

IN THE SUPREME COURT OF OHIO
2008

STATE OF OHIO,

Plaintiff-Appellant,

-vs-

CHRISTOPHER SWANN,

Defendant-Appellee.

Case No. 2007-1046

On Appeal from the
Franklin County Court
of Appeals, Tenth
Appellate District

Court of Appeals
Case Nos. 06AP-870
06AP-899

REPLY BRIEF OF PLAINTIFF-APPELLANT

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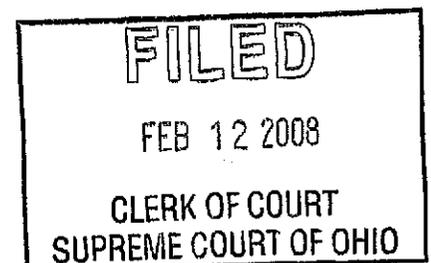


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ARGUMENT

Proposition of Law: The Federal Constitution does not prohibit a trial court from applying the “corroboration” requirement in Evid.R. 804(B)(3) to exclude hearsay testimony offered by a criminal defendant. [*Holmes v. South Carolina* (2006), 547 U.S. 319, 126 S.Ct. 1727, distinguished.]

Defendant’s brief offers no valid reason for this Court to affirm the Tenth District’s judgment. Defendant does not even allege, let alone establish beyond a reasonable doubt, that the corroboration requirement in Evid.R. 804(B)(3) is an unreasonable evidentiary restriction or that it is arbitrary or disproportionate. Rather, just as Judge Tyack did in his opinion below, defendant mostly argues that the exclusion of Delmar Carlisle’s out-of-court statements was unconstitutional for no other reason but that the evidence was relevant to defendant’s third-party-guilt defense.

But the United States Supreme Court has repeatedly stated that the right to present a defense—whether grounded in the Due Process Clause or in the Sixth Amendment’s Compulsory Process Clause—turns not on the relevancy of the evidence but on the reasonableness of the evidentiary restriction. Because the corroboration requirement in Evid.R. 804(B)(3) serves a legitimate purpose in accordance with *Chambers v. Mississippi* (1973), 410 U.S. 284, and because the exclusion of Carlisle’s out-of-court statements was constitutional, the Tenth District’s judgment should be reversed.

I. Defendant Misreads Judge Tyack’s Opinion as Not Resting on Broad Constitutional Grounds

Echoing his arguments in his memorandum opposing jurisdiction, defendant tries to downplay the constitutional nature of Judge Tyack’s opinion by claiming that it “was merely the application” of *Holmes v. South Carolina* (2006), 547 U.S. 319, to the specific facts of this case. (Brief, 9) To support this assertion, defendant points to Judge Tyack’s

discussion of the trial evidence and of defendant's proffer.¹ Defendant also emphasizes Judge Tyack's use of the phrase "In this case." For these reasons, defendant maintains that Judge Tyack's opinion "clearly effects [sic] only [this] case and not the validity of the corroboration requirement of Evid.R. 804(B)(3) itself." (Brief, 9)

But Judge Tyack in fact *did* conclude that the corroboration requirement in Evid.R. 804(B)(3) is constitutionally invalid. Most telling is the following passage from Judge Tyack's opinion: "In light of *Holmes*, we hold that Evid.R. 804(B)(3) cannot be construed in a way that denies an accused a meaningful opportunity to present a complete defense." *State v. Swann*, 171 Ohio App.3d 304, 2007-Ohio-2010, ¶12. Read in context with the remainder of his opinion, this sentence can only mean that, according to Judge Tyack, the exclusion of evidence under Evid.R. 804(B)(3) unconstitutionally infringes on the right to present a defense. In other words, in Judge Tyack's view, Evid.R. 804(B)(3) must be "construed" as if the rule's corroboration requirement did not apply to criminal defendants.

