IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2013

No. 13-8427

BILLY WAYNE COPE,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S QUESTION PRESENTED ON CERTIORARI

I. Did South Carolina violate petitioner's federal due process right to present his full defense under Washington v. Texas, 388 U.S. 14 (1967), and Chambers v. Mississippi, 410 U.S. 284 (1973), while replicating its error in Holmes v. South Carolina, 547 U.S. 319 (2006), by arbitrarily applying state evidentiary rules to exclude a wealth of highly relevant and reliable evidence about the true perpetrator's modus operandi and out-of-court admissions that tended to prove that the perpetrator raped and murdered petitioner's child by himself, rather than in some sort of improbable collaboration with petitioner?

II. Despite this Court's unanimous decision in Holmes v. South Carolina, did South Carolina erroneously evaluate petitioner's federal constitutional challenge to the exclusion of defense evidence in light of the prosecution's evidence and theory of guilt, while failing to consider the actual issues raised by the defense or the purposes of the evidentiary rules at issue?

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The Respondent State of South Carolina requests that this Court deny the petition for a writ of certiorari.

RESPONDENT'S STATEMENT OF THE FACTS

As stated by the South Carolina Supreme Court, the facts surrounding the sexual assault and murder of Child A are "graphic and disturbing." On November 29, 2001, between 2 and 4 a.m., twelve year "Child A", a 160 pound girl, was forcefully sexually assaulted by an object in her vagina and her rectum, severely beaten and strangled to death in her bedroom. Certain salient factors point to the existence of an agreement and conspiracy between her father, Billy Wayne Cope, and James Sanders to commit the sexual acts which ultimately lead to her death. There is substantial circumstantial evidence to support the existence of the conspiracy.

On November 29th, 2001, at about 6 A.M., Billy Wayne Cope called York County 911 and reported that he had just discovered his daughter Child A dead in her bed. Cope reported to the operator that she had apparently choked to death as a result of the edging of her blanket (which had become loose for a length of about 6 feet) wrapping itself around her neck. When asked if she was breathing or if he had performed CPR, he explained that she was "dead - she is cold as a cucumber" twice. ROA 948 - Line 22 and State's Exhibit 15). Child A's mother was not in the home that evening as she was working 3rd shift at a local company.

When the first responders arrived, Cope stated that his daughter was dead. When asked how long, Cope responded "four hours." The first responders indicated that Cope seemed calm and detached and he was seen typing on his computer when they arrived. Cope repeated that she had choked herself on her blanket and stated that she had a history of rolling in her sleep. (ROA 956 - Line 11). He asked one officer "if anything bad was going to happen to him with his daughter being dead in the house." (ROA 981 - Line 14).

Cope gave three interviews over the course of the day to both the Rock Hill Police as well as a

South Carolina Department of Social Services (DSS) caseworker. In the first interview at 8 A.M., Cope told Detective Burris that his youngest daughter (Child C) had gone to bed at 9:30 P.M. the night before and his two older daughters, Child B and Child A, had gone to bed at 12:30 A.M. or so after working on some homework. He stated that when he awoke and Child A did not respond to his call, he went to her room and found her dead with the blanket edging around her neck.

In a subsequent interview, four hours later, to Detectives Burris and Herring, he stated that when she did not respond, he thought "the rapture" may have come and taken her. He stated that he went to her room and the door was closed and he had to kick it open. He found Child A with her hands at her throat with the green blanket edging around her neck four to five times. He stated she was dressed with her shirt partially up so that one breast was exposed.

At 3:45 P.M. that same day, he and his wife Mary Sue Cope were interviewed at the home of a relative by Department of Social Services Caseworker Rebecca Herron. He stated that the prior evening his daughters went to bed at 9:30 P.M. (Child C), 10:30 P.M. (Child B) and 11:30 P.M. (Child A). He repeated the story of how he had found Child A, stating that her fingers were grasping at the blanket edging wrapped around her throat and he believed that the incident was most likely an accident. (ROA 2945 - Line 15 and State's Exhibit 40).

Throughout the day, the crime scene was secured and processed as best as its filthy condition would allow. Witnesses described the home as "uninhabitable", "extreme filth" and "bugs, roaches, all over the place." ROA 1027. See State's Exhibit #81 (video of the scene). The home was inspected for signs of forced entry and the condition of each window and door was documented with photographs. (State's Exhibits 40 - 52B , 68 - 79, 83.1 and 103; [Testimony of Jerry Waldrop and Todd Gardner] ROA 1237-38, 1532-1580, 1589). None of the windows showed any sign of forced entry. Each window was inspected including the ground beneath them. The dirt, leaves and cobwebs on and below each window showed no sign of recent disturbance. (ROA 1580, l. 4). The three doors of the home

were also examined. One door was blocked with furniture and impassable. The rear door was locked and blocked with items that, according to the defendant, were undisturbed from the evening before. (ROA 1561, l. 6). The front door was secured with both the thumb lock on the door knob as well as a chain latch the evening before by the two eldest daughters prior to their going to bed. (ROA 2079, l. 9).

