

US Supreme Court chips away at habeas corpus and right against self incrimination

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The US Supreme Court issued a ruling Wednesday in the case *White v. Woodall*, which limits the applicability of the Fifth Amendment protection against self-incrimination and the centuries-old right of habeas corpus, which allows prisoners to challenge the legal basis for their detention.

The case concerned death row inmate Robert Keith Woodall, convicted and sentenced to death in a Kentucky state court for a 1997 kidnapping, rape and murder of a teenaged girl. Woodall pled guilty to all of the facts alleged by the prosecution, choosing to argue only at the sentencing phase of his trial.

His defense attorney called witnesses who testified about Woodall's character in an effort to humanize the defendant and avoid a death sentence, an approach that is by no means unusual where the accused faces the barbaric possibility of capital punishment. Woodall chose not to testify, invoking his right against self-incrimination under the Fifth Amendment to the US Constitution.

After all of the testimony and other evidence was heard, Woodall's lawyer requested that the trial judge read a standard instruction to the jury regarding the defendant's decision not to take the witness stand.

The proposed instruction read: "defendant is not compelled to testify and the fact that the defendant did not testify should not prejudice him in any way." The aim of this instruction, based on the Fifth Amendment, is to keep the jury from making any inference that the choice not to testify is a sign of culpability. In this particular case where there was a guilty plea, Woodall's lawyer was concerned that without the above instruction, the jury might infer that the defendant had no remorse about the crimes to which he pled guilty.

The trial court denied the instruction and Woodall

was sentenced to death, a sentence affirmed by the Kentucky Supreme Court. The Supreme Court of the United States denied Woodall's petition to have his case reviewed in 2002. He filed a petition for habeas corpus in 2006 in Federal District Court, which is the trial court, or lowest level, in the federal court system.

Habeas corpus is a fundamental democratic legal principle (also called a "writ") dating back to the Middle Ages. Habeas corpus, Latin for "you may have the body," allows a prisoner to argue that his or her detention is contrary to law and should be modified or terminated. Under US law, habeas corpus has traditionally encompassed the power of federal courts to review actions at the highest levels of the state courts. It is frequently implicated in death penalty cases, earning it the ire of law-and-order fanatics who see habeas corpus as nothing more than a delaying tactic to slow down the operation of the state killing machine.

The Federal District Court for the Western District of Kentucky ruled in Woodall's favor in 2009, finding that the state court's refusal to grant the instruction quoted above constituted a violation of his Fifth Amendment rights. The Sixth Circuit Court of Appeals affirmed this decision in 2012.

It is remarkable that a 6-3 majority of the Supreme Court of the United States overturned the Sixth Circuit and effectively reinstated Woodall's death sentence. The majority consisted of the right-wing bloc of chief Justice John Roberts along with justices Samuel Alito, Clarence Thomas and Antonin Scalia, the author of the opinion.

Joining this bloc was the supposedly more moderate or "swing" justice Anthony Kennedy and Obama appointee Elena Kagan. That neither Kagan nor Kennedy even wrote a *concurring* opinion, spelling out

a different rationale for, but ultimately agreeing with, the majority opinion, indicates broad agreement with the decision's attack on democratic rights.

As is his wont, Scalia crafted an opinion bustling with half-truths, distortions and out-and-out revisions of established law. Scalia acknowledged the undeniable relevance of earlier US Supreme Court decisions tending to find that a "no-adverse-inference instruction" (like the one offered by Woodall's attorney above) was a requirement of the Fifth Amendment.

Nonetheless, he opined, "but it is not uncommon for a constitutional rule to apply somewhat differently at the penalty phase than it does at the guilt phase."

When one looks at the relevant portion of the Fifth Amendment, Scalia's pretensions of "originalism" i.e., looking at all legal questions from a strict and literal interpretation of the US Constitution, instantly vanish.

"No person ... shall be compelled in any criminal case to be a witness against himself" says the Fifth Amendment. Of course, if a jury is permitted to draw inferences of lack of remorse if a defendant does not take the stand, does that damning prospect not *compel* the defendant to testify against himself?

For that matter, the plain text of the Fifth Amendment does not carve out any exceptions as to what phase of a criminal trial it applies to. It is up to Scalia to craft such exceptions out of whole cloth.

The *Woodall* decision is of a piece with the high court's recent jurisprudence, both taken as a whole and on the Fifth Amendment specifically. We wrote the following about the 2013 decision in *Salinas v. Texas*:

"Justice Clarence Thomas wrote a concurring opinion, joined by Justice Antonin Scalia, which went so far as to say that even if Salinas [the defendant who tried to invoke his right to remain silent by simply remaining silent] had unambiguously invoked his right against self-incrimination, his doing so, as well as his nervousness, shifting, and lip-biting, would be admissible in court as evidence of guilt. They would even have held that a prosecutor could infer at trial that the defendant's invocation of the Fifth Amendment and refusal to testify was evidence of guilt. If such rules were in effect they would serve to penalize defendants for invoking their constitutional rights.

"This seems to be precisely the reason the court granted review of the case. By simply refusing to hear

the case, the high court would have left Salinas's conviction untouched. Instead, the court's right wing took the opportunity to 'clarify' the application of the Fifth Amendment, that is, to further erode a basic democratic right."

Regarding habeas corpus itself, Scalia's opinion engages in hairsplitting about when the legal remedy is available, paving the way for future curtailment of the centuries-old writ. The court will hear another habeas case, *Jennings v. Stephens*, in the October term. Based on the 6-3 opinion in *Woodall*, one can expect further erosion on what remains of the habeas front.

The results will be more and swifter state killings of citizens by a court system fraught with error, injustice and cruelty.



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