Further proof that Judge Tyack found Evid.R. 804(B)(3) to be unconstitutional is his prefatory observation that "[t]he rules of evidence, whether state or federal, were not

¹ As explained in the State's initial brief, (pp. 25-26), Judge Tyack's description of the evidence is inaccurate. See, also, *Swann*, at ¶47 (Sadler, J., dissenting). Contrary to Judge Tyack's assertion, *id.* at ¶8, John Stith's identification of defendant as the shooter was based on much more than just defendant's voice. Stith was adamant that, although he did not see the gun in defendant's hand, he saw the "fire" come from defendant immediately before the bullet hit his neck. (Tr., 156, 230, 245, 250, 271-72) Kavar Thompson also saw defendant shoot Stith. (*Id.*, 356) Judge Tyack also misread the record in claiming that both Stith and Thompson stated that "two men perpetrated the attack." *Swann*, at ¶8. Both Stith and Thompson testified that no one was near defendant when he fired at Stith. (Tr., 174, 363) And, although a minor point, there is no evidence that Stith ever had sexual intercourse with Carlisle's girlfriend. *Swann*, at ¶9. Rather, Tia Holland testified that Carlisle told her that Stith had only propositioned Carlisle's girlfriend for sex. (Tr., 885)

intended to deprive a criminal defendant of a fair opportunity to present a defense.” Id. at ¶6. This preface frames the overall context of Judge Tyack’s conclusion: that a “rule[] of evidence” (i.e., Evid.R. 804(B)(3)) deprives defendants of the right to present a defense.

Judge Tyack’s discussion of the trial evidence and of defendant’s proffer does not have the limiting effect that defendant gives it. The only apparent purpose of Judge Tyack’s factual discussion was to demonstrate how Carlisle’s out-of-court statements were relevant to defendant’s third-party-guilt defense. Because the evidence was relevant to defendant’s theory that Carlisle committed the crime—and only for this reason—Judge Tyack concluded that the trial court “should have allowed the proffered testimony and evidence to be presented to the jury for its own consideration.” Id. at ¶12. The essence of Judge Tyack’s opinion is that criminal defendants have a constitutional right to present any relevant evidence and that Evid.R. 804(B)(3) infringes on this right.

The United States Supreme Court, however, has explained time and again that the constitutionality of an evidentiary exclusion does not turn on the relevancy of the evidence or on how badly the defendant wants the evidence admitted:

- “A defendant’s right to present relevant evidence is not unlimited, but rather is subject to reasonable restrictions.” *United States v. Scheffer* (1998), 523 U.S. 303, 308.
- “[T]he proposition that the Due Process Clause guarantees the right to introduce all relevant evidence is simply indefensible.” *Montana v. Egelhoff* (1996), 518 U.S. 37, 42.
- “The accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence.” *Taylor v. Illinois* (1988), 484 U.S. 400, 410.
- “[T]he right to present relevant testimony is not without limitation.” *Rock v. Arkansas* (1987), 482 U.S. 44, 55.

- “[W]e have never questioned the power of States to exclude evidence through the application of evidentiary rules that themselves serve the interests of fairness and reliability—even if the defendant would prefer to see that evidence admitted.” *Crane v. Kentucky* (1986), 476 U.S. 683, 690, citing *Chambers*, 410 U.S. at 302.

The relevancy and importance of the evidence factors into the analysis only to determine whether the exclusion of the evidence was harmless—after all, the exclusion of evidence should never result in a reversal if the evidence would not have made a difference in the trial.

In short, Judge Tyack discussed the facts not to limit his opinion, but because he was applying a relevancy-based test that the United States Supreme Court has repeatedly rejected.

II. The Right to Present a Defense Is Subject to Reasonable Evidentiary Restrictions, Including Evid.R. 804(B)(3)

Most of defendant’s brief suffers from the same flaw as Judge Tyack’s opinion. In arguing that the exclusion of Carlisle’s out-of-court statements was unconstitutional, defendant relies solely on the relevancy of the evidence. Defendant offers various formulations of this argument throughout his brief:

- “The Sixth Amendment Right to Confrontation and a defendant’s right to present a defense require that trial courts admit evidence of third party guilt offered by a criminal defendant, where circumstances provide a rational basis for that evidence to be considered by the fact finder, not withstanding the ‘corroboration’ requirement of Evid.R. 804(B)(3).” (Brief, 2—Proposition of Law)
- “[T]he rules of evidence are not dispositive where their enforcement would deprive the accused of favorable evidence.” (Id., 2-3)
- “The defendant has a right under the compulsory process clause to present any evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Evid.R. 401.” (Id., 7)

- “[G]iving the defense parity with the prosecution is not sufficient if the rule, though equally applied to the accused and the state, still results in the exclusion of favorable evidence.” (Id.)
- “The threshold of admissibility should not be any higher than suggested by the question ‘Could this evidence create a reasonable doubt in the mind of a qualified juror.’” (Id.)
- “Thus, though conflicting with rules of evidence, such as hearsay, evidence favorable to the accused which the jury has a rational basis to evaluate ought to be admitted.” (Id., 8)