An autopsy was performed that same morning. The results of the autopsy were shared with law enforcement in the early evening. The autopsy revealed that Child A had been struck about the head and abdomen resulting in a subdural hematoma (ROA 1050, l. 18) and internal injuries to the spleen and small intestine (ROA 1107, l. 17). In addition, she had been sexually assaulted with a foreign object both vaginally and rectally causing significant trauma. (ROA 1120, l. 3). Later, a more detailed examination of the vagina revealed chronic inflammation for which the pathologist could find no natural cause thus making this finding consistent with prior penetration. (ROA 1082, l. 2 - 1086, l. 9).

Investigators decided to contact Cope and to conduct a more in-depth interview in light of this additional information from the autopsy. This interview was taped and admitted into evidence. (State's Exhibit # 39).

At the conclusion of this interview, Cope was arrested and charged with the murder of his daughter, as well as three counts of unlawful neglect for the living conditions to which his three daughters were exposed.

The next morning, Cope was transported to the Moss Justice Center and administered a polygraph examination. At the conclusion of the exam, he confessed to Detective Mike Baker of the Sheriff's Office that he had killed and sexually assaulted his daughter while in a dream-like state. He stated that he could see images in his head of the attack and asked near the end of the confession if he could plead insanity. (Testimony of Mike Baker - ROA 1437 - 1510).

Cope was transported back to the Rock Hill Police Department that Friday afternoon and taken in front of a judge for advice of rights, bond setting and screening for indigency on November 30,

2001. He was found qualified for, and was appointed a public defender. After his bond was set, Cope was booked into the York County Detention Center at the Moss Justice Center. Over the weekend, Cope was not questioned.

On Sunday evening, 48 hours after his confession to Detective Baker, he approached a detention center employee and asked her to contact Det. Jerry Waldrop as he had some additional things he "wanted to get off his chest." ROA 166-169.

On Monday morning, he was transported back to the Rock Hill Police Department and questioned further pursuant to his request of the previous evening. ROA 287, 289. During the course of this questioning, he was returned to his Rich Street residence and gave a video-taped confession which included detailed descriptions and a spontaneous re-enactment of how he strangled and sexually assaulted his daughter with a broomstick. This video was admitted into evidence as State's Exhibit # 83.

Returning to the Rock Hill Police Department, Cope was questioned further about inconsistencies in his confessions and ultimately gave a final written confession acknowledging that he had not only been sexually abusing Child A for some time but had also been abusing his two youngest daughters, Child B and Child C.

Cope's confession to prior repeated sexual abuse of Child A was confirmed by the forensic evidence by Dr. Maynard, a pathologist. He testified that his exam revealed there was no trace left of Child A's hymen, even though a previous exam conducted two years earlier revealed that she had a hymen and that it was intact. He called this "very unusual" for a 12 year old girl. (ROA 1073, line 19). He further described that in his opinion Child A lost her hymen **prior** to the night of her murder and stated that the hymen is typically torn from penetration. Another forensic corroborating factor was the discovery of chronic inflammatory cells in Child A's vagina for which Dr. Maynard could find no natural causes. He described this chronic inflammation as ongoing and consistent with prior

penetration. There are also signs of prior repeated penetration of the anus. When describing State's exhibit #22 which depicts Child A's gaped open anus following the assault, the pathologist confirmed that this type of dilatation of the anus was not caused solely by the brutal attack that night but also by prior repeated penetration of the rectum.

It was also during Cope's final interview where he stated that on the night of the murder he masturbated into a wash rag while in Child A's room and placed the wash rag under a bookshelf just outside Child A's room. Subsequently, the police ultimately located and recovered it (ROA 1809, 1810). The police did not know about this rag until Cope final confession.

The pathologist's examination of Child A also revealed that the child had been severely beaten about the head and had sustained significant internal injuries to her spleen, pancreas, and intestinal tract (including her large and small intestines and her colon). In addition, the autopsy revealed that she had suffered a brutal sexual assault with a foreign object that caused deep tissue hemorrhaging throughout her rectum extending 8 inches up into her rectal canal (see State's exhibit # 35). In the doctor's opinion, the anal injuries could have only been perpetrated through the use of extensive force with a blunt object liked a broom handle, baton, dildo, etc. ROA 1116-17. Child A also suffered extensive hemorrhaging throughout the entire length of her vagina that extended deep into the vaginal walls up to and including the top of the vaginal cavity. ROA 1080. The vaginal hemorrhaging extended past the vaginal walls and to Child A's uterus and ovaries. The doctor also indicated that the vaginal injuries were consistent with the use of a broom handle. ROA 1116-17.

