized there's something  
6 different about third party guilt potential evidence  
7 because of the inherent unreliability which may exist  
8 in the manner and the way it was presented.

9 JUSTICE ALITO: Can -- can a trial judge  
10 exclude defense evidence based on credibility  
11 determinations?

12 MR. ZELENKA: No. I don't -- I don't think  
13 they can.

14 JUSTICE ALITO: Isn't that -- but isn't that  
15 what happened here?

16 MR. ZELENKA: No. I think -- I think this  
17 court excluded it on the basis of reliability  
18 determinations, whether in fact there was sufficient  
19 corroboration for what the individual was saying in the  
20 statement. The trial judge found that the information  
21 that was purported to be said by Jimmy McCaw White was  
22 something that was generally known within the community  
23 as a whole.

24 JUSTICE ALITO: How could -- how could court  
25 conclude that the State's evidence was strong without



1 making -- without finding, in effect, that the State's  
2 forensic witnesses were credible?

3 MR. ZELENKA: I think they could evaluate the  
4 evidence in the manner that it -- that it was presented  
5 to them to get an indicia as to whether there is any  
6 reasonable reliability to the third party guilt  
7 evidence.

8 JUSTICE ALITO: Just take, for example, the  
9 -- the palm print. The chief Mobley said he found it  
10 in -- in the apartment, and that would be very strong  
11 evidence, if in fact that was the case. But his  
12 credibility was contested. So how can you conclude  
13 that the palm print is strong evidence for the  
14 prosecution without implicitly making a determination,  
15 a credibility determination?

16 MR. ZELENKA: Well, I think that type of  
17 evaluation, we believe, necessarily needs to be done to  
18 make a determination to the -- to the probative value  
19 or the prejudicial value to the presentation of the  
20 third party guilt evidence of -- of the defendant, that  
21 all those matters need to be looked at as to whether,  
22 in fact, it should come in.

23 JUSTICE ALITO: But then the court is making  
24 --

25 MR. ZELENKA: If there was just the palm

1     print --

2                   JUSTICE ALITO:  -- the court is excluding  
3     defense evidence based on a finding that a prosecution  
4     witness is credible.

5                   MR. ZELENKA:  No.  I don't think that's the  
6     test, and I don't think that's what they were doing in  
7     this case.  They were making that -- viewing that  
8     information to determine whether the presentation was  
9     reliable that was being presented, whether there was  
10    some substance actually to what was being given, and  
11    whether leaving that information out would have  
12    deprived him of a meaningful right to present relevant  
13    evidence in his defense.

14                  JUSTICE ALITO:  On the other side, if  
15    Westbrook was credible, isn't that strong evidence for  
16    the defense?

17                  MR. ZELENKA:  The -- the -- it's -- it's  
18    evidence for the defense, but it's evidence for the  
19    defense that lacked the sense of reliability.  And it  
20    lacked --

21                  JUSTICE ALITO:  But if he's credible that  
22    White confessed to him --

23                  MR. ZELENKA:  He -- he --

24                  JUSTICE ALITO:  -- then wouldn't that be  
25    strong evidence for the defense?

1           MR. ZELENKA: It's some evidence for the  
2 defense, but the problem is it lacked corroboration.  
3 It wasn't given in a timely manner. If you contrast  
4 that to the situation which occurred in Chambers v.  
5 Mississippi, there was an entire information that the  
6 Chambers situation had independent of the third party  
7 statement which supported and showed that that  
8 information did have persuasive assurances of  
9 reliability. That was lacking in this particular case.

10           I see my time is about up, but I would --

11           JUSTICE THOMAS: Counsel, before you change  
12 subjects, isn't it more accurate that the trial court  
13 actually found that the evidence met the Gregory  
14 standard?

15           MR. ZELENKA: No. He specifically found, I  
16 believe, from my reading --

17           JUSTICE THOMAS: Well, he says --

18           MR. ZELENKA: -- that it didn't meet the  
19 Gregory standard.

20           JUSTICE THOMAS: Well, he says at first  
21 blush, the above arguably rises to the Gregory  
22 standard. However, the engine that drives the train in  
23 this Gregory analysis is the confession by Jimmy McCaw  
24 White. And then he goes on to say that that, of  
25 course, can't be introduced because it's hearsay. So

1     it -- it seems as though he says that if it is to be  
2     believed what Jimmy White says, it meets the Gregory  
3     standard.

