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The Right to Present a Defense: Help When You Really Need It

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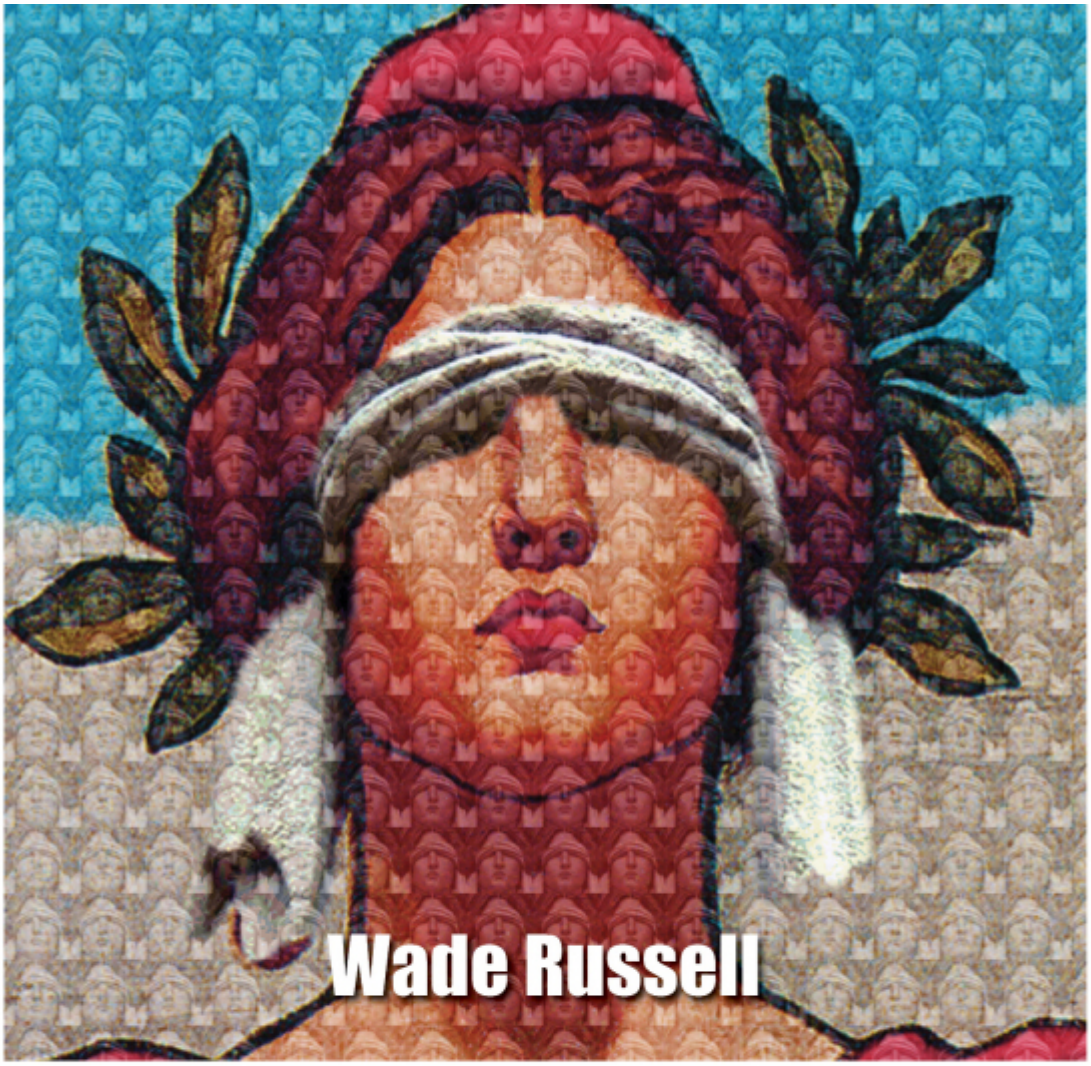

The Right to Present a Defense: Help When You Really Need It

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This ?right to present a defense? is a broad right that can allow you to present important, helpful material or exculpatory evidence to the jury when other more specific rules, like the hearsay rule or other state evidentiary laws, would seem to prevent you from presenting such evidence.