The pathologist observed what appeared to be a bite mark/bruise on the right breast of Child A and swabbed that area of her breast in order to capture any DNA that might be present. ROA 1058. This material was ultimately connected to James Sanders.

The pathologist noted that the cause of death was manual strangulation and that in his opinion the child's rectal area had been cleaned and that she was redressed after the assault. ROA 1116-17. Dr.

Maynard estimated that the bruises on her neck, breast and head occurred as a result of blows that were struck less than four hours prior to her death and stated that they all were committed at the same time. ROA 2083. In fact, he testified that the hemorrhaging and bruising all over her body occurred within the same time period. Contrary to the earlier claims of Cope, the blanket edging played no part in the strangulation of the child. ROA 1057.

The other pertinent facts will be developed as needed throughout the brief.

PRIOR PROCEDURAL HISTORY

Respondent adopts the prior procedural history set forth in the Petition.

ARGUMENT WHY CERTIORARI SHOULD BE DENIED

I. **The Supreme Court reasonably applied state evidentiary rules concerning the exclusion of evidence concerning other bad acts and an alleged statement of his co-defendant, James Sanders. The application of these rules complied with the Court's mandates Holmes v. South Carolina and Chambers v. Mississippi and did not deprive the Petitioner of a meaningful defense under the Due Process Clause and Sixth Amendment.**

Cope contends that certiorari should be granted to review the rejection of his claim that he should have been allowed to present evidence concerning other independent crimes allegedly committed by James Sanders, and an alleged statement made by Sanders after incarceration. The trial court properly denied these efforts concluding the "other bad act" evidence failed to satisfy the requirement of Rule 404(b) to be admissible, that the alleged "Little Girl in Rock Hill" statement in jail was not relevant or admissible, and that the refusal to sever was appropriate. Cope maintains that certiorari is warranted because for three general reasons. First, he contends that the state court's failure to admit the evidence violated his right to present a complete defense under Holmes v. South Carolina, 547 U.S. 319 (2006) which he contrasts with the state evidentiary law issue. Petition, p. 18-26. Second, again citing Holmes, suggests the South Carolina courts repeated the Holmes error by excluding the evidence through the "lens of the prosecution's theory, rather than in light of the record

as a whole.[1] Petition, p. 26-36. Lastly, he contends that the decision revealed a tendency of confessions which may be unreliable to overwhelm strong DNA–based proof due the biasing effect of confession evidence. Petition, p. 36-39.[2]

The South Carolina Supreme Court – cognizant of the mandates of this Court in Holmes v. South Carolina – properly applied state evidentiary law in rejecting the "other [subsequent] crimes" evidence under South Carolina Rule of Evidence Rule 404(b) as a basis for a new trial. The state courts did not base the exclusion on the strength of the state's case as in Holmes v. South Carolina, but on the failure of the proffered evidence to show sufficient similarity to the crime charged - a condition precedent to the admission of the evidence under Rule 404(b) to show the use Cope sought to show. Particularly, the South Carolina Supreme Court found the minimal probative value of the proffered evidence was outweighed by "the unfair prejudice, confusion of the issues, and potential to mislead the jury" by the collateral evidence. 405 S.C. at340, 748 S.E.2d at 206. This rejection was consistent with Holmes's similar qualification and did not deprive Cope with a "meaningful opportunity to present a complete defense." Applying the State v. Gregory, 198 S.C. 98, 16 S.E.2d 532 (1941) standard approved in Holmes for third party guilt evidence,[3] the state court expressly excluded the evidence because the "probative value is outweighed by unfair prejudice, confusion of the issues, or potential to mislead the jury." This basis for the decision was consistent with this Court's mandates. As to the exclusion of the alleged statement Sanders made to an unknown person, the state court concluded under South Carolina Evidence Rule 804(b)(3) that it was not clearly corroborated to

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[1] In the Brief of Professors of Evidence Law as Amici Curiae in Support of the Petition for Writ of Certiorari, the amici assert that certiorari should be granted to give states clear guidance that applying evidence rules in a manner that assumes the truth of the state's theory violates the defendant's right to present a complete defense.

[2] This assertion about the alleged existence of a "confession effect" on jurors and judges is also set forth in the Brief of Amicus Curiae the National Innocence Network in Support of Petitioner.

[3] In Gregory, the state court held to be admissible, evidence of third-party guilt must be "limited to such facts as are inconsistent with [the defendant's] own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence." Id. at 104, 16 S.E.2d at 534

indicate its trustworthiness. Certiorari is not warranted.

A. The "Other Act" Evidence Issue – Excluded because its probative value is outweighed by unfair prejudice, confusion of the issues, or potential to mislead the jury.

