

IN THE  
SUPREME COURT OF THE UNITED STATES

October Term, 2013

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No. 13-8427

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Billy Wayne Cope,  
Petitioner,  
v.  
State of South Carolina,  
Respondent.

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PETITIONER’S REPLY TO BRIEF IN OPPOSITION

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## PETITIONER'S REPLY TO BRIEF IN OPPOSITION

The state's Brief in Opposition repeats the same fundamental error that characterizes the South Carolina Supreme Court's majority opinion in this case: it assumes Cope's guilt, and then justifies the exclusion of the core of his defense on that basis. The state accomplishes this, moreover, by an utterly one-sided and misleading recitation of the facts. Thus the state's brief begins with a 5-page "Statement of the Facts" that never mentions the presence of James Sanders' saliva and semen on the victim's body. And nowhere in the entire 40-page brief does the state ever squarely acknowledge the two gaping holes in the "joint-enterprise" theory by which it has doggedly sought to reconcile Sanders' DNA with Cope's guilt. Those are

1. that Cope (a morbidly obese, socially-isolated white man) and Sanders (an African-American career burglar and drug addict who had been released from a North Carolina prison just six weeks before the murder) *did not know each other, and had apparently never met*, and
2. that Cope never mentioned Sanders, or any other accomplice, in his "strange series of confessions." App. 26a (Kittredge, J., dissenting),.

Instead of acknowledging these critical facts---facts which, by themselves, strongly suggest that Cope is innocent and that his confessions are false---South Carolina attempts to bury them in an avalanche of largely irrelevant details. The state's factual recitation, moreover, reads as though the issue in this case were the sufficiency of the prosecution's case, rather than the exclusion of Cope's defense. Thus the state presents every controverted facet of the prosecution's case as though it was unchallenged and undisputed fact. To give just a few examples out of many:

- The state asserts as a fact that “[t]he front door was secured with both the thumb lock on the door knob and as well as a chain latch the evening before” the murder, BIO at 3, but it fails to acknowledge that the sole source for this detail, the victim’s then-eleven-year-old sister, never mentioned it to anyone until the prosecution was preparing her to testify at trial, nearly three years after the crime. R.p. 2090, line 4, to 2091, line 3. Nor does the state acknowledge Cope’s plausible assertion in his own testimony that the family did not use the chain latch while his wife was at work at night (as she was on the night of the murder) because it would have kept her from letting herself in at the end of her shift. R.p. 3673, line 7 to 3674, line 10.
- The state cites police testimony that Cope was typing on his computer when they responded to his 911 call, BIO at 1, but omits Cope’s testimony that he was actually making telephone calls to family members on a touch phone that was located in front of the computer. R.p. 2943, lines 14-25; and see 2067, lines 2-13, 2092, lines 12-21 (both children identify photo of phone in front of computer).
- The state asserts as if it were an unchallenged fact (to corroborate Cope’s confessions) that the victim “had been sexually assaulted *with a foreign object* both vaginally and rectally causing significant trauma,” BIO at 3 (emphasis added), without disclosing that a defense pathologist of considerably greater experience than the prosecution’s expert disputed the conclusion that the injuries could only have been inflicted with a foreign object, and testified that the injuries could have been inflicted by an erect penis during a violent rape. R.p. 2829, line 8 to 2830, line 18; R.p. 2848, lines 14-22; R.p. 2851, line 25 to 2852, line 13.
- In trying to corroborate Cope’s admission about prior sexual abuse of the victim, the state asserts that “a more detailed examination of the vagina revealed chronic inflammation for which the pathologist could find no natural cause thus making these finding [sic] consistent with prior penetration,” BIO at 4, but omits testimony from both the state’s and defense experts to the effect that many factors other than prior sexual penetration could explain this autopsy finding. R.p. 1145, line 22 to 1148, line 16 (Dr. Maynard); R.p. 2825, line 4 to 2826, line 19 (Dr. Nichols).
- The state correctly notes that Cope was arrested and charged after a tape-recorded interview (his third interrogation of the day), BIO at 3, but fails to

acknowledge that during that interview, which lasted some four hours, R.p. 1468, lines 5-9, he denied guilt countless times, R.p. 1781, lines 13-19, and demanded a polygraph exam. R.p. 1774, lines 1-8.