Here is how Professor Westen defines the right to present a defense:

> A defendant has the right to introduce material evidence in his favor whatever its character, unless the state can demonstrate that the jury is incapable of determining its weight and credibility and that the only way to ensure the integrity of the trial is to exclude the evidence altogether.2

This right can help you overcome evidentiary or other barriers when you really, absolutely need to get potentially winning evidence in front of the jury, but the judge is saying that it is hearsay or that this statute says to ?keep it out.?

Where does this right come from and how has it been used in the past? The right to present a defense initially derives from the common law right to compulsory process and the right to due process, and then became a named right through a line of Supreme Court cases.3

The right of compulsory process derived from English common law as the procedure for conducting trials moved from an inquisitional system process to an adversarial process.4 The right to compulsory process was incorporated into many state laws before the adoption of the Bill of Rights. When the framers of the new United States Constitution failed to specifically include a number of common law rights, the Bill of Rights incorporating these rights was drafted at the insistence of several states. James Madison is credited with including the right to compulsory process in these enumerated rights.5

The right to compulsory process was contested early in our nation?s history in cases involving Aaron Burr. Mr. Burr was accused by President Thomas Jefferson of plotting to start a war with Spain and to set up a new and separate government in the American west by force.6 Burr sought to subpoena certain letters from General James Wilkerson to aid in his defense. President Jefferson refused to provide them, relying on the concept of executive privilege and other defenses. Writing for the Supreme Court, Justice John Marshall ruled against Jefferson and ordered him to comply with the subpoenas. Marshall?s opinion in *United States v. Burr*, 25 F. Cas. 187, 192 (No. 14,694) (CC Va. 1807), said that it would be ?a very serious thing, if such letter should contain any information material to the defence, to withhold from the accused the power of making use of it.?

The right of compulsory process apparently was little mentioned by the Supreme Court until *Washington v. Texas, supra.*7 At the time of Washington?s trial, Texas had statutes that prevented a participant accused of a crime from testifying for his co-participant. Washington and his co-defendant, Fuller, were accused of a fatal shotgun shooting in Dallas. Fuller was convicted before Washington went to trial and was serving a 50-year sentence. Washington sought to put Fuller on as a witness because ?Fuller was the only person other than [Washington] who knew exactly who had fired the shotgun and whether petitioner had at the last minute attempted to prevent the shooting.? *Id.* at 16. The trial court denied Washington?s request to have Fuller testify. The Court noted that ?we have increasingly looked to the specific guarantees of the Sixth Amendment to determine whether a state criminal trial was conducted with due process of law.? *Id.* at 18.

The Supreme court ruled that Washington had a right to call Fuller to testify for him, thus overriding the Texas statutes. The Court went on to name the right as the ?right to present a defense?:

> The right to offer the testimony of witnesses, and to com-pel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the de-fen-dant?s version of the facts as well as the prosecution?s to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution?s wit-nesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due pro-cess of law.

Id. at 19.

The next Supreme Court case demonstrating the right to present a defense is *Chambers v. Mississippi,* 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). Chambers was on trial for the murder of a police officer. His theory of defense relied on the fact that another person who was present at the time of the shooting, McDonald, had told three of his friends that *he* had shot the officer, not Chambers. McDonald had also given a sworn statement to Chambers? attorney admitting this. When the prosecution failed to call McDonald as a witness, the defense called him as their witness. After he denied making the admissions, the defense was prevented from cross-examining him as an adverse witness. This was based on Mississippi?s ?voucher? rule. The defense then sought to introduce the testimony of the witnesses who had heard McDonald make the admissions, and the state objected because it was hearsay. The trial court judge agreed and did not allow Chambers to call these witnesses.