4             So I don't quite understand where Gay, which  
5     is subsequent to -- to this case -- where Gay comes in  
6     because it didn't seem to be the standard that the  
7     trial court applied.

8             MR. ZELENKA:  Actually Gay was -- two things.

9     Gay was not the standard when the trial judge made the  
10    pretrial hearing.  Gay was -- was the standard at the  
11    time the case was tried, and the trial judge was  
12    addressing that standard and he found that Gay was not  
13    satisfied because he didn't believe that there was  
14    evidence which clearly pointed to the defendant --  
15    excuse me -- to the third party as being guilty of the  
16    particular crime.  He made that --

17            JUSTICE SCALIA:  Excluding the confession.  
18    Excluding the confession.

19            MR. ZELENKA:  Other than that information in  
20    the confession, which he had also found previously  
21    lacked appropriate corroboration at the trial --  
22    pretrial hearing as evidenced within his written order.

23            I would also like to preserve the ability to  
24    argue harmless error, as we've done in our case to some  
25    extent.  The South Carolina Supreme Court's opinion was

1 a harmless error analysis, but more importantly, in  
2 addition, that -- that we do not believe and continue  
3 to assert that the matter wasn't properly preserved  
4 before this Court based upon the manner and only the  
5 manner that it was raised before the South Carolina  
6 Supreme Court in the direct appeal briefs.

7 CHIEF JUSTICE ROBERTS: Thank you, Mr.  
8 Zelenka.

9 Mr. Johnson.

10 ORAL ARGUMENT OF STEFFEN N. JOHNSON

11 ON BEHALF OF KANSAS, ET AL.,

12 AS AMICUS CURIAE, SUPPORTING THE RESPONDENT

13 MR. JOHNSON: Thank you, Mr. Chief Justice,  
14 and may it please the Court:

15 In my time today, I'd like to focus on two  
16 basic issues.

17 The first is that this case does not approach  
18 the outer limit of due process set by this Court in  
19 Chambers. As the trial court found in three specific  
20 instances, there is no evidence to corroborate these  
21 confessions. And the confession evidence itself in  
22 Chambers was far stronger than the confession evidence  
23 in this case.

24 Second, I'd like to respond to Justice  
25 Breyer's question about the nature of the Supreme Court

1 of Carolina's opinion and to remind the Court that it's  
2 reviewing the judgment primarily, not the opinion. And  
3 it seems to me that Petitioner's argument is  
4 essentially criticizing the opinion for the absence of  
5 a word, the absence of the word automatically, and that  
6 the opinion would look very different if it said where  
7 there's strong evidence of guilt, the defendant's third  
8 party guilt evidence doesn't automatically raise a  
9 reasonable inference of innocence.

10 JUSTICE SOUTER: Okay. And I -- I take it  
11 what you will do, in the course of your second point,  
12 is tell us the answer to this question, that if we do  
13 not accept the overcome by reasonable inference  
14 formulation that is here, what would be an acceptable  
15 formulation because I think that's what you -- you say  
16 you're getting to. But that would be very helpful to  
17 us.

18 MR. JOHNSON: We -- we believe that the raise  
19 a reasonable inference of innocence standard, as the  
20 counsel for South Carolina said, does not necessarily  
21 require that it be the only inference --

22 JUSTICE SOUTER: Well, one of the problems is  
23 I don't know what it requires. On -- on the -- on the  
24 second page of the opinion that I quoted, it is used  
25 with the word overcome, which certainly suggests that

1 it is supposed to raise a probability of innocence in  
2 light of all the evidence. Sometimes it is used  
3 without overcome, as it was earlier in the opinion. I  
4 don't know what they mean by inference. Do they mean  
5 evidence from which one might reasonably conclude, from  
6 which one -- there is a reasonable possibility of  
7 concluding? I just don't know what the terms mean. So  
8 I hope you'll give us a suggested formulation with --  
9 with terms that -- that are defined that -- that you  
10 and the States that you represent would -- would think  
11 was an acceptable and constitutional standard.

12 MR. JOHNSON: And I think your formulation is  
13 actually a fair one. Does it raise some --

14 JUSTICE SOUTER: Well, I included several.  
15 Which -- which one --

16 MR. JOHNSON: The second one, does it raise  
17 some reasonable possibility of innocence. In other  
18 words, if you believe this evidence --

19 JUSTICE SOUTER: Okay.

20 MR. JOHNSON: -- does it raise a reasonable  
21 possibility of innocence, not -- not that it's the most  
22 likely or the only possibility from that evidence.