The South Carolina Supreme Court concluded that the other crime evidence was inadmissible because it did not show the limited common features in the manner Sanders allegedly entered the other residences to show that he would have similarly entered the Cope residence, in addition to other dissimilarities in the crimes. In denying the Rule 404(b) state evidentiary claim in the appeal, the Supreme Court concluded:

> We find no abuse of discretion in the exclusion of this evidence. Although there are some similarities between the crime charged and the other acts, there are also many distinctions. Those crimes all occurred subsequent to Child's murder and none of them involved children. Only one of those victims was raped and that rape did not include anal penetration, the use of a foreign object, nor was the victim cleaned up afterward. Additionally, none of the attacks involved manual strangulation or resulted in the victim's death. **Furthermore, although those crimes arguably demonstrate that Sanders could enter a house without signs of forced entry, his method varied wildly, ranging from a ruse to entering through an unlocked door.** Given these differences, we cannot conclude the trial judge abused his discretion in finding the evidence was inadmissible under a Rule 404(b)/ Lyle analysis. FN4
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> FN4. The dissent criticizes our analysis of the similarities as ineffectual given the evidence that Sanders committed the other crimes as well as the charged crimes. We disagree that identity alone precludes consideration of the other particulars of the crimes. If the purpose of the evidence is to show that Sanders acted pursuant to a common scheme, we fail to see how we can decline to look at the commonality of the entire crimes when determining admissibility. **We cannot look only to the fact that Sanders committed all the subsequent assaults alone simply because that is the detail Cope wants the jury to draw inferences from. The jury would be presented with all the specifics of these crimes and we therefore cannot ignore the differences that militate against a conclusion Sanders employed any common scheme.**

State v. Cope, 405 S.C. 317, 338-339, 748 S.E. 2d 194, 204-205. (Emphasis added). As to a lower admissibility standard when the evidence is not offered by the state, the Court found it was unpreserved.[4] Id, at 338-339. In rejecting the Due Process claim in reliance on Holmes v. South

[4] Some jurisdictions lower the standard of similarity necessary for admission of evidence of "other crimes," as

Carolina, 547 U.S. 319 (2006), the South Carolina Supreme Court concluded:

> The facts here are distinguishable from Holmes. It was not the strength of the State's case that led to exclusion of evidence of Sanders' other crimes. Instead, it was because the other crimes were not sufficiently similar to the crime charged so as to be admissible. **Holmes plainly acknowledges that excluding evidence because its probative value is outweighed by unfair prejudice, confusion of the issues, or potential to mislead the jury is not violative of the Constitution. Id. at 326, 126 S.Ct. at 1732. Because we find the exclusion of this testimony was appropriate for those exact reasons,** we hold Cope's federal due process rights were not violated. We accordingly affirm the court of appeals' affirmance of the trial court's exclusion of this testimony.

405 S.C. at 205-206, 748 S.E.2d at 339-340.

B. The Trial Court Properly Excluded Cope's Proffer of Evidence of Other Crimes James Sanders Committed Under Rule 404(b).

Cope claims that the trial court erred in excluding evidence that co-defendant Sanders committed other crimes subsequent to the November 29, 2001 murder.[5] Cope asserts that this evidence was admissible under SCRE 404(b) to show the existence of a "common scheme or plan" and "identity."[6] The trial judge rejected the showing after a pre-trial hearing on September 8, 2004 based

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here, a defendant is attempting to introduce the evidence. See State v. Garfole, 76 N.J. 445, 388 A.2d 587, 591 (1978) (stating lower standard of degree of similarity of offenses may justly be required of a defendant using other-crimes evidence defensively than is exacted from the State). See also United States v. Stevens, 935 F.2d 1380, 1403 (3d Cir.1991) (applying a lower standard and quoting Garfole);United States v. Cohen, 888 F.2d 770, 776 (11th Cir.1989) (finding standard for admission relaxed when the evidence is offered by a defendant). This is sometimes called the "Reverse 404(b) Rule." Jessica Broderick, *Comment and Casenote, Reverse 404(b) Evidence: Exploring Standards When Defendants Want to Introduce Other Bad Acts of Third Parties*, 79 U.Colo.L.Rev. 587, 587 (2008). Even with a lower standard of similarity, the defendant must still show the other crimes are of a similar nature. See Rivera v. State, 561 So.2d 536, 539-40 (Fla.1990) (recognizing lower standard of admissibility but finding other crimes dissimilar enough to determine trial court did not abuse discretion in excluding evidence).

5 The same standard for other crime evidence applied to the state as well as to the defense. In a pretrial proceeding, the State acknowledged that it would not be presenting as evidence against Cope under Rule 404(b) concerning the additional independent sexual assaults on his two daughters , the middle daughter and the youngest daughter) (Child B and Child C) and that he had been indicted. ROA 79, l. 9-18. The prosecution was of the similar opinion concerning other act evidence against Mr. Sanders and would not be introducing those. Id,

6 Evidence of other crimes, wrongs, or acts is generally not admissible to prove the defendant's guilt for the crime charged. Such evidence is, however, admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent. Rule 404(b), SCRE; State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). The bad act must logically relate to the crime with which the defendant has been charged. Even if prior bad act evidence is clear and convincing and falls within an exception, it must be excluded if its probative value is substantially outweighed by the danger

upon the dissimilarity of the crimes. R. 887-890; 9/8/04 Tr. 166-69.