The Supreme Court reversed the conviction, holding that the voucher rule violated the defendant?s confrontation right, and that the exclusion of the hearsay testimony denied Chambers the right of

compulsory process. Justice Powell believed that the excluded hearsay had several indicia of reliability and should have been admitted. *Id.* at 298. The court also held that the errors resulted in a denial of the defendant?s rights to a fair trial and due process. *Id.* at 302.

The Supreme Court affirmed this principle in *Green v. Georgia,* 442 U.S. 95, 99 S.Ct. 2150, 60 L.Ed.2d 738 (1979). The trial judge excluded hearsay testimony in the punishment phase of the trial that Green?s co-defendant had actually committed the offenses. Green and the co-defendant had abducted the victim from a store where she was working and raped and murdered her. The co-defendant had already pled guilty and been sentenced at the time of Green?s trial. Green was convicted of murder, and at his punishment attempted to present hearsay evidence that his co-defendant had confided to a close friend that he had killed the victim, shooting her twice after ordering Green to run an errand. Green was sentenced to death.

The Supreme Court held that the hearsay evidence was ?highly relevant to a critical issue in the punishment phase of the trial . . . and substantial reasons existed to assume its reliability.? *Id.* at 97. Indeed, the state had relied upon that very evidence to convict the co-defendant earlier. Citing *Chambers,* the court ruled that ?the hearsay rule may not be applied mechanistically to defeat the ends of justice.? *Id.* Thus, the state did not have a legitimate reason to keep evidence from the jurors that would help them assess the defense presented by the defendant, even though it was hearsay.

This principle was reaffirmed once again in *Crane v. Kentucky,* 476 U.S. 683, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986). The 16-year-old defendant attempted to suppress his confession due to circumstances under which it was obtained: after being placed in a windowless room and questioned over a protracted period of time by six officers who refused to let him to call his mother. The trial judge refused to allow the jury to hear this evidence, ruling that he had already made a determination on the voluntariness of the confession. Crane was convicted and sentenced to 40 years? confinement. The Supreme Court overturned the conviction, holding that it was error to prevent jurors from hearing tes-ti-mony about the environment in which the confession was taken by the police, because the manner in which it was taken was relevant to the reliability and credibility of the confession. The court found that the ?Constitution guarantees criminal defendants ?a meaningful opportunity to present a complete defense?? whether found in the Fourteenth Amendment?s due process clause or the Sixth Amendment?s confrontation and compulsory process clauses. *Id.* at 690.

In a 1987 case, *Rock v. Arkansas,* 483 U.S. 44, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987), the Supreme Court held that a defendant has the right to testify on her own behalf without undue restrictions. The defendant, charged with manslaughter, had undergone hypnosis prior to trial with a trained neuropsychologist. As a result of the hypnosis, defendant had remembered that the gun was defective and had misfired while she struggled with her husband. The condition of the rifle was corroborated by a weap-ons expert. The Arkansas court excluded the testimony resulting from the hypnosis as *per se* unreliable. The Supreme Court ruled that a State could not prevent her testimony by rules that are arbitrary or disproportionate to the purposes they are de-signed to serve. Without using the term ?right to present a defense,? the Court still held that criminal defendants have a right to testify in their own behalf under the Due Process Clause of the Fourteenth Amendment, the Compulsory Process Clause of the Sixth Amendment, and the Fifth Amendment?s privilege against self-incrimination. *Id.* at 44. The court cited *Washington v. Texas, supra,* and *Chambers v. Mississippi, supra,* as examples where it had invalidated State rules that had excluded testimony vital to the defendant.

The most recent Supreme Court affirmation of the right to present a defense appears in *Holmes v. South Carolina,* 547 U.S. 319, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006). The issue was whether a criminal defendant?s federal constitutional rights were violated by a State rule of evidence that would not allow a defendant to introduce proof of third-party guilt if the prosecution had already introduced forensic evidence that, if believed, strongly supported a guilty verdict.

