

Katrina: Its Lessons and its Challenges for the Equal Justice Community

By Don Saunders, Director of
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The horrible scenes of floating corpses, families trapped on rooftops and desperate efforts to escape a flooded nightmare will long sear the memories of all Americans. Hurricane Katrina not only exposed our lack of preparedness to face a threat both clear and foreseeable, but its winds also blew away the disquieting diffidence to and silence on issues relating to race and poverty that have existed in this country for many years. Suddenly, mainstream America was forced to wrestle with the fact that we remain a country sharply divided along lines of race, class and poverty.

From New Orleans to Biloxi, from the inner city to the most rural of communities, we stood witness to a system that simply turned a blind eye to the needs of its most vulnerable citizens. For many who had found it convenient to forget that we are really two nations, with 37 million among us living below the poverty line, the scenes from the Gulf Coast stood as a stark reminder that the problems of the poor, frail and elderly remain central to our challenge as a civil society.

As pointed out in the New York Times, two-thirds of the citizens of New Orleans are African American, with more than a quarter of them living in poverty. In the Ninth Ward, the most devastated part of the city, more than 98 percent of the residents are black and over a third are poor. When many were unable to escape the rising waters due to lack of resources, transportation or physical capacity, they were simply herded like cattle into huge shelters lacking the basics of food, water and safety. In other parts of the Gulf Coast, people waited for days upon end without a response from federal, state or local officials.

The overwhelming perception among the African American communities in the region is that the failure of planning and timely response was completely related to the intersection of poverty and race in the region. Whether you got out or were stuck in the Superdome largely depended on your race and class. There can be no doubt that the events of early September were completely foreseeable and to a degree preventable. Yet the tragedy of Katrina dramatically points out the dangers of a national policy that ignores the divisions that exist and inordinately favors the haves against the have nots.

The equal justice community faces enormous challenges in even beginning to meet the needs generated by the hurricanes. We have witnessed the greatest displacement of people in this country since the Civil War. Literally hundreds of thousands of people are homeless, have lost most or all of their possessions and have no idea about when they can begin to get their lives back in order. Legal aid advocates are just beginning to see the tip of the iceberg in terms of the crushing amount of civil legal needs that will be generated in the aftermath of Katrina.

For example, the rate of evictions in Louisiana is reported to have risen over 500%, as landlords take advantage of the scant housing market to spike rents to unconscionable levels. People who have lost cars, homes or jobs have been forced to make crucial decisions regarding whether to file bankruptcy proceedings before the implementation of the harsh new Bankruptcy Reform Act, which seriously undermines their rights. Congress appears indifferent to those needs, even in such extraordinary circumstances.

The unscrupulous predators that follow every disaster have already descended on

the area, and one can only imagine the number of consumer and insurance-related matters that will be generated in the aftermath of the storm. Advocates for the disabled are afraid that twenty-five years of advocacy designed to ensure independent living situations for the handicapped will be lost, as disabled persons are once again warehoused in institutions. Issues of family law and child snatching are overwhelming given the huge displacement in the region.

The challenges on the indigent defense side are extraordinary as well. Large numbers of the criminally accused in New Orleans were warehoused in a Greyhound bus station for days without access to a

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Correction: Elizabeth Gladden Keboe of the National Juvenile Defender Center was incorrectly listed (Cornerstone, Volume 27, Number 1) as the executive Director. Keboe is a senior staff attorney with the National Juvenile Defender Center.

Supreme Court Watch

House v. Bell and Hudson v. Michigan



Laurence A. Benner

By Marshall J. Hartman¹ and
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We had eagerly anticipated that the October 2005 term would be bristling with *Crawford* cases involving the right to confrontation (and the definition of “testimonial hearsay”) and *Booker* and *Blakley* cases further refining the right to jury fact finding in sentencing. However, at the end of the Rehnquist Court’s last term there were less than a dozen criminal cases

scheduled on the docket and none addressed these important issues. We will have to watch to see if the new Court has the same inclination to let these matters ferment awhile longer in the lower courts.

The agenda bequeathed by the Rehnquist Court, nevertheless, contains a number of important cases for defenders, including issues involving the death penalty (*Oregon v. Guzek*: Can defendant present evidence at sentencing phase that casts doubt upon his guilt?), the Fourth Amendment (*Georgia v. Randolph*: Is wife’s consent to search home valid over physically present husband’s objection), and the Fifth Amendment (*Maryland v. Blake*: Can an *Edwards* violation be cured?).

