

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER 2019 TERM

TYLER BAREFIELD

PETITIONER

V.

STATE OF ARKANSAS

RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE
SUPREME COURT OF ARKANSAS

JEFFREY M. ROSENZWEIG
300 Spring St. Suite 310
Little Rock, AR 72201
(501) 372-5247
(501) 376-0770 (Facsimile)
jrosenzweig@att.net

Attorney for Petitioner

QUESTION PRESENTED

To what extent— consistent with the right to present a defense —
may a State restrict the ability of a defendant to present evidence tending
to establish that another person committed the offense.

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PARTIES

The parties in this litigation are Tyler Joseph Barefield and the State of Arkansas.

CITATION TO OPINION BELOW

The decision of the Arkansas Supreme Court is cited as Barefield v. State, 2019 Ark. 149 574 S.W.3d 142.

JURISDICTIONAL STATEMENT

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257. The original opinion of the Supreme Court of Arkansas was issued on May 16, 2019, but a timely petition for rehearing was denied on August 1, 2019. Copies of the opinion and the order denying rehearing are in the Appendix. This petition, being filed within 90 days thereof, is timely. Rule 13, RULES OF THE SUPREME COURT OF THE UNITED STATES. The mandate of the Arkansas Supreme Court has been stayed for the filing of this petition.

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment, United States Constitution

nor be deprived of life, liberty, or property, without due process of law;

Sixth Amendment, United States Constitution

In all criminal prosecutions, the accused shall enjoy the right to ... be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor...

Fourteenth Amendment, United States Constitution:

....nor shall any state deprive any person of life, liberty, or property, without due process of law;

STATEMENT OF THE CASE

Tyler Joseph Barefield worked in his family's salvage yard in Russellville, Arkansas. He was at the lot on the night of September 20, 2016 when two intruders were shot and their bodies placed in a vehicle which was later crushed. Barefield denied committing the offense.

Barefield was charged with two counts of capital murder, Ark. Code Ann. § 5-10-101, in the circuit court of Pope County, Arkansas. In his trial, Barefield sought to introduce certain pieces of evidence in support of the proposition that other persons, not he, had committed the killings: Photographs of footprints indicating that other persons had been present at the scene and the testimony of witnesses as to Brock's and Dewitt's ties to white supremacist organizations and the identity of other persons who may have been motivated to commit the offense. The trial court denied introduction, citing the Arkansas doctrine of *Zinger v. State*, 313 Ark. 70, 852 S.W.2d 320 (1993), holding that a defendant may introduce evidence tending to show that someone other than the defendant committed the crime charged, but only if it points directly to the guilt of the third party. The court also denied Barefield's claim that exclusion of the evidence violated Barefield's constitutional right to present a defense.

The Arkansas Supreme Court affirmed the trial court in a split 4-3 vote on the essential issue in this case. *Barefield v. State*, 2019 Ark. 149 574 S.W.3d 142. Four justices held that Barefield's right to present a defense was not violated by the application of Zinger. One justice fully dissented, holding that the right to present a defense was "deprived of his right to present to the jury evidence that could support a reasonable alternative theory of who committed the murders." Two others would hold that the excluded evidence was admissible as evidence of the lack of thoroughness of the police investigation and that Zinger was inapplicable.

REASON TO GRANT THE WRIT AND ARGUMENT

BAREFIELD'S CONVICTION WAS OBTAINED BY VIOLATION OF HIS RIGHT TO PRESENT A DEFENSE. THIS CASE PRESENTS AN OPPORTUNITY FOR THIS COURT TO OUTLINE THE RIGHT TO PRESENT A DEFENSE WITH REGARD TO STATE EVIDENTIARY REQUIREMENTS TO IDENTIFY AN ALTERNATIVE PERPETRATOR.