Holmes was convicted by a jury of first-degree murder, sexual conduct, burglary, and robbery and sentenced

to death. The state relied heavily on forensic evidence?and the fact that the defendant was seen near the victim?s house within an hour of the time of the attack. Holmes attacked the forensic evidence at trial, and also attempted to show that the police had tried to frame him. He also attempted to present evidence that another person, Jimmy McCaw White, had attacked the victim?through several witnesses that said that White either acknowledged that Holmes was innocent or that he, White, had actually committed the crimes. Holmes also tried to present a witness who could say that a police officer had asked him to testify falsely. The trial court excluded the testimony and the conviction was upheld by the South Carolina Supreme Court.

The United States Supreme Court reversed, holding Holmes? right to present a defense had been violated. The Court held that evidence rules that are arbitrary or disproportionate to the purposes they are designed to serve interfere with that right and must not stand in the way if they prevent a defendant from pre-sent-ing important evidence. As examples, the court cited *Washington v. Texas, supra, Chambers v. Mississippi, supra,* and *Crane v. Kentucky, supra,* at 325. The court said that specific examples of this are rules that ?regulat[e] the admission of evidence proffered by criminal defendants to show that someone else committed the crime with which they are charged.? *Id.* at 327. The only restriction on this is that the evidence offered must not be remote or speculative. *Id.*

The above cases have focused on overcoming hearsay objections and unique state statutes that prevent a defendant from presenting material and helpful evidence in defense, especially evidence showing that someone other than the defendant actually committed the crime. There are also other factual instances where the courts have ruled that the right to present a defense has been violated by actions of the prosecution, or agents of the prosecution, or even the judge presiding over the trial.

In *Webb v. Texas,* 409 U.S. 95, 93 S.Ct. 351, 34 L.Ed.2d 330 (1972), the unusually harsh warnings by the trial judge made a defense witness unwilling to testify, in violation of the de-fen-dant?s right to a fair trial. After the prosecution rested its case, the jury was temporarily excused, and the defendant called his only witness, who had a conviction and was serving a prison sentence. The judge, on his own initiative, admonished the witness that:

> [Y]ou don?t have to testify, that anything you say can and will be used against you. If you take the witness stand and lie under oath, the Court will personally see that your case goes to the grand jury and you will be indicted for perjury and the liklihood [*sic*] is that you would get convicted of perjury and that it would be stacked onto what you have already got, so that is the matter you have got to make up your mind on.

Id. at 96.

He kept going. When he was finished, the defense objected that the court was depriving his client of his defense by coercing his only witness into refusing to testify. The motion was denied. The Texas Court of Criminal Appeals also rejected his objection, although it did not approve of the judge?s actions. The Supreme court overruled the appellate court, and, relying on *Washington v. Texas, supra,* stated that:

> In the circumstances of this case, we conclude that the judge?s threatening remarks, directed only at the single witness for the defense, drove that witness off the stand, and thus deprived the petitioner of due process of law under the Fourteenth Amendment.

Id. at 98.

Other cases follow the ruling in *Webb v. Texas:* In *United States v. Vavages,* 151 F.3d 1185 (9th Cir. 1998), a violation of the defendant?s right to present a defense occurred where the pros-e-cutor told a witness that he did not believe the defendant?s alibi defense and threatened perjury if the witness testified. In *United States v. Thomas,* 488 F.2d 334 (6th Cir. 1973), the defense witness decided not to testify after a Secret Service agent threatened him with misprision of a felony if he did testify.

So, how can you use the right to present a defense to get material, useful evidence to the jury when hearsay or other ob-sta-cles appear to present an insurmountable barrier? Here is an example of how I was able to convince a trial judge to allow the jury to hear hearsay identification evidence from an absent witness?evidence which tended to show that a third party may have committed the crime. (I have altered the facts because the actual case has been reversed on another issue and subsequently dismissed on speedy trial grounds.)