- The state's first reference to Cope's eventual confession the following morning blandly states that he confessed after taking a polygraph test, BIO at 3, but omits that the triggering event (as in many cases of proven false confessions) was that he was told, quite possibly falsely, that he had failed the test, whereupon he asked whether he could have committed the murder and not remember it. R.p. 1468, lines 20-25, to 1469, lines 1-21; 2376, lines 3-6; 2369, lines 5-12. Nor does the state acknowledge Cope's ensuing questions to the polygrapher about whether he could have committed the crime in his sleep, ending with an admission, "Well, I must have done it," R.p. 1469, lines 10-2---all familiar warning signs that a "coerced internalized" false confession is taking shape. R.p. 2496-2499 (testimony of Saul Kassin, Ph.D.).
- The state dwells repeatedly on Cope's "staging" of the crime scene and his initial explanation for his daughter's death---that she accidentally strangled herself with the detached edging of her blanket, BIO at 1, 5---but avoids Cope's explanation that since neither he nor his daughters heard anyone in the house that night (in part, because Cope was wearing a somewhat noisy sleep apnea machine), an accidental death seemed to be the only reasonable scenario. The state also avoids the question of why any such "staging" by Cope would not have included ensuring that Child A was properly clothed (she was found with a breast exposed and her bra pulled up) or that Cope would have cleaned up the saliva or semen left on her body).
- While the state labors to show that Cope's various confessions matched some of the physical evidence (at last when that evidence is viewed, for no valid reason, in the light most favorable to the prosecution), it never mentions, let alone explains, the most glaring discrepancy between all of Cope's confessions and the state's theory of his guilt, which is that he never mentioned the presence of a second perpetrator. This omission is all the more inexplicable in light of Cope's apparent effort to reduce his blameworthiness by offering a naïve mental status defense in his second confession. App. 5a to 7a. If the state's theory was true, why would Cope simply not have claimed that a black man committed the crime, and urged the police to find and test the assailant's DNA?

These examples could go on indefinitely. They reflect South Carolina's continued adherence to the same tunnel vision that produced Cope's conviction at trial, and that has now produced a narrow affirmance of his conviction. That tunnel vision consists of a fixed belief in Cope's guilt---based on his confessions, his odd post-crime behavior, his dirty home, and his physical appearance---that hardened like concrete during the months before DNA analysis implicated Sanders alone. Viewing everything about the case through this distorted lens, the state now finds no fact to be worth including in its Brief in Opposition unless it can be made to appear to support the prosecution's case. The state's slanted rendition of the evidentiary record exemplifies why police and prosecutors sometimes find it almost impossible to admit that a miscarriage of justice has occurred. This DNA-denialism can perhaps be explained by the corruptive power of confession evidence and the blind faith that many in law enforcement place in confessions. But it does not assist the Court in identifying the operative facts of this case, or in evaluating the constitutional error that occurred when the state court excluded the critical elements of Cope's defense.

There is, to be sure, a certain logic to the state's approach. Any case, once obscured in a dense fog of misleading and one-sided detail, can be made to appear "fact-bound," and thus an unlikely candidate for review by this Court. But the state's impenetrable BIO should not be permitted to obscure the grievous constitutional wrong that occurred here.

Despite the state's effort to make this case appear dauntingly complex, it is actually rather simple. Just as in Holmes v. South Carolina, 547 U.S. 319 (2006), the state court misapplied state evidentiary rules without regard to the rules' own purposes, and without appreciating the crippling effect on the defendant's federal constitutional right to present a complete defense. The mechanism by which this error occurred---well illustrated by the state's Brief in Opposition itself---was to assume the defendant's guilt, and then to evaluate the relevance of his own evidence of innocence through that distorting lens. The result was a trial in which the prosecution's highly improbable theory of Cope's guilt---that Sanders formed some sort of bizarre alliance with Cope, a man he did not know, in order to gain access to Cope's 12 year-old daughter---was made to seem plausible. But it seemed plausible only because Cope was prevented from showing that Sanders might have gained entry to the Cope home on his own and without leaving any signs of forced entry. That Sanders had done exactly that on at least four other occasions, all close in time and location to the Cope crime (and had been overheard bragging in jail that he did so in this instance too), makes it far more likely that he could have entered the Cope home on his own, and without leaving signs of forced entry. But that is the evidence that South Carolina views as irrelevant---and irrelevant only because it failed to pass an evidentiary test that bore no logical relationship to the reasons why the evidence was offered.

The state insists over and over again that South Carolina has learned the lesson of Holmes v. South Carolina, supra. BIO at 7, 9, 14-16, 20, 22, 29, 33, 35. But like the state court majority opinion, the state's brief---which tries to obscure the relevance of Cope's excluded evidence by a myopic focus on the prosecution's evidence alone--shows otherwise. The point of Holmes was not, as the state seems to think, the truism that state courts retain discretion to exclude defense evidence that is of marginal relevance or that is likely to confuse or mislead the jury. Rather, it is that in deciding whether to exclude a criminal defendant's evidence, courts must fairly evaluate the logical connection, if any, between the proffered evidence and some material fact at issue, taking into account the persuasive strength of the evidence in relation to each side's case as a whole. When this is done, as Holmes requires, the relevance of the Sanders other-crimes evidence and his jailhouse admission and their importance to Cope's defense of actual innocence becomes obvious. South Carolina's continuing failure to adhere to this bedrock requirement of due process---in a case where its failure appears to have produced an appalling miscarriage of justice that has already lasted over twelve and one-half years --- warrants intervention by this Court.

## CONCLUSION

For the foregoing reasons and those set forth in his petition, Billy Wayne Cope submits that the Court should grant the writ and summarily reverse the judgment of the South Carolina Supreme Court, or else set this case for full briefing and argument.

Respectfully submitted,

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