23 And I think if you look at the South Carolina  
24 Supreme Court's opinion carefully, in light of the --  
25 the supreme court's decisions in Gregory and Gay, you

1     see that in fact what the court was doing was simply  
2     saying this case is like Gay.  There's strong evidence.  
3     We're going to look at the evidence on both sides.  
4     And there's a -- there is certainly language in the  
5     opinion that makes it sound like an automatic or  
6     categorical rule, but in fact, they did go on to look  
7     at the defendant's evidence.

8             JUSTICE SCALIA:  Has anybody else looked at  
9     the evidence on both sides?

10            MR. JOHNSON:  The trial court certainly  
11     looked at the defendant's evidence.

12            JUSTICE SCALIA:  Other States I mean.  Other  
13     States.

14            MR. JOHNSON:  Yes, Your Honor.  I think that  
15     it would be fair to say that -- that any of the nine  
16     States collected in our appendix whose standard is does  
17     the evidence raise a reasonable inference of innocence  
18     look at those sorts of questions.

19            In addition, we collected, I believe, four  
20     cases in our brief, in addition to the California Court  
21     of Appeal and the D.C. Circuit's opinion in Cabrera.  
22     There's the Kansas v. Adams case which very clearly  
23     looks at the State evidence.  In that case, the issue  
24     was the defendant was on trial for shaking his baby to  
25     death, and the medical evidence of the prosecution



1       showed that the death took place within a certain time  
2       period. The defendant wanted to introduce evidence  
3       that his wife --

4               JUSTICE GINSBURG: Can we -- can we just back  
5       up to Cabrera? The D.C. Circuit did not publish that  
6       and --

7               MR. JOHNSON: That's correct, Your Honor.

8               JUSTICE GINSBURG: -- and unless the rule has  
9       changed, it didn't have -- it didn't have any  
10       precedential effect -- those opinions that they did not  
11       put in the Federal Reports.

12              MR. JOHNSON: I think its reasoning stands on  
13       its own, Your Honor. But in addition to that case, you  
14       have these other three published cases, and we stand by  
15       the description of them in our argument.

16              Kansas v. Adams was a case where the court  
17       said the issue -- the State's evidence shows this baby  
18       died within a certain time period, and although the  
19       wife had a history of violence against the child, the  
20       court said it's not getting in because it's -- there's  
21       no evidence that she had access to the child during the  
22       relevant time period. That's a very clear example.  
23       There are other examples.

24              JUSTICE KENNEDY: Suppose there had been  
25       evidence that the time of death testimony had been

1 contrived, planted, fabricated. Then what? Or suppose  
2 that was the allegation of the defense.

3 MR. JOHNSON: I -- I think it would be within  
4 the -- the trial court's discretion to exclude it. I  
5 certainly don't think it would necessarily violate the  
6 due process --

7 JUSTICE STEVENS: But if he did, he would be  
8 making a credibility determination, wouldn't he? He  
9 would be deciding an issue that normally would be  
10 submitted to the jury.

11 MR. JOHNSON: It's not our position, Your  
12 Honor, that -- that the trial court can make  
13 credibility determinations, but --

14 JUSTICE STEVENS: But the example that  
15 Justice Kennedy gave you was such a determination.

16 MR. JOHNSON: I -- I think, though -- I -- I  
17 suppose that would depend on the nature of the specific  
18 evidence at issue. If you look at the evidence --

19 JUSTICE SCALIA: Why wasn't it in the baby-  
20 shaking case?

21 MR. JOHNSON: I'm sorry?

22 JUSTICE SCALIA: Why was there no credibility  
23 determination made in the baby-shaking case you just  
24 described? Didn't -- didn't you have to conclude that  
25 the evidence concerning the time of death was -- was

1 credible, was accurate?

2 MR. JOHNSON: I -- I think, Your Honor, that  
3 the trial judge found that -- that there simply wasn't  
4 a dispute about that, that -- that the -- that there  
5 wasn't enough. And so it was fine to look at the  
6 State's case. And I would urge the Court --

7 JUSTICE KENNEDY: But there is a dispute here  
8 as to the forensic evidence. The suggestion is it's  
9 planted.

10 MR. JOHNSON: That's correct, Your Honor, and  
11 -- and we would -- we would simply urge the Court not  
12 to adopt a categorical rule that it's inappropriate to  
13 look at the State's case.