In this first edition of *Supreme Court Watch* we will highlight two of the upcoming cases, which we believe have particular relevance to defenders because they deal with a habeas claim of actual innocence and the future of the Fourth Amendment exclusionary rule.

House v. Bell

(Habeas Claims of Actual Innocence)

Paul House, a neighbor of the victim Mrs. Carolyn Muncey, was convicted of her murder in 1986 in a rural county in Tennessee and sentenced to death. In this case, in the words of one justice, “we are faced with a real life murder mystery, an authentic “who-done-it” where the wrong man may be executed.” *House v. Bell*, 386 F. 3d 668 at 709 (6th Cir.) Gilman J., dissenting from the Sixth Circuit’s 8 to 7 *en banc* decision affirming the denial of habeas corpus relief.

Mrs. Muncey disappeared from her home on a Saturday evening and was killed roughly between 9:00 p.m. and 11:00 p.m. On Sunday afternoon her badly beaten body, clad in a nightgown and housecoat, was discovered in the brush along a creek bed, 100 yards from her home. She left two children and a husband.

A severe blow to her forehead evidently caused her death, but she had numerous other bruises all over her body. The defendant, Mr. House, lived not far from Mrs. Muncey at the home of his girlfriend, Ms. Turner. The state’s case was based on the following circumstantial evidence. On Sunday afternoon, witnesses said they noticed that the defendant had bruises on his arms, hands and body, including a significant bruise on his ring finger. That same Sunday afternoon two witnesses also saw the defendant wiping his hands as he emerged from an embankment where the victim’s body was later found in a creek bed. They stopped and talked with the defendant about the disappearance of Mrs. Muncey. Suspicious, they later returned to the area where House had been seen and found Mrs. Muncey’s body under some brush.

Thereafter, a pair of the defendant’s blue jeans worn on the night of the murder, were found in the bottom of a clothes hamper in his girlfriend’s trailer. Tests established that reddish brown stains on the defendant’s blue jeans were consistent with the victim’s blood. In addition, fibers found on his blue jeans were consistent with fibers found on the clothing of the victim.

Although House told the police that he had not gone out the night of the murder, his girlfriend testified that he had gone out that Saturday night about 10:45 p.m. and returned an hour later, panting, hot and exhausted. He told her that he had been assaulted by some men in a truck who had tried to kill him. Ms. Turner noticed abrasions and bruises on his hands at that time.

The jury found House guilty and imposed the death penalty after a separate sentencing hearing. At the hearing it was established that he came from a broken home, had a prior conviction for aggravated sexual assault and had attempted slashing his wrists between the verdict and the sentencing hearing.

After his conviction was affirmed on direct appeal, the defendant developed through a series of post conviction and habeas petitions, a considerable body of evidence in support of his actual innocence. Initially, the police had two suspects - House and the victim’s husband. Although the husband had a history of severe domestic abuse, the police concentrated on House because he had a prior record for criminal sexual assault. After the trial, however, the revelation of forensic errors and newly discovered evidence began to point to the husband as a more likely candidate for the murder.

For example, the State had relied on semen stains on the victim’s nightgown to argue that rape was the motive for the murder. Rape was also an aggravator making House eligible for the death penalty. However, DNA evidence later proved that the semen belonged to the husband. Moreover, at the habeas hearing, new evidence was introduced that the husband had confessed to two women that he had killed his wife during an argument. He had also told a third woman that he was going to “get rid” of his wife just two weeks prior to her murder.

In addition, the state’s forensic evidence was thoroughly discredited. The state’s medical examiner testified that he had no doubt that one of the vials of the victim’s blood collected during the autopsy had either accidentally or intentionally been spilled on House’s blue jeans. Finally, it was established that a key witness who said he saw House come up from the creek where the body was later found could not have seen House from the position he testified he was in.

The problem confronting the Supreme Court is that House’s post conviction claims of ineffective assistance of counsel have been, as the Sixth Circuit Court of Appeals ruled, procedurally defaulted. This case therefore raises the issue which Justice Scalia once said he hoped he never had to face: an apparently innocent man, sentenced to death, who has procedurally defaulted his constitutional claim that would entitle him to a new trial. At issue therefore is whether House’s claim of innocence is sufficient to override this procedural default or, in the alternative, whether, as a substantive matter, his “freestanding” claim of innocence is sufficient to render House’s execution “constitutionally intolerable.”