In this fictional case, the defendant was accused of using a tree branch to assault the victim outside his apartment on the sidewalk, causing serious injuries to the victim. The victim told the Austin police he had informed the defendant that his girlfriend had ?given it up? to him quite readily because of his superior love-making abilities, abilities the defendant apparently lacked. The defendant denied that the victim ever said this to him, and offered evidence from a witness, a neighbor, who had seen the actual confrontation and picked out another person from a six-pack photo lineup. The lineup had been lost, but the neighbor, Mr. X, had given a sworn statement to the police describing the actual perpetrator. This description did not match the defendant. This witness was not available to testify in person because he was terrified of the actual perpetrator. He had gone into hiding and could not be served with a subpoena or otherwise brought to the court to testify.

A motion, followed by a brief, was filed to admit his statement. This was the argument contained in the motion:

1. *Necessity of the Testimony for Defendant*

?The Defendant absolutely needs to present the statements by Mr. X that he saw a man, who does not match the physical description of the defendant, outside his apartment committing the assault. Because the person he described does not match the physical description of the Defendant, his evidence is highly exculpatory and essential for Defendant to obtain a fair trial.

2. *Common Law Rule and the Residual Hearsay Exception*

?Under the common law, the trial judge has discretion to admit hearsay even if the hearsay does not fall within a specific hearsay exception. Imwinkelreid & Garland, *Exculpatory Evidence*, 3rd Ed., Copyright 2004, Matthew Bender & Company, p. 543. This right, often referred to as the residual hearsay rule, is now incorporated into Federal Rule of Evidence 807, which states:

A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the in-ter-ests of justice will best be served by admission of the state-ment into evidence. However, a statement may not be ad-mitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent?s intention to offer the statement and the particulars of it, including the name and address of the declarant.

?The residual hearsay rule has also been recognized the 3rd Court of Appeals of Texas in *Muttoni v. State*, 25 S.W.3rd 300 (Tex.Ct.App.?Austin 2000).

3. *Defendant?s Right to Present a Defense*

?A defendant has a right to present a defense that overrides the hearsay rule and other rules of evidence, where the proffered evidence is essential to a fair trial and has some indicia of reliability. *Chambers v. Mississippi*, 410 U.S. 284 (1972); *Washington v. Texas*, 388 U.S. 14 (1967); *Green v. Georgia*, 442 U.S.

95 (1979); *Holmes v. S. Carolina,* 574 U.S. 319 (2006).

4. *Unavailability of the Witness*

?Federal Rule of Evidence 804(a)(2) treats the refusal of a witness to cooperate as ?unavailability?: ?Unavailability as a witness? includes situations in which the declarant?

. . . (5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant?s attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant?s attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

This standard has been adopted in Texas by the El Paso Court of Appeals in *Rogers v. State,* 845 S.W.3d 328, 331 (Tex.App.?El Paso, 1992, no petition):

?The determination of whether the efforts to secure the presence of the witness were sufficient to meet the test of [TRE] 804(a) is within the sound discretion of the trial judge. The test has been described as ?good faith? efforts undertaken prior to trial to locate and present that witness.?

6. *Necessity of the Testimony for Defendant*

?This evidence is highly exculpatory and essential for Defendant to obtain a fair trial.

