IN THE SUPREME COURT OF THE UNITED STATES

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BOBBY LEE HOLMES, :

Petitioner :

v. : No. 04-1327

SOUTH CAROLINA. :

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Washington, D.C.

Wednesday, February 22, 2006

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

APPEARANCES:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. BLUME: If the South Carolina --

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

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

JUSTICE BREYER: Yes.

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

JUSTICE BREYER: Because?

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

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

MR. BLUME: -- his right to defense.

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

Now, why would that ruling under 403 be unconstitutional?

MR. BLUME: Well, that ruling in this case

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

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

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

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

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

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

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

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

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

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

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

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

White? There -- there was no trace of White's DNA. And that was a FBI officer who testified to that.

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

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

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

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

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

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

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

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

MR. BLUME: In the Holmes opinion.

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

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

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

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

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

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

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

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

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

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

MR. BLUME: 403 --

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

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

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

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

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

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

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

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

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

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

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

JUSTICE ALITO: And that would be unconstitutional as well.

MR. BLUME: I think that's unconstitutional.

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

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

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

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

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

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

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

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

JUSTICE SOUTER: No. I -- I grant you that. But to say that the only test is relevance seems to be too strong.

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. BLUME: I think --

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

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

But even if --

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

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

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

MR. BLUME: That's not the way the decisions, if you read them and read the evidence, that they work. But it's -- I mean, it -- it does -- if the judge weighs and conditions the admissibility of evidence of innocence on the ability to overcome -- and that's the South Carolina rule, overcome the prosecution's case and overcome it with a stacked deck where any of the defendant's counter-evidence is irrelevant, it's impossible. A defendant could never overcome it.

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

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

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

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

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

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

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

JUSTICE SCALIA: Not -- not harmless you

mean.

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

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

JUSTICE ALITO: But there wasn't much evidence against him other than the forensic evidence. Isn't that right? There's just some people who saw him nearby.

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

JUSTICE ALITO: Right.

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

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

MR. BLUME: Well, they found him guilty based

on it, yes.

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

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

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

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

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

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

And finally --

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, Mr. Blume.

Mr. Zelenka.

ORAL ARGUMENT OF DONALD J. ZELENKA

ON BEHALF OF THE RESPONDENT

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

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

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

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

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

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

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

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

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

JUSTICE SOUTER: Yes, but what does it mean? I mean, I've given you a suggestion as to what it seems to mean on a straightforward reading, and -- and I take it you disagree with that. But can you explain how it could mean something else?

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

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

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

MR. ZELENKA: No, it doesn't.

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

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

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

MR. ZELENKA: It reads certainly like a

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

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

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

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

MR. ZELENKA: I think that's correct.

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

MR. ZELENKA: I think that's --

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

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

MR. ZELENKA: Absolutely.

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

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

MR. ZELENKA: It doesn't --

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

MR. ZELENKA: That's correct.

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

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

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

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

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

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

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

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

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

JUSTICE SCALIA: That's right.

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

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

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

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

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

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

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

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

JUSTICE SCALIA: He said more than that. I

think he said it was --

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

JUSTICE SCALIA: Well --

MR. ZELENKA: -- that allowed for --

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

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

JUSTICE STEVENS: May I ask you this question?

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

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

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

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

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

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

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

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

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

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

JUSTICE GINSBURG: Could you use --

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

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE ALITO: But then the court is making --

MR. ZELENKA: If there was just the palm

print --

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

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

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

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

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

MR. ZELENKA: He -- he --

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

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

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

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

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

JUSTICE THOMAS: Well, he says --

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

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

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

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

MR. ZELENKA: Actually Gay was -- two things. Gay was not the standard when the trial judge made the pretrial hearing. Gay was -- was the standard at the time the case was tried, and the trial judge was addressing that standard and he found that Gay was not satisfied because he didn't believe that there was evidence which clearly pointed to the defendant -- excuse me -- to the third party as being guilty of the particular crime. He made that --

JUSTICE SCALIA: Excluding the confession. Excluding the confession.

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, Mr. Zelenka.

Mr. Johnson.

ORAL ARGUMENT OF STEFFEN N. JOHNSON

ON BEHALF OF KANSAS, ET AL.,

AS AMICUS CURIAE, SUPPORTING THE RESPONDENT

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE SOUTER: Okay.

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

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

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

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

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

JUSTICE SCALIA: Other States I mean. Other States.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. JOHNSON: I'm sorry?

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

credible, was accurate?

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

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

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

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

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

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

MR. JOHNSON: And that's why --

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

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

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

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

Now, contrast Chambers --

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

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

MR. JOHNSON: Possibly --

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

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

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

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

MR. JOHNSON: No. No.

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

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

JUSTICE GINSBURG: I don't --

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Please.

MR. JOHNSON: I understand that, Your Honor. It was part of the hearsay analysis, but it's a narrower ground that's -- that's fully supportable by the record for affirmance because it distinguishes the evidence in Chambers.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Johnson.

Mr. Blume, you have 2 minutes remaining.

REBUTTAL ARGUMENT OF JOHN H. BLUME

ON BEHALF OF THE PETITIONER

MR. BLUME: May it please the Court:

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

joint appendix page 134.

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

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

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

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

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

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

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

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

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

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

MR. BLUME: Well --

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

MR. BLUME: And the jury might be absolutely right about that, and it's their determination to make. It might be that they don't challenge the DNA evidence because the trial judge didn't give them funds to do it. In this case they did it because a Washington, D.C. law firm essentially was able to provide funds for them to really look at and challenge the inadequacies in this evidence.

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

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

The case is submitted.

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