CENTER FOR APPELLATE LITIGATION

120 WALL STREET – 28TH FLOOR, NEW YORK, NY 10005 TEL. (212) 577-2523 FAX 577-2535
http://appellate-litigation.org/

ISSUES TO DEVELOP AT TRIAL

March 2019 – Vol 4, Issue 2

Below, we summarize an important constitutional question that has been lurking for more than a decade: does Holmes v. South Carolina, 547 U.S. 319 (2006), allow a court to block an expert witness on false confessions or misidentification because the confession/identification is "corroborated"? We think the answer is a hard "no." And if you preserve the argument, the Court of Appeals may ultimately agree.

- **If you want to present an expert on false confessions/misidentification, specifically argue (in a pretrial written submission) that the purported corroboration of a confession/ID is irrelevant to the admissibility of the expert's testimony and that any reliance on "corroboration" as a ground for denying an expert would be unconstitutional.**

The Relevant Law: In *Holmes*, the Supreme Court struck down a Georgia evidentiary rule barring third-party guilt evidence if a judge determined that the State's evidence appeared "strong." *Id.* at 328-31. The Supreme Court held that the Georgia rule was unconstitutional because it was "arbitrary," illogical, and advanced no legitimate state interest. *Id.*

As the Court explained, the strength of the prosecution's case does not logically undermine the relevance and value of the defense's proffered evidence. *Id.* at 330 ("Just because the prosecution's evidence, *if credited*, would provide strong support for a guilty verdict, it does not follow that evidence of third-party guilt has only a weak logical connection to the central issues in the case.") (emphasis in original). "And where the credibility of the prosecution's witnesses or the reliability of its evidence is not conceded, the strength of the prosecution's case cannot be assessed without making the sort of factual findings that have traditionally been *reserved for the trier of fact*." *Id.* (emphasis added).

Barring exculpatory evidence because the prosecution's case seems "strong" is, the Court further held, just as illogical as blocking the *prosecution* from offering *in*culpatory evidence because the *defendant* has a great defense. *Id.* at 330. "The point is that, by evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt. Because the [Georgia] rule . . . did not heed this point, the rule is 'arbitrary' . . . Nor has the State identified any other legitimate end that the rule serves. It follows that the rule . . . violates a criminal defendant's right to have "a meaningful opportunity to present a complete defense." *Id.* at 331 (quoting *Crane v. Kentucky*, 476 U.S. 683, 690 (1986)).

The Argument You Should Make: *Holmes* invalidates New York's illogical rule that a court can block a defense expert (misidentification or false confessions) because the prosecution's "corroborating" evidence seems—*if credited*—strong. *E.g.*, *People v. McCullough*, 27 N.Y.3d 1158, 1161 (2016). As *Holmes* held, blocking exculpatory evidence (here an expert) because the prosecution's case seems strong is just as illogical as blocking inculpatory testimony because the defendant has a great defense (*e.g.*, blocking a second inculpatory eyewitness because evidence of innocence is compelling). The Connecticut Supreme Court, and several judges, have recognized that *Holmes* casts a "corroboration" approach into serious doubt. *People v. Santiago*, 75 A.D.3d 163, 177 n. 4 (1st Dept. 2010) (McGuire, J., concurring) ("whether" reliance on "corroboration" "is consistent with *Holmes v. South v. Carolina* is unclear"); *State v. Guilbert,* 306 Conn. 218, 263 & n. 44 (2012) (holding that denying an expert on corroboration grounds would "unfairly restrict the defendant's opportunity to mount a defense"); *Patterson v. United States*, 37 A.3d 230, 250-51 (D.C. 2012) (Glickman, J., concurring).

PRACTICE TIP:

The Proffer. If you want to call an expert, make a detailed pretrial proffer, which includes an affidavit from your expert. Your proffer is *critical* to your client's appellate prospects as an appellate court will analyze an expert-denial claim by focusing on your proffer.

Specifically link the facts of your case to the proffered testimony. Cite and provide (as exhibits) the literature justifying your expert's conclusions. Be as specific as possible ("the expert will testify to studies X and Y, which confirm that an officer's promise of leniency enhances the likelihood of a false confession"). Never rest on general claims ("the expert will testify that false confessions happen").

Dealing With Corroboration. Meticulously argue that there is no (or weak) corroboration. Argue, in the alternative, that even if the court finds corroboration, there is not "overwhelming" corroboration in your case, as recent case law requires. *People v. Evans*, 141 A.D.3d 119, 126 (1st Dept. 2016) ("There can be no dispute that the relevant inquiry here is whether the confession was corroborated by overwhelming evidence.").

Finally, citing *Holmes*, argue that rejecting an exculpatory expert because the State has "corroborating" evidence—be it weak, strong, or even overwhelming—violates the state and federal: (1) due process right to present a defense, (2) compulsory process right, (3) confrontation right, and (4) jury right. Citing *Holmes* again (at 328-31), argue that considering the strength of the prosecution's case when assessing a defense-witness proffer is illogical, arbitrary, advances no valid state interest, and allows courts to usurp the jury's function.

Remind the judge that courts do *not* condition the prosecution's right to call witnesses on the "strength of the defense's case." In turn, contend that such irrational and disparate treatment of prosecution and defense witnesses offends the state/federal equal protection clauses (U.S. Const. Amend. 14; N.Y. Const. Art. I sec. 11) and the state/federal due process right to reciprocity. *Wardius v. Oregon*, 412 U.S. 470 (1973)

Last but not least, stress that even if the court finds that consideration of corroboration does not violate the federal constitution, that approach does not satisfy New York's more protective state constitutional standards. *People v. P.J. Video*, 68 N.Y.2d 296, 302 (1986); *Cooper v. Morin*, 49 N.Y.2d 69, 79 (1979).

General Reminders:

- **If your client is a second felony or persistent felony offender of any kind, or is being sentenced on an A-I felony, advise him that any period of undischarged parole time must run consecutively to the sentence imposed as a matter of law. See Penal Law §70.25(2)(a).**

- **A defendant convicted of a controlled substance or marijuana offense can be judicially sentenced to a shock incarceration program if otherwise eligible. For those convicted of other offenses, DOCCS selects participants, although the court can make a recommendation.**

See our September 2017 issue for further discussion of these and other sentencing issues!