14 JUSTICE BREYER: What do I do in this case?  
15 I'm totally with you if I read American Jurisprudence  
16 and others as saying the following. Judge, there's a  
17 particular kind of evidence that really has a tendency  
18 to mislead the jury, that's that somebody else did it  
19 because they start trying the other person in their  
20 minds. So if you have a strong case that this guy did  
21 it, don't let them even introduce that evidence unless  
22 you have some reason to think it's really going to show  
23 this guy didn't do it. That's what it's saying, isn't  
24 it?

25 MR. JOHNSON: Yes, and -- and --

1 JUSTICE BREYER: Okay. Now, that gets us  
2 through Gregory. And the difficulty here is that the  
3 court went on to say something that couldn't possibly  
4 be true, which is if you have a strong case against  
5 this guy, never admit this other thing. That couldn't  
6 be right.

7 MR. JOHNSON: And that's why --

8 JUSTICE BREYER: And so now what do I do with  
9 that particularly? Because the other side has said, by  
10 the way, this is that case.

11 MR. JOHNSON: And that's why I would  
12 emphasize the trial court's findings in this case.

13 JUSTICE BREYER: The trial court's findings  
14 -- I read them the way Justice Thomas did.

15 MR. JOHNSON: It's very clear. This is at  
16 pages 136 and 137 of the joint appendix, page 140 of  
17 the joint appendix, and again at pages 252 and 253 of  
18 the joint appendix. The trial court said there is  
19 nothing to corroborate these confessions.

20 Now, contrast Chambers --

21 JUSTICE GINSBURG: On that, could a  
22 prosecutor have gotten this case -- gotten an  
23 indictment against White on the basis that he had four  
24 witnesses who put him in the proximity of the crime,  
25 four who said that they heard him confess? On the

1 basis of that evidence, could White have been indicted  
2 for this?

3 MR. JOHNSON: Possibly --

4 JUSTICE GINSBURG: And -- and also throw in  
5 one more thing, the victim's description of the  
6 assailant. So if -- if White could have been indicted  
7 for this crime and -- and yet the jury is not allowed  
8 to hear that evidence, that sounds passing strange to  
9 me.

10 MR. JOHNSON: Possibly that evidence would be  
11 sufficient to support an indictment, Your Honor, but I  
12 don't believe it would be sufficient to support a  
13 conviction.

14 And I also think that it's -- it's -- we're  
15 talking about the outer limits of due process here. If  
16 you look at the evidence in Chambers, the corroboration  
17 evidence there was extensive. There was a witness who  
18 said I saw the third party shoot the victim.

19 JUSTICE STEVENS: Surely, you're not arguing  
20 the third party evidence can only come in if it's proof  
21 beyond a reasonable doubt. You're not arguing that  
22 standard, are you?

23 MR. JOHNSON: No. No.

24 JUSTICE STEVENS: But you did say it wouldn't  
25 be enough to convict.

1           MR. JOHNSON: Right, Your Honor, and -- and  
2     that -- that might present a different case.

3           JUSTICE GINSBURG: I don't --

4           MR. JOHNSON: But -- but that evidence --

5           JUSTICE GINSBURG: You said it was enough to  
6     indict and that very same evidence is put before the  
7     jury, but it wouldn't be enough to convict?

8           MR. JOHNSON: I'm saying, Your Honor, that  
9     the evidence here clearly isn't strong enough to meet  
10    the standard for due process, quite apart from whether  
11    it's enough to support an indictment or a conviction.  
12    And if you compare it with the evidence in Chambers,  
13    that's very clear where there was eyewitness testimony  
14    of the shooting itself. There was eyewitness testimony  
15    that the third party was at the scene of the crime with  
16    the gun in his hand. There was -- there was testimony  
17    from the gun dealer that he sold the person the type of  
18    crime at issue -- the type of gun at issue both before  
19    and after the offense. The confession itself, in  
20    contrast to the evidence here, was a sworn statement.  
21    There was not even any dispute as to whether the -- the  
22    confession was made. The only dispute was whether the  
23    evidence of the confession was true.