In addition to these relevancy-based arguments, defendant also maintains that evidentiary restrictions can trump the right to present a defense only in exceptional circumstances:

- “[T]he defendant has a constitutional right to introduce any evidence favorable to himself unless the prosecution can demonstrate that the evidence is so inherently unreliable as to leave the jury no rational basis for evaluating its truth.” (Id., 4)
- “[T]he exclusion of evidence on the grounds of state evidentiary rules such as the rule against hearsay must be necessary to satisfy a compelling state interest.” (Id.)

Defendant’s arguments are far afield from the United States Supreme Court’s established precedent. Again, a defendant does not have the right to present evidence merely because it is relevant. *Scheffer*, 523 U.S. at 308; *Egelhoff*, 518 U.S. at 42; *Rock*, 482 U.S. at 55. Thus, the issue is not, as defendant argues, whether there is a “rational basis” for the fact-finder to consider the evidence, whether the evidence is “favorable,” or whether the evidence could “create a reasonable doubt in the mind of a qualified juror.” Nor does the right to present a defense hinge on whether the evidence satisfies the minimal relevancy standard under Evid.R. 401.

In fact, defendant's proposed "let it all in and let the jury sort it out" approach would immunize criminal defendants from many standard evidentiary restrictions. For example, defendant's approach would mean that a defendant's evidence could not be excluded on the basis that its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. But see, *Egelhoff*, 518 U.S. at 42 (noting that Evid.R. 403 is "unquestionably constitutional"). It would also mean that a defendant would have a constitutional right to present polygraph results, despite the absence of a joint stipulation. But see, *Scheffer*, 523 U.S. at 317 (upholding constitutionality of evidence rule excluding polygraph results); *State v. Levert* (1979), 58 Ohio St.2d 213, 215 (exclusion of polygraph results does not violate Sixth Amendment). And it would mean that a defendant could present any expert testimony, regardless of whether the "expert" was properly qualified or whether the expert's opinions rest on a reliable foundation. But see, *United States v. Bahena* (C.A. 8, 2000), 223 F.3d 797, 808-09 (constitutional to exclude expert testimony pursuant to trial court's "gatekeeping" role under *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993), 509 U.S. 579).

Moreover, defendant's proposed tests for determining the validity of an evidentiary restriction raise the hurdle far too high. As noted above, evidence may be excluded under any *reasonable* restriction. *Scheffer*, 523 U.S. at 308. A defendant's right to present a defense may "bow to accommodate other *legitimate* interests in the criminal trial process." *Rock*, 483 U.S. at 55, quoting *Chambers*, 410 U.S. at 295 (emphasis added). As a result, states have "broad latitude" to establish evidentiary restrictions, and "such evidentiary restrictions do not abridge an accused's right to present a defense so long as they are not 'arbitrary' or 'disproportionate to the purpose

they are designed to serve.” *Scheffer*, 523 U.S. at 308, citing *Rock*, 483 U.S. at 58.

Defendant therefore wrongly claims that the State must show that there is “no rational basis” for the fact-finder to evaluate the evidence or that the exclusion of evidence must satisfy a “compelling state interest.”

Defendant’s arguments notwithstanding, neither *Chambers* nor *Green v. Georgia* (1979), 442 U.S. 95, held that a defendant has the right to present any favorable evidence. Rather, the evidentiary exclusions in those cases were unconstitutional because Mississippi’s and Georgia’s hearsay rules unreasonably excluded statements against penal interest without regard to the trustworthiness of the statements. *Chambers*, 410 U.S. at 299-302; *Green*, 442 U.S. at 97.

The United States Supreme Court has since confirmed that *Chambers* was based on the unreasonableness of the rule, not the favorability of the evidence. “*Chambers* * * * does not stand for the proposition that the accused is denied a fair opportunity to defend himself whenever a state or federal rule excludes favorable evidence.” *Scheffer*, 523 U.S. at 316; see, also, *Egelhoff*, 518 U.S. at 53 (*Chambers* did not hold that a defendant is denied the right to present a defense whenever “‘critical evidence’ favorable to him is excluded”); *Rock*, 483 U.S. at 55 (describing *Chambers* as “invalidat[ing] a State’s hearsay rule * * *”). Likewise, the exclusion of the evidence in *Holmes* was unconstitutional because “the rule applied by the State Supreme Court [did] not rationally serve the end that [it was] designed to promote * * *.” *Holmes*, 547 U.S. at 330.