The power of the claim of actual innocence has been debated since the Supreme Court’s decisions in *Herrera v. Collins*, 506 U.S. 390 (1993) and in *Schlup v. Delo*, 513 U.S. 298 (1995). In *Herrera*, several state troopers were killed, and *Herrera*, a narcotics trafficker, was arrested with a note in his pocket, implicating him in their deaths. After his conviction and death sentence, *Herrera*’s brother died, and his brother’s lawyer came to court claiming that the brother was guilty of the crime, not *Herrera*. Although the Supreme Court affirmed *Herrera*’s conviction and sentence, five justices indicated in different opinions that a truly compelling claim of innocence would be cognizable via habeas

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corpus. In order to establish this “free standing” or bare claim of innocence, Justices Blackmun, Stevens, and Souter stated that the petitioner must not only show there is a reasonable doubt as to guilt, but that “he is probably actually innocent.” Justice O’Connor cautioned that the test should not be too low, lest the Court become inundated with “frivolous claims of actual innocence.” Justice White’s view was, “that a persuasive showing of actual innocence... would render unconstitutional the execution of petitioner [but] petitioner would... be required to show that based upon proffered newly discovered evidence and the entire record before the jury... no rational trier of fact could find proof of guilt beyond a reasonable doubt.” Because the Court did not decide in *Herrera’s* favor, a debate has raged over *Herrera’s* value as precedent. *House* thus presents the Court with an opportunity to clearly settle whether, in the absence of constitutional error, such a “free standing” claim of innocence can in fact be presented in a habeas petition, and if so what the standard of persuasiveness as to innocence should be.

In *Schlup v. Delo*, 513 U.S. 298 (1995), the Court addressed the procedural use of a claim of actual innocence. Here the claim of innocence serves as a “gateway” to reopen the courtroom door so a procedurally defaulted claim can be heard. In *Schlup* the defendant was charged with killing another inmate in state prison. He claimed that he had not committed the crime, but in fact had been in the line for lunch, and could produce a videotape showing him in the lunchroom at the time of the murder. However, he could not establish the time that he actually was in the lunchroom, so he was convicted and sentenced to death. On habeas, he raised the claim of ineffectiveness of counsel, but the claim was procedurally defaulted. In the Supreme Court he argued that because he had a colorable innocence, the procedural default should be forgiven. The Court stated the test for allowing this procedural use of innocence as a gateway to revive a defaulted constitutional claim as follows: “To establish the requisite probability [of innocence] the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence.” 513 U.S. at 327.

The case at bar presents the Court with an opportunity to clarify the application of this “gateway” standard as well as to establish the standard for a freestanding claim of innocence. The decision will therefore vitally impact public defenders, appointed counsel, and pro bono counsel who handle the bulk of habeas corpus and death penalty cases in this country. Because the record here establishes at least a grave doubt as to the defendant’s guilt, this case will also be a bellwether signaling how the new Court will view the ultimate goal of the rule of law. Will it be to assure, to the maximum extent possible, the reality of justice, or only an approximation of justice, submissive to the demands of expediency?

Hudson v. Michigan (Inevitable Discovery Exception)

During the Rehnquist Court years the scope of Fourth Amendment protection for personal privacy was substantially eroded for those who ventured outside their homes to walk on the streets, travel in their cars or board busses and airplanes. Nevertheless the Court drew the line when it came to the sanctity of the home.

In *Kyllo v. United States*, 531 U.S. 27 (2001), for example, the Court held that the Fourth Amendment protected against even minor invasions of residential privacy, and thus required a warrant and probable cause to discover even the relative temperature of an exterior wall with thermo-imaging technology. In *Wilson v. Arkansas*, 514 U.S. 927 (1995), the Rehnquist Court ruled that the manner of entry into the home must also be

reasonable and incorporated the common law “knock notice” requirement into the Fourth Amendment. Enforcement of this protective boundary through the exclusionary rule immediately came under attack, but the Court held firm and refused in *Richards v. Wisconsin*, 520 U.S. 385 (1997), to allow a blanket exception to the knock notice rule in drug cases. This term, however, the newly reconstituted Supreme Court will consider a new strategy to defeat the knock notice exclusionary rule; one which threatens to make the boundary of the home a mere line in the sand.