This case presents an opportunity to clarify the constitutional right to present a defense. This petition is cognizable under Rule 10(c) of the RULES OF THE SUPREME COURT OF THE UNITED STATES:

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

This Court has long established the existence of the right to present a defense, an amalgam of the Sixth Amendment rights of compulsory process and confrontation and the Fifth and Fourteenth Amendment right of due process. The leading cases on the right to present a defense are *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038 (1973). *Washington v. Texas*, 388 U.S. 14, 87 S.Ct. 1920 (1967). *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105 (1974). *Rock v. Arkansas*, 483 U.S. 44, 107 S.Ct. 2704 (1987). *Crane v. Kentucky*, 476 U.S. 683, 106 S.Ct. 2142

(1986); *Olden v. Kentucky*, 488 U.S. 227, 109 S.Ct. 480 (1988)

Crane's language has been often quoted:

Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, *Chambers v. Mississippi*, *supra*, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, *Washington v. Texas*, 388 U.S. 14, 23 (1967); *Davis v. Alaska*, 415 U.S. 308 (1974), the Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense." *California v. Trombetta*, 467 U.S., at 485 ; cf. *Strickland v. Washington*, 466 U.S. 668, 684 685 (1984) ("The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment"). We break no new ground in observing that an essential component of procedural fairness is an opportunity to be heard. *In re Oliver*, 333 U.S. 257, 273 (1948); *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). That opportunity would be an empty one if the State were permitted to exclude competent, reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant's claim of innocence. In the absence of any valid state justification, exclusion of this kind of exculpatory evidence deprives a defendant of the basic right to have the prosecutor's case encounter and "survive the crucible [476 U.S. 683, 691] of meaningful adversarial testing." *United States v. Cronin*, 466 U.S. 648, 656 (1984). See also *Washington v. Texas*, *supra*, at 22-23.

476 U.S. at 690-691, 106 S.Ct. at 2146-2147

In this case, four members of the Arkansas Supreme Court signed

on to this opinion affirming the trial court's decision to exclude significant evidence that the victims were on the wrong side of, and may have been killed by, persons wholly unassociated with Barefield.

The other evidence on which appellant argues error concerns the following proffered but excluded witness testimony: employees McCubbin and Ibanez would have testified regarding the reasons for believing the victims would be coming to the property to steal parts and for believing that they were white supremacists; Investigator Keith Lunsford would have testified that he learned through the investigation that someone named J.J. was to have been with Brock and Dewitt at the time of their disappearance, that there was speculation that Brock Lee, the father of Rowan's child and a white supremacist, was involved, and a Randall Gordon stated that he was aware of a disturbance at a church in Casa in which a woman stated that the man with whom she had been arguing had killed two people; Erick Riggs would have discussed connections between J.J. Boen, the victims, and Brock Lee and white-supremacy groups; Officer John Reinhold would have testified that Dewitt's mother expressed concern that Brock Lee might have been involved; Doug Lewis would have testified that he was present at the church altercation in which it was stated that a man had just killed two men; Investigator Russell Hill would have testified that his interviews had disclosed the possibility that J.J. Boen, Brock Lee, and T.J. Ferguson might have been involved; and Zachary Berry would have testified that he knew Beau

Dewitt and people in the Scranton area thought he was a violent hoodlum. Additionally, in the testimony of ATF agent Timothy Boles, the defense was precluded from asking him about the National Aryan Empire and the “To The Dirt” investigation. Appellant characterizes this as “evidence about the white supremacist associations of the deceased and evidence about specific persons with whom one or both of the deceased essentially were at war and thus had a motive to harm them.”

Appellant argues that the circuit court misapplied Zinger in several ways: by essentially holding that Zinger supersedes other grounds for the admissibility of evidence; by agreeing with the prosecution that the evidence was inadmissible unless appellant testified; by suggesting through discussion of *Schnarr v. State*, 2017 Ark. 10, 2017 WL 374727, that appellant was arguing justification for the shooting (which he was not); and by suggesting that appellant was required to name a specific person as the alternative perpetrator. However, the fact remains that appellant could not connect the proffered evidence to the murders. This court has rejected arguments that a circuit court abused its discretion in excluding evidence of another person's motive for committing a crime when the defendant could not link the other person to the crime. See *Conte*, 2015 Ark. 220, 463 S.W.3d 686; *Armstrong v. State*, 366 Ark. 105, 233 S.W.3d 627 (2006). To be admissible, evidence suggesting third-party guilt must be sufficiently linked to the crimes charged. Here, the circuit court did not abuse its discretion by excluding testimony that merely suggested that others may have had a motive for these crimes or that another person had been publicly accused of having killed two unnamed men.

Appellant also argues that evidence of his knowledge of potentially violent white supremacists breaking into his property should have been admitted to explain why he was armed, and the Zinger doctrine is not implicated. The State responds that the testimony offered by appellant—had it been admitted—would have been more prejudicial than probative because the proffered testimony did not establish that either the appellant or the witnesses: (1) actually knew the victims were associated with white-supremacist groups; (2) personally knew the victims to be violent; or (3) had any knowledge that the victims had ever committed acts of violence. It simply established that, on the basis of tattoos, the witnesses told appellant that they believed the victims were associated with white supremacists and that white supremacists are violent. We agree that the circuit court did not abuse its discretion in excluding this evidence.