Defendant is also wrong in arguing that *Washington v. Texas* (1967), 388 U.S. 14, requires that all relevant evidence be submitted for the jury’s consideration. In *Washington*, the defendant’s evidence was excluded under a Texas statute prohibiting

coparticipants in the same crime from testifying for each other. The Court reversed, not because the evidence was relevant, but because the statute was arbitrary. *Id.* at 22. Specifically, the Court concluded that the statute did not “rationally set[] apart a group of persons who are particularly likely to commit perjury.” *Id.* Important to the Court’s analysis was the statute’s nonapplication when a coparticipant testified for the State. *Id.* “To think that criminals will lie to save their fellows but not to obtain favors from the prosecution for themselves is indeed to clothe the criminal class with more nobility than one might expect to find in the public at large.” *Id.* Also, the statute allowed defense-offered testimony of an already-acquitted coparticipant, even though the coparticipant would have a greater incentive to commit perjury after such an acquittal. *Id.*

Several cases cited in defendant’s brief are inapposite in that they address the right to the *discovery* of evidence. *United States v. Agurs* (1976), 427 U.S. 97, 112-13 (defining standard of materiality when the prosecutor fails to disclose evidence absent a specific request for favorable information) (partially overruled by *United States v. Bagley* (1985), 473 U.S. 667, 683); *Giglio v. United States* (1972), 405 U.S. 150, 154 (nondisclosure of material impeachment evidence); *Napue v. Illinois* (1959), 360 U.S. 264, 269-70 (prosecutor’s failure to correct testimony he knew was false); *United States v. Miller* (C.A. 2, 1969), 411 F.2d 825, 831 (failure to disclose the pre-trial hypnosis of one of its principal witnesses). Unlike the right to present a defense, the right to the discovery of evidence *does* focus on the quality of the evidence. These cases therefore lend no support to defendant’s argument that the exclusion of Carlisle’s out-of-court statements under Evid.R. 804(B)(3) was unconstitutional.

Pennsylvania v. Ritchie (1987), 480 U.S. 39, is similarly unhelpful to defendant. In that case, the defendant claimed that he was improperly denied access to the protective agency's records, which may have contained exculpatory information. *Id.* at 43. The Court specifically declined to address whether this denial of access violated the Sixth Amendment's Compulsory Process Clause, choosing instead to analyze the issue under the due-process right to the discovery of evidence. *Id.* at 55-56. Thus, the Court's passing observation that the Compulsory Process Clause gives defendants "the right to put before a jury evidence that might influence the determination of guilt," *id.* at 56, is dictum and was not meant to create an unlimited constitutional right to present relevant evidence. Indeed, since *Ritchie*, the Court has rejected the notion that the right to present a defense turns on the relevancy of the evidence. See, e.g., *Scheffer*, 523 U.S. at 308.

Welcome v. Vincent (C.A. 2, 1977), 549 F.2d 853, also cited in defendant's brief, is inapposite for a different reason. In that case, the trial court prohibited the defendant from impeaching his own witness, finding that the witness was not "hostile." *Id.* at 856. The Court reversed, relying on the portion of *Chambers* dealing with Mississippi's "voucher rule," which precluded a party from cross-examining its own witness. *Id.* at 857-58. The Court specifically noted that the other portion of *Chambers*—dealing with the exclusion of hearsay—was not at issue in *Welcome*. *Id.* at 857-58. Thus, the "some semblance of reliability" test announced in *Welcome* refers only to when a defendant may impeach his or her own witness's in-trial repudiation of a prior confession. *Id.* at 858-59.

Defendant also errs in citing Wigmore's comment that "any rule which hampers an honest man in exonerating himself is a bad rule." Wigmore was discussing the then-prevailing hearsay rule, which—as was the case in *Chambers* and *Green*—allowed into

evidence statements against pecuniary interests but blanketly excluded statements against penal interests. This comment therefore has no relevance today. Indeed, Wigmore cited with approval the proposal for Fed.R.Evid. 804(b)(3), which required corroboration for statements against penal interest offered to exculpate the accused (but unlike the current Ohio rule, did not require corroboration for statements offered to inculcate the accused). 5 Wigmore on Evidence, § 1477 (Chadbourn rev. 1974), p. 360, n. 7.