The Trial Court's Order – Insufficient Similarity.

In denying the admission of the evidence concerning the other bad acts of Sanders, the trial court determined that the various crimes were too dissimilar to be admitted.[7] At the outset of his

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of unfair prejudice to the defendant. State v. Braxton, 343 S.C. 629, 541 S.E.2d 833 (2001).

When this exception is invoked, it is important to recognize that a close degree of similarity between the prior bad acts and the crime charged, by itself, does not satisfy Lyle. The foundation for admissibility transcends mere similarity, for the admission of such evidence under the common scheme or plan exception requires a connection between the extraneous crimes and the crime charged so that proof of the former tends to prove the latter. See State v. Timmons, 327 S.C. 48, 52, 488 S.E.2d 323, 325 (1997) ("A common scheme or plan concerns more than the commission of two similar crimes; some connection between the crimes is necessary."); State v. Bell, 302 S.C. 18, 27-28, 393 S.E.2d 364, 369 (1990), cert. denied, 498 U.S. 881, 111 S.Ct. 227, 112 L.Ed.2d 182 (1990) (noting that "evidence of other crimes is never admissible unless necessary to establish a material fact or element of the crime charged"); State v. Stokes, 279 S.C. 191, 193, 304 S.E.2d 814, 815 (1983) ("The 'common scheme or plan' exception requires more than mere commission of two similar crimes by the same person. There must be some connection between the crimes. If there is any doubt as to the connection between the acts, the evidence should not be admitted").

[7] The Proffered Evidence

A. Alicia Lowery - 20 year old Black Female - December 19, 2001 Incident. [Victim 3].

This occurred in the victim's residence in Rock Hill. Alicia Lowery returned home at 7:00 PM and entered her residence through her back door. Although she lived there with her female cousin, no one else was home at the time. She went straight to the bathroom. When she came out, she noticed the front door was open. As she went to close the door, Sanders, who she did not know and did not have a weapon, forced his way in through the open door. Sanders tackled her. At some point he demanded money. R. 751; 9/8/04 Tr.p. 29. Sanders grabbed a black plastic bag and initially put it over her head but she clawed it off. He then wrapped a throw rug around her head. He attempted to undress her by trying to pull up her shirt and tried to unbuckle her belt. She took a pen out of her back pocket and stabbed him a couple of times. Sanders pushed her back into one of the bedrooms or bathroom and closed the door and he held it shut from the outside. While she was in that room, she heard her screen door slam and Sanders ran away. R. 739-751; 9/8/04 Tr. 16-29. She later identified Sanders in a line-up and at the hearing. R. 741, 745; 9/8/04 Tr. 19, 23.

B. Sarah Hagman Lee - 20 year old White Female - January 12, 2002 Incident. [Victim 4].

Around midnight, Sarah Hagman Lee was attacked in her residence which is within the same block as George White's residence where a burglary had occurred at 10:30 that same night). Lee answered a knock at her bathroom door while she was in her room watching T.V., thinking it was a roommate. There were a series of knocks without an answer before she went to the door. Sanders pushed his way into her bedroom pushing her back and hitting her head. (This residence is a boarding house that she had recently moved into.) They wrestled their way back through the bathroom and into the kitchen. Once he had he her on the ground he kicked her and pushed her, Sanders then got up and went into her bedroom and grabbed her purse which was on her sofa. When he came back into the communal kitchen, which was the only way out of the house, Lee had gotten up and grabbed a baking pan. She then hit Sanders in the head with a pan three times. He dropped her purse and some mace fell out of it. Sanders then got on top of her, but she sprayed Sanders with the mace and he got off of her. As Sanders ran for the door, Lee picked up a screwdriver (which was not hers and she assumed that Sanders brought with him) and tried to stab him as she grabbed Sanders left foot. Lee stabbed at Sanders at three times and noticed blood running down his neck behind his left ear. Sanders then ran out the door with Lee's purse. Although she did not know him previously, she identified him. She stated he had a toboggan on his head than night that she pulled off during the assault and he was not wearing gloves. She did not know how he entered the house and was not aware of any signs of forced entry. Another female resident was across the hallway during the attack, but would not have been able to see the attack. (The record does not indicate whether she heard the commotion ore not or whether she called the police). R. 753-766; 9/8/04 Tr.