24           JUSTICE SCALIA: Mr. Johnson, your -- your  
25    citation of the -- of the portion of the -- of the

1 trial court opinion, which says that there was no  
2 corroboration of the -- of the confession, that was not  
3 stated in -- to say, and therefore, the confessions  
4 were weak evidence. That point was made in order to  
5 say, therefore, the confession cannot be admitted  
6 because the -- the rule was it's hearsay, but hearsay  
7 that's corroborated can be admitted. So I think you're  
8 misdescribing the --

9 MR. JOHNSON: No, I -- if I may answer.

10 CHIEF JUSTICE ROBERTS: Please.

11 MR. JOHNSON: I understand that, Your Honor.

12 It was part of the hearsay analysis, but it's a  
13 narrower ground that's -- that's fully supportable by  
14 the record for affirmance because it distinguishes the  
15 evidence in Chambers.

16 CHIEF JUSTICE ROBERTS: Thank you, Mr.  
17 Johnson.

18 Mr. Blume, you have 2 minutes remaining.

19 REBUTTAL ARGUMENT OF JOHN H. BLUME

20 ON BEHALF OF THE PETITIONER

21 MR. BLUME: May it please the Court:

22 The trial judge in this case found, if you  
23 want to go -- he found there was sufficient evidence  
24 from which the jury could find that Jimmy White was in  
25 the area at the time. The trial judge -- that's on

1 joint appendix page 134.

2 On 135, he also found there was sufficient  
3 evidence from which a jury could believe that Jimmy  
4 White confessed to being the perpetrator, and there was  
5 sufficient evidence from which a jury could conclude  
6 that Jimmy White had in the past committed acts against  
7 women.

8 And then he made the mistake of fact and a  
9 mistake of law. He treated White as unavailable and  
10 therefore he excluded the statement made. That was  
11 wrong. White was available. Under South Carolina law,  
12 he should have been able to have been called. He could  
13 have been impeached, and the prior -- these statements  
14 would come in as substantive evidence.

15 It was also wrong, even as the statement gets  
16 penal interest. The only corroboration is was the  
17 statement made, not is it true. That's the -- and in  
18 that case, he found the statements were made. And  
19 that's why the State supreme court did not embrace or  
20 rely upon what the trial court did because it was  
21 clearly wrong.

22 CHIEF JUSTICE ROBERTS: Does your -- your  
23 case hinge upon your challenge to the DNA evidence? In  
24 other words, if you don't have the suggestion that the  
25 DNA evidence was manipulated, would you agree that in



1     that case the third party guilt evidence could be kept  
2     out?

3             MR. BLUME:  No.  I -- I think it might be  
4     harmless at that point.  Any error excluding might be  
5     harmless.  But the third party guilt evidence  
6     inferentially and directly says, you know, this DNA  
7     isn't all it's cracked up to be.

8             CHIEF JUSTICE ROBERTS:  Well, why would it be  
9     -- I mean, if it meets the standard for harmless, it  
10    suggests that it didn't make a difference, would not  
11    have been likely to make a difference with the jury,  
12    and therefore it could have been excluded in the first  
13    instance.

14            MR. BLUME:  No.  I just think it might be  
15    that it was then -- the error might not have been  
16    prejudicial in context of the record as a whole.  
17    But a jury could still, looking at the third party  
18    guilt evidence say, well, you know, this DNA isn't all  
19    it's cracked up to be.  There's nothing sacrosanct  
20    about DNA or forensic evidence.

21            CHIEF JUSTICE ROBERTS:  Well, isn't that  
22    exactly what the rule is designed to prevent?  In other  
23    words, you have no challenge to the DNA evidence, and  
24    yet you bring up some third party guilt evidence.  And  
25    your suggestion just now is, well, the jury might think

1       maybe there's not that much to the DNA evidence.

2                   MR. BLUME:   Well --

3                   CHIEF JUSTICE ROBERTS:   In other words, it  
4       gets them off on a detour, distracts their attention  
5       from the evidence that is before them.

6                   MR. BLUME:   And the jury might be absolutely  
7       right about that, and it's their determination to make.

8       It might be that they don't challenge the DNA evidence  
9       because the trial judge didn't give them funds to do  
10      it.   In this case they did it because a Washington,  
11      D.C. law firm essentially was able to provide funds for  
12      them to really look at and challenge the inadequacies  
13      in this evidence.

14                   It's that -- the problem is that even if you  
15      don't read the opinion like we do -- and we think it's  
16      the only fair reading -- there's no question that the  
17      South Carolina rule requires you to overcome it and it  
18      stacks the deck.

19                   Thank you.

20                   CHIEF JUSTICE ROBERTS:   Thank you, counsel.

21                   The case is submitted.

22                   (Whereupon, at 12:18 p.m., the case in the  
23      above-entitled matter was submitted.)

24

25