Finally, appellant argues that this court's holding in *Zinger*, and the circuit court's application of it, deprived him of his right to present a defense. However, the constitution permits the exclusion of evidence that is repetitive, only marginally relevant, or poses an undue risk of harassment, prejudice, or confusion of the issues. E.g., *Holmes v. South Carolina*, 547 U.S. 319, 326–27, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006). Properly applied, *Zinger* prohibits evidence of third-party guilt that is irrelevant, or which is relevant but substantially outweighed by the danger of unfair prejudice or confusion because it is not sufficiently linked to the crime in question. Appellant has not shown a deprivation of his constitutional right to present a defense.

We hold that the circuit court did not abuse

its discretion in excluding the evidence proffered by the defense.

2019 Ark. 149, 7-10, 574 S.W.3d 142, 147-148

In Zinger, the Arkansas Supreme Court affirmed the exclusion of testimony about a similar murder occurring about thirty miles away in Louisiana. Quoting some other states' courts, the Arkansas Supreme Court said, somewhat contradictorily:

- ❑ A defendant may introduce evidence tending to show that someone other than the defendant committed the crime charged, but such evidence is inadmissible unless it points directly [emphasis added] to the guilt of the third party. Evidence which does no more than create an inference or conjecture as to another's guilt is inadmissible. For this proposition the court cited State v. Wilson, 322 N.C. 117, 367 S.E.2d 589 (1988).
- ❑ The rule does not require that any evidence, however remote, must be admitted to show a third party's possible culpability. Evidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt: there must be direct or circumstantial evidence [emphasis added] linking the third person to the actual

perpetration of the crime. For this proposition, the court cited *People v. Kaurish*, 52 Cal.3d 648, 276 Cal.Rptr. 788, 802 P.2d 278 (1990).

The Zinger court then held:

Although there are some similarities between the crimes committed in Louisiana and Arkansas, there was no evidence presented connecting the Louisiana suspect to the Holley murder. The Trial Court was not even given the name of the Louisiana suspect or whether he or she had any connection to Holley. There was neither direct nor circumstantial evidence connecting the Louisiana perpetrator to the Arkansas crime, other than a few similarities found in the two crime scenes, and we cannot conclude the Trial Court abused his discretion in refusing to allow the evidence to be admitted. (At 76)

Zinger's restrictions are inconsistent with the idea that the state must prove a criminal charge beyond a reasonable doubt. A defendant who asserts he did not kill the homicide victim is prohibited from presenting evidence that someone else might have done the crime unless he is lucky enough that the person whom he is accused of killing is someone whose enemies are sufficiently brazen and sloppy to leave definitive evidence of his guilt where it can be discovered. That simply cannot be an appropriate constitutional test.

This Court should grant certiorari to establish that a criminal defendant has the constitutional right to present evidence that another person may have been the perpetrator of the offense.

CONCLUSION

This Court should grant certiorari and upon plenary argument vacate the judgment of the Arkansas Supreme Court.

TYLER JOSEPH BAREFIELD

/S/ Jeffrey M. Rosenzweig

JEFFREY M. ROSENZWEIG

300 Spring St. Suite 310

Little Rock, AR 72201

(501) 372-5247

(501) 376-0770 (fax)

jrosenzweig@att.net

Attorney for Petitioner

CERTIFICATE OF SERVICE

I, Jeff Rosenzweig, hereby certify that I have mailed a copy of the foregoing to Leslie Rutledge, Attorney General, 323 Center St., Little Rock, AR 72201 this 24th day of October, 2019.

/S/ Jeffrey M. Rosenzweig

JEFFREY M. ROSENZWEIG

CERTIFICATE OF COMPLIANCE

1. This Brief complies with the type-volume limitation of Rule 33 of this Court's rules because it is less than 40 pages and because it contains 2130 non-excluded words.

2. This motion complies with the typeface requirements of this Court because it has been prepared in a proportionally spaced typeface using WordPerfect X-6 in 14 point Century Type.

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Decision of the Arkansas Supreme Court in Barefield v. State.

Order of August 1, 2019, denying rehearing.