ruling, the trial judge discounted the testimony of expert crime scene analyst Gregg McCrary concluding that his analysis was flawed. Judge Hayes noted that McCrary, who attempted to equate the various crimes, did not address whether there were other similar crimes in the Rock Hill area which had also been committed by others than Sanders (without evidence of forced entry). Judge Hayes stated that the asserted similarities between the crimes were not significant. He stated that the any similarity with crimes happening "in doors", to strangers, and with no forced entry was arguable but not significant where stealth was used, climbing a lattice or waiting outside in a car for a door to open. R. 887-88 . He also questioned the basis for concept of dual motives which McCrary added.[8]

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Cope also proffered evidence regarding the George White residential break-in committed by Sanders around 10:30 that night [January 12] and within the block as Lee. In that incident, White walked into his living room and saw Sanders. He yelled at him and Sanders fled upon being detected, apparently seeking sanctuary and escape at Lee's . Sanders was identified as this intruder based on fingerprints lifted from the scene. R. 830; 9/8/04 Tr. 109, lines 14-18, Defense Exhibit 5.

C. K.--- D ---- Elderly White Female - December 12, 2001 Incident. [Victim 1] – Sexual Assault.

At 11:30 PM, K.D.s, alone, answered a knock at the door. Sanders, who she was unable to identify, said he had car trouble and asked to use the phone. He then pushed the door open and knocked her down. Sanders asked where she had money and looked everywhere for it, including under the bed and in the mattress . Sanders picked her up and carried her into the bedroom and on to her bed. He kissed on her lips and breast and had vaginal intercourse with her. He finally got $20 from her purse. He then left after getting the money and pulled out the phone from the wall to get a head start. Subsequently, Sanders was connected to this case by DNA. R. 766-774; 9/8/04 Tr. 44-52.

D. Sarah Phillips - Adult White Female - December 16, 2001 Incident. [Victim 2].

This occurred in the victim's second floor apartment located in Rock Hill. Sarah Phillips was home with her three daughters that night. She had fallen asleep on her sofa. The TV was on along with the lights and the Christmas tree. She woke up around 1:00 AM with Sanders standing over her. He said nothing and was not out of breath. He had come in through the possibly unlocked patio door and must have climbed up the lattice. She stated that she immediately screamed and he put his hand over her mouth. She wiggled and kicked causing Sanders to put a rocking chair on her attempting to trap her. One of her daughter started coming down the hall yelling. She continued to scream and he let go and ran out the patio sliding glass door. The defendant did not say anything. She stated that the entire event lasted two minutes or a short period of time. He had on a grey sweat shirt and a grey toboggan. She identified Sanders as the culprit. R. 774-786; 9/8/04 Tr. 52-64.

[8] McCrary testified he had reviewed information about the incidents involving K.D. [Victim 1], Phillips, Lowery and Hagman. R. 828; 9/8/04 Tr. 107. He also reviewed information about the murder of Child A.

He contended that there were factors to consider about these incidents including date, location, in-door crime, out-door crime, suspect (known or stranger), forced entry, dual motives, sex, robbery, choking or asphyxia, element, and evidence. R. 831; Id. 110. He considered these crimes to have a tight temporal pattern from December 12 to January 12. He contended the location revealed that they were all in Rock Hill within miles of each other, which he contended was a family close geographic pattern. He contended that there was significance in committing crimes in door as opposed to out in the public because a private residence would allow the culprit more control of the premises. He considered a stranger factor to be significant and asserted that stranger based rapes were uncommon as opposed to "known relationship." He contended that in the particular cases there was no sign of what he defined as "forced entry." Concerning dual motives based upon his

The trial court concluded that although Cope had proved by clear and convincing evidence that Sanders was involved in the four incidents, the inquiry did not end there. R. 889. The trial court felt

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review of the police reports, there appeared to be a consistent pattern of dual motives of sex and forced sex, sexual assault, robbery and money. He noted that in the Phillips incident she had not reported an interest in robbery or money, but he included it as robbery due to the police report. R. 829-836; 9/8/04 Tr. 108-115.

As to this classification, Judge Hayes questioned how McCrary could include robbery as a factor when the victim did not include it in her testimony. R. 836; 9/8/04 Tr. 115. The witness noted that she had not reported it as such. R. 836-37; Id. p. 115-16.

Concerning choking or asphyxial elements, he suggested that some had not reported this, like K.D. [Victim 1] who he opined was overcome easily due to being disabled, but that Phillips, Lowery, and Hagman (Lee) all had reported this behavior. [It is evident that he also equates this factor with merely putting a hand over a victim's mouth who is screaming. See Phillips. As to Lee, he equates a choke hold for control with choking or asphyxia.] He also asserts that the offender did not take precautions in avoiding identification because of the presence of DNA or fingerprint at the scene. [Again, this classification ignores that on one occasion, the DNA match was the result of Sanders being stabbed (Lee).]

McCrary felt the Child A murder possessed similar characteristics because it was 17 days before the K.D. [Victim 1] [sexual] assault, was an in-door crime, had no forced entry and contended sex and robbery existed because of her pocketbook being on the bed. In addition, he found the presence of asphyxia or choking present. He opined a statistical base about the relationship rapes and that stranger rapes are rare.