In *Hudson v. Michigan* the Court is asked to rule that the inevitable discovery doctrine creates a *per se* exception to the exclusionary rule for knock notice violations. In this case, Detroit police officers, armed with a valid narcotics search warrant, shouted “Police, search warrant” and immediately entered the home of Booker T. Hudson without knocking or waiting for an answer. Finding that no exigency justified the no knock entry, the trial court granted Hudson’s motion to suppress the small amount of narcotics found in his pants pocket. Hudson’s victory was short-lived, however, because pending the prosecution’s appeal of the ruling, the Michigan Supreme Court held in another case that the exclusionary rule was not an appropriate remedy for a mere knock notice violation. Hudson was thus ultimately convicted of possession and given a sentence of probation.

The inevitable discovery doctrine, relied upon by the state, is much like the Court’s test for pornography in the 1960’s: easy to state but difficult to apply. As explained by Chief Justice Burger in *Nix v. Williams*, 467 U.S. 431 (1984), the purpose of the doctrine is to prevent convictions from being overturned if they would have been obtained in any event without police misconduct. Thus if the prosecution can prove by a preponderance of the evidence that the unconstitutionally obtained evidence would inevitably have been discovered by an independent process untainted by the illegal police conduct, the exclusionary rule will not be applied. In *Nix* the defendant had led police to the body of a young girl he had murdered following an illegal interrogation in blatant disregard of his Sixth Amendment right to counsel. While the confession and defendant’s role in leading police to the body was excluded, the Court upheld the admission of testimony concerning the location of the body and its condition on the ground that a search party, just two miles away, had been heading in the direction of the culvert in which the body was found, and would have inevitably discovered it in as little as three to five hours.

How this doctrine can logically be applied to the illegal execution of a search warrant, in a case where there is no alternate process operating that would inevitably lead to the lawful disclosure of the evidence, is a puzzle. One searches in vain for any theory grounded in the inevitable discovery doctrine other than simple distaste for the exclusionary rule. According to the Michigan Supreme Court, so long as the scope of the search conducted was authorized by the warrant, evidence obtained pursuant to a valid search warrant “inevitably would have been discovered” because the entry was authorized. This argument ignores the constitutional dimensions of a knock notice violation and treats it as merely a timing error. Because the police have the right to search for and seize the evidence, the fact that they did so “too quickly” is deemed irrelevant.

It is true, of course, that privacy interests have been protected by compliance with the warrant and probable cause requirements. The question is whether the Supreme Court will focus on just this aspect of reasonableness or recognize the important goals served by the knock notice requirement. The purpose of the rule is not only to prevent the needless destruction of property, but more importantly to deter the police from unnecessarily terrorizing citizens and creating an unjustified risk of physical injury and death, which unfortunately accompanies the SWAT team manner of forced entry into the home.

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SUPREME COURT WATCH

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If deterrence is still the basis for the exclusionary rule, then suppression of evidence obtained in violation of the Fourth Amendment's knock notice requirement still serves a vital deterrent purpose in protecting the right of all citizens to be safe in their homes. After all, probable cause, which under today's lax standards can be based upon an anonymous tip, is hardly a guarantee of certainty that only the homes of criminals will be invaded. Indeed, it has not infrequently been the case that innocent citizens, confused by the tumult of a nighttime no knock entry, have been shot by the police while attempting to defend themselves against what they believed was an unlawful home invasion.

Equally disturbing are the consequences of creating a *per se* exception to the exclusionary rule based upon the inevitable discovery rationale. Not only would it render the knock notice requirement unenforceable across the board, it would also portend, if the state's strained logic is accepted, the ultimate demise of the warrant requirement itself, so long as the court finds, after the fact, that probable cause did exist for the entry. The success of our commitment to the rule of law depends upon the vitality of our system of checks and balances. The Rehnquist Court pushed the theoretical envelope to the maximum in minimizing the check created by the exclusionary rule. This decision will tell us much about whether the new Roberts Court will explode that envelope altogether, by adopting a new logic which casts aside even the deterrence rationale as a justification for the exclusionary rule.

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