

Media Impressions: 299,377
November 2, 2009

OPINION

When procedure trumps justice

The judge and prosecutor were having an affair during his murder trial, but Charles Hood got no relief.

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What could be worse than a capital murder trial in which the trial judge and the prosecutor are having a secret love affair and, working in tandem, cause a defendant to be found guilty of murder and face execution? That incredible scenario happened to Charles Hood. On trial for murder in a Texas courtroom, Hood claimed — correctly as it turns out — that the judge and the prosecutor were having a sexual relationship during his trial and that his right to a fair trial was thereby compromised. A lower court agreed to the extent of ordering a hearing, but the highest appeals court in Texas reversed. Why? Because Hood failed to raise the claim in earlier pleadings, as he could not substantiate the "rumors" of the affair with sufficient proof and, therefore, according to the Texas appellate court, was procedurally barred from raising the claim now. The Texas prosecutor hailed the decision "as a significant procedural victory."

Interestingly, the prosecutor did not say that the defendant's allegation lacked merit because the prosecutor knew otherwise. Indeed, the judge and the trial prosecutor — a different prosecutor from the appeals prosecutor — acknowledged the love affair in sworn depositions taken after Hood's trial. Nor did the prosecutor say that justice was served, which is the legal and ethical mandate of every prosecutor. The prosecutor could not say this, of course, because Hood's right to a fair trial was almost certainly prejudiced by the affair, and the pursuit of justice, at the very least, should have informed the prosecutor that a hearing was necessary, as the lower court had ordered. Nor did the prosecutor appear to be troubled by the fact that the trial judge was later elevated to the same appeals court, and she sat with many of the same judges who denied Hood the opportunity to prove his innocence.

Of all the gamesmanship that prosecutors routinely play, one of the most alarming is to aggressively raise - hypertechanical and attenuated procedural obstacles and hurdles that a defendant must overcome in order to get a court to listen to his often meritorious claim that the prosecutor committed misconduct. Indeed, the U.S. Supreme Court has characterized such prosecutorial conduct as "gambling" and "playing the odds" with a defendant's rights, playing "hide and seek" to avoid disclosure of exonerating evidence, and requiring a defendant to engage in "scavenger hunts" to find exonerating evidence of which the prosecutor is secretly aware but has suppressed.

Thus, knowing full well that a defendant's claim is legitimate and meritorious, prosecutors regularly argue that the defendant failed to raise his claim earlier, as with Hood, even though the prosecutor well knew that the defendant could not raise the claim because he did not have the information that, brazenly, the prosecutor had suppressed. Some prosecutors have sought to deflect post-conviction claims of innocence by arguing that the defendant pleaded the wrong theory, or failed to use the correct nomenclature to describe the violation. And too many courts have endorsed the prosecutor's arguments. There are limits to this judicial deference. A few terms ago, in *Banks v. Dretke*, the Supreme Court reversed the U.S. Court of Appeals for the 5th Circuit, which had endorsed another Texas prosecutor's gamesmanship. In a death penalty case, the prosecutor argued that the defendant failed to differentiate sufficiently between his distinct legal claims — in effect, he "didn't say 'Simon Says.' "

Procedural gamesmanship by prosecutors is not a new phenomenon. But with the increasing demands by courts for enhanced and much more rigorous pleading requirements — for example, the Supreme Court's decision last term in *Ashcroft v. Iqbal* — defendants like Charles Hood are going to find the gateway to justice littered with procedural hoops and mazes of sufficient magnitude and complexity that a defendant may be barred from establishing on the merits that a prosecutor engaged in prejudicial misconduct, that a fair trial was denied and that the truth was lost. And some prosecutors, like the prosecutor of Hood, will champion this result as a big victory.

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