In the end, defendant falls well short of showing that the corroboration requirement in Evid.R. 804(B)(3) is an unreasonable evidentiary restriction. As explained more fully in the State's initial brief (pp. 12-17), Evid.R. 804(B)(3) advances its reliability-based purpose in accordance with *Chambers* by "striking a balance between hearsay statements against penal interest which are sufficiently trustworthy to be admissible and those which are not." *State v. Sumlin* (1994), 69 Ohio St.3d 105, 111. And unlike the statute in *Washington*, which arbitrarily excluded evidence only when offered by a defendant, the corroboration requirement in Evid.R. 804(B)(3) applies equally to both defendants and the State. Defendant cannot meet his burden of proving that the rule is unconstitutional beyond a reasonable doubt.

III. The Exclusion of Carlisle's Unreliable Out-of-Court Statements Was Constitutional

The final section of defendant's brief argues that the trial court abused its discretion in excluding Carlisle's out-of-court statements under Evid.R. 804(B)(3).² But

² To support his abuse-of-discretion argument, defendant claims that Judge Brown "clearly ruled that the trial court did abused [sic] that discretion." (Brief, 10) This argument is somewhat mysterious, given that Judge Brown's concurrence contains no reference at all to the abuse-of-discretion standard. *Swann*, at ¶¶35-56 (Brown, J., concurring). Instead, Judge Brown conducted an apparent de novo review. *Id.* at ¶35 ("I would find").

this question is not formally before this Court; only the *constitutional* question was accepted as a proposition of law. Nonetheless, as explained in the State's initial brief (p. 21), Evid.R. 804(B)(3) substantially overlaps with *Chambers*, so statements against penal interest that flunk the rule's corroboration requirement will necessarily lack the "persuasive assurances of trustworthiness" required under *Chambers*. The opposite is also true—*Chambers* and its progeny are instructive in determining admissibility under Evid.R. 804(B)(3).

In response to defendant's argument that Carlisle's statements were admissible under Evid.R. 804(B)(3), the State incorporates Section IV of its initial brief (pp. 20-26). Although couched in constitutional terms, the State's arguments in Section IV fully address why Carlisle's out-of-court statements do not satisfy the corroboration requirement in Evid.R. 804(B)(3).

Suffice it to say here, Carlisle's father-son-like relationship with defendant, combined with his apparent belief that shooting Stith would enhance his reputation, gave Carlisle ample reason to falsely claim responsibility for the shooting. Plus, contrary to defendant's assertions, Stith's and Kavar Thompson's statements to the detectives actually *negate* Carlisle's statements that he shot Stith—both Stith and Thompson told the detectives that defendant, not Carlisle, was the one who shot Stith. Defendant's weak alibi witnesses do not make Carlisle's out-of-court statements any more reliable. And while unavailability is a requirement for admission under Evid.R. 804(B)(3), as a constitutional matter, Carlisle's refusal to testify was a reason to *exclude* his out-of-court statements. *Chambers*, 410 U.S. at 301.

In the final analysis, the corroboration requirement in Evid.R. 804(B)(3) is a reasonable evidentiary restriction, and the trial court's exclusion of Carlisle's out-of-court statements under the rule was constitutional under *Chambers*.

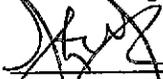
CONCLUSION

For the foregoing reasons, the State respectfully requests that the judgment of the Tenth District Court of Appeals should be reversed under the terms set forth in the conclusion to the State's initial brief.³

Respectfully submitted,

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³ If this Court *sua sponte* contemplates a decision upon an issue not briefed, the State respectfully requests notice of that intention and requests an opportunity to brief the issue before this Court makes its decision. *Miller Chevrolet v. Willoughby Hills* (1974), 38 Ohio St.2d 298, 301 & n. 3; *State v. 1981 Dodge Ram Van* (1988), 36 Ohio St.3d 168, 170.

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by regular U.S. Mail, this day, February 12, 2008, to DIANNE WORTHINGTON, P.O. Box 425, Galloway, Ohio 43119, Counsel for Defendant-Appellee.



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APPENDIX

Evid.R. 403A-1

EvR 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Undue Delay.

(A) **Exclusion mandatory.** Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.

(B) **Exclusion discretionary.** Although relevant, evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, or needless presentation of cumulative evidence.

HISTORY: Amended, eff 7-1-96