7. *Reliability Standard*

?The defense does not have to show that the proffered hearsay statement is absolutely true to meet the reliability re-quirement. The defense has satisfied the reliability standard so long as a reasonable person could conclude that the hearsay statement is true. It is sufficient if the hearsay state-ment has ?some semblance of reliability.? *Welcome v. Vincent,* 549 F.2d 853, 859 (2d Cir.), cert. denied, 432 U.S. 911 (1977). Under decisions of the U.S. Supreme Court interpreting the 6th Amendment?s compulsory process clause, the ?testimony of a defense witness may not be excluded because there are doubts about the witness? credibility if the testimony is ?capable of being rationally evaluated by a properly instructed jury for its probative value and weight.?? *People v. Cudjo,* 6 Cal. 4th 585, 639, 863 P.2d 635, 670, 25 Cal. Rptr. 2d 390 (1993); *Westen, Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases* (1978) 91 Harv. L. Rev. 567, 627, fn. 167. ?A requirement that the defendant corroborate the declarant?s entire statement . . . may run afoul of the defendant?s due process rights under *Chambers v. Mississippi* . . . If the issue of sufficiency of the defendant?s corroboration is close, the judge should favor admitting the statement. In most . . . instances, the good sense of the jury will correct any prejudicial impact.? *Commonwealth v. Drew,* 397 Mass. 65, 76?77, 489 N.E.2d 1233, 1241 (1986).

?WHEREFORE, the Defendant moves that this Court rule that either:

?1) Defendant?s right to a fair trial and to present a defense has been violated and the case be dismissed [*always ask for more than your think you can get*]; or

?2) Defendant be allowed to present all hearsay evidence of Mr. X?s statements to the Austin Police Department regarding the person he saw with a tree branch outside the apartment where the victim was assaulted and also allow defendant?s counsel to allude to such testimony in opening statements.

RESPECTFULLY SUBMITTED,

_____

Etc.

Based on this motion, I was able to present evidence to the jury, the neighbor?s statement to police, that he had seen another person outside the apartment who committed the crime, and who did not physically match my client. It was not enough information to win the case at trial, but it certainly helped to have this bit of evidence on the record for purposes of the appeal.

So, how will you use the right to present a defense? When you have evidence that is material and useful to your defense, evidence with some indicia of reliability, you can use this right to argue for the admission of the evidence if it would otherwise be excluded by the rules of evidence or other rule limiting the admissibility of a class of evidence. The Supreme Court cases cited above, and subsequent cases interpreting this right, pre-sent an invitation to be creative in using the right to present a de-fense in order to provide your client with a full and compelling defense.8 Sometimes evidentiary rules are just guidelines, and the right to present a defense is your trump card.

Endnotes

1. *Washington v. Texas,* 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967).

2. Westen, ?The Compulsory Process Clause,? 73 Mich. L.R. 71, 159 (1974); *see also* Westen, ?Compulsory Process II,? 74 Michigan L.R. 191 (1975), and Westen, ?Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases,? 91 Harv. L.Rev. 567 (1978).

3. My initial education on this developing right, and some of the sequence of the cases reviewed here, came from the excellent, and much more comprehensive, article by New York attorney Mark J. Mahoney, ?The Right to Present a Defense? (1989?2011). Additional, in-depth analysis on this topic can be found in *Exculpatory Evidence: The Accused?s Constitutional Right to Introduce Favorable Evidence,* Imwinkelried and Garland, 3rd Ed., Copyright 2004, Matthew Bender & Company. The right to present a defense is closely related to, but broader than, the right to present evidence that a specific third party committed the crime. *See Wiley v. State,* 74 S.W.3d 399 (Tex. Crim. App. 2002).

4. Westen, *supra,* 177?79.

5. *Id.* at 90?91.

6. *Id.* at 102.

7. *Id.* at 108.

8. Another line of cases has held that a defendant has a right to rebut prosecution evidence. For example, see *Ake v. Oklahoma,* 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), holding that a defendant charged with capital murder had a right to have funds provided to hire a mental health expert on the issue of insanity. In *Gardener v. Florida,* 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), the defendant was convicted of murder and sentenced to death. The sentence was partly based on information from the presentence investigation report, which was not disclosed to defense counsel. The Supreme Court held that it was a violation when ?the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain.? *Id.* at 362.

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