McCrary discounted the fact that Cope was charged with raping his daughter because the DNA match was to Sanders, "so the actual sexual assault was not done by Cope." R. 840; 9/8/04 Tr. p. 119, ll. 23-25. He opined that "there is sort of a common scheme and pattern that exists in these cases." R. 845; 9/8/04 Tr.p. 124, ll. 17-21. [It must be noted that Cope described his sexual assault of his daughter with a broom.]

On cross-examination, McCrary admitted he had not spoken with the victims nor visited the crime scenes. R. 849-50; 9/8/04 Tr. 128-29. Importantly, he admitted that he failed to look at other crimes of burglary that occurred in the Rock Hill area during the same time period. R. 851; Id. at p. 130, ll. 9-22. He also admitted that he did not report on the Cope incident as whether it was "known or stranger" and had not reviewed the videotape of Cope's confession. He admitted that if the father was the "suspect" it would be different from the others crimes related to Sanders.

As to evidence of "forced" entry, he considered it to be physically defeating a lock or door jamb. McCrary admitted that in K.D. [Victim 1], Lowery, and Hagman (Lee), the perpetrator pushed the door open, forcing it and then entering.

Concerning K.D. [Victim 1], it was pointed out "he kept looking for money", but in Phillips there was no evidence of robbery. Additionally, the hand was put over Phillips' mouth because she was screaming, not to smother. As to Hagman (Lee), he was unable to state that there was any evidence of a sexual assault on her or that it was other than a fight and robbery. R. 858; 9/8/04 Tr. 137.

As to Child A, he felt the mere fact the victim's pocketbook was out of place was evidence of "robbery." R. 858; 9/8/04 Tr. 137.

As to age of victim, although Child A was 12 years old, the others were all grown women. R. 858-59; 9/8/04 Tr. 137-38.

As to date patterns, he felt that the fact Child A was the earliest, and rejected that if Child A fell within the time frame it would be more substantiated. R. 859; 9/8/04 Tr. 138.

His analysis of choking and asphyxiation next came under assault by Sanders' counsel. Particularly, K.D. [Victim 1] never indicated any and Phillips only stated the hand was over the mouth to stop screaming (twice), that Lowery described the bag, but not that there was any attempt to strangle, and in White there was nothing except flight. Although Hagman (Lee) spoke about a "choke hold" she never described someone on top of her trying to choke her (as in Child A). Id. at 140.

Concerning Child A, it was pointed out that there was evidence of sexual mutilation in vaginal and rectal trauma, and evidence about a broom stick being used. However, there was no evidence of sexual mutilation (by object) in any of the other cases, although there was some vagina trauma on K.D. [Victim 1]. He admitted that there was no actual sexual assault on Hagman and others, but they had fiercely resisted. McCrary felt that the two sexually assaulted victims, the 60 year old disabled K.D. [Victim 1] and 12 year old girl were vulnerable. R. 862-63; 9/8/04 Tr. 141-42. However, he then admitted as to Phillips, Lowery, Hagman, there was no commonality of vulnerability by age. Most importantly, he admitted that one "glaring difference" in the crimes is that Child A was dead and the others were not. R. 863-64; 9/8/04 Tr. 142-43.

the evidence failed to rise to the level necessary for admission under Rule 404 to show motive, common scheme or plan. Judge Hayes found that there were a variety of dissimilarities and when attempted to match them up, it cannot be done, even though there are some similarities. He noted that using "identity" to prove a connection to the crime did not count since there was DNA so identity is not necessary to prove Sanders was at the Cope residence. Judge Hayes found that the ages of the victims are dissimilar, but the locales are somewhat similar. He stated that he was not going to catalog them, "but I find that they are dissimilar to the extent that he will not let them in under Rule 404." R. 889-90. The trial judge stated that the evidence did not need to be addressed under the balancing test of Rule 403 because he found that the evidence did not meet the threshold level of a "common scheme." R. 893, l. 1-6. See also, R. 2308-2313 - renewed motion to admit and denial at beginning of defense case.

ANALYSIS

The question is not whether the South Carolina Supreme Court and trial courts properly construed one of the State's evidentiary rules, namely Evidence Rule 404(b)'s prohibition against introducing character evidence to show that an individual acted consistently with the evidence. It is whether the state courts' construction of their evidentiary rule violates the Sixth Amendment right to present a complete defense. The Constitution guarantees "a meaningful opportunity to present a complete defense," Crane v. Kentucky, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986) (quotation marks omitted), but "not an unlimited right to ride roughshod over reasonable evidentiary restrictions," Rockwell v. Yukins, 341 F.3d 507, 512 (6th Cir.2003) (en banc). A defendant must "comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." Chambers v. Mississippi, 410 U.S. 284, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). The right to present a complete defense - including the third-party culpability defense raised here - thus does not mean that a defendant may introduce whatever evidence he wishes, only that any state-law evidentiary restrictions cannot be "arbitrary" or "disproportionate to

the purposes they are designed to serve." United States v. Scheffer, 523 U.S. 303, 308, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998) (quotation marks omitted). See United States v. Lucas, 357 F.3d 599 (6th Cir.2004),[9]

What was true in Lucas is true today. Just as Federal Rule 404(b) permissibly limited Lucas's right to introduce propensity evidence directed toward a third party, so the same kind of state law evidentiary rule - indeed essentially the same rule, see South Carolina Rule of Evidence Rule 404(b) permissibly limited Cope's right to introduce propensity evidence about Sanders. And just as this rule did not bar Lucas from introducing other evidence to support this defense, so the same was true for Cope, who introduced considerable non-propensity-based evidence in support of the "Sanders-did-it-alone" defense.

Petitioner asserts that under Holmes v. S.C., 547 U.S. 319 (2006), he is entitled to present this evidence. Considerations of relevancy and probativeness affect even a criminal defendant's constitutional right to present a defense. Holmes addressed a South Carolina rule of evidence preventing a defendant from introducing third party culpability evidence if there is forensic evidence strongly supporting defendant's guilt. Cope essentially contends that Holmes has "constitutionalized" the reverse 404(B) doctrine. We disagree because Holmes involved a different exclusionary rule from the one involved in the case before us. In Holmes, the Supreme Court of the United States rejected a rule adopted by the South Carolina Supreme Court, which excluded proffered evidence of a third party's alleged guilt, "where there is strong evidence of a defendant's guilt, especially strong forensic

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[9] In United States v. Lucas, 357 F.3d 599 (6th Cir.2004), the defendant tried to introduce propensity evidence-a previous conviction for cocaine possession-to prove that a third party, not the defendant, committed a drug crime. Id. at 604. Relying on Federal Rule 404(b), which likewise bars evidence about a person's character "in order to show action in conformity therewith," the district court excluded the evidence. In affirming, the Sixth Circuit first explained that Federal Rule 404(b) applies to all propensity evidence, whether used to show that the defendant or another individual acted in conformity with their prior misconduct. Id. at 606. The Court then rejected Lucas' constitutional argument. The Sixth Amendment right to present "a complete defense" the Court explained, "does not imply a right to offer evidence that is otherwise inadmissible under the standard rules of evidence." Id. And "[t]he exclusion of [the third party's] prior conviction," it explained, "did not violate Lucas's constitutional right to present a defense," because "Lucas was able to explore her theory that [another individual] was in fact the culprit" through other evidence. Id. at 606-07.

evidence." Id. at 320. The Supreme Court stressed that while lawmakers have wide latitude to establish rules excluding evidence in criminal trials, this latitude is not unlimited. In this regard, the Court emphasized that:

> "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.' " This right is abridged by evidence rules that "infring[e] upon a weighty interest of the accused" and are " 'arbitrary' or 'disproportionate to the purposes they are designed to serve.' " (Citations omitted.)

Id. at 324–325, 126 S.Ct. 1727, 164 L.Ed.2d 503.

However, the Supreme Court did not imply in Holmes that it was breaking new ground with respect to rules on "other-crimes" evidence. To the contrary, the Court cited this type of rule as being consistent with the Constitution, which "permits judges 'to exclude evidence that is "repetitive ..., only marginally relevant," or poses an undue risk of "harassment, prejudice, [or] confusion of the issues." ' " (Citations omitted.) Id. at 327, 126 S.Ct. 1727, 164 L.Ed.2d 503. The Supreme Court noted that:

> A specific application of this principle is found in rules regulating the admission of evidence proffered by criminal defendants to show that someone else committed the crime with which they are charged. See, e.g., 41 C.J.S., Homicide § 216, pp. 56–58 (1991) ("Evidence tending to show the commission by another person of the crime charged may be introduced by accused when it is inconsistent with, and raises a reasonable doubt of, his own guilt; but frequently matters offered in evidence for this purpose are so remote and lack such connection with the crime that they are excluded"); 40A Am.Jur.2d, Homicide § 286, pp. 136–138 (1999) ("[T]he accused may introduce any legal evidence tending to prove that another person may have committed the crime with which the defendant is charged.... [Such evidence] may be excluded where it does not sufficiently connect the other person to the crime, as, for example, where the evidence is speculative or remote, **or does not tend to prove or disprove a material fact in issue** at the defendant's trial" * * *). Such rules are widely accepted, and neither petitioner nor his amici challenge them here.

Holmes, at 326–327, 126 S.Ct. 1727, 164 L.Ed.2d 503. (Footnote omitted.).

As this Court stated in Holmes, "the Constitution permits judges 'to exclude evidence that is "repetitive ..., only marginally relevant" or poses an undue risk of "harassment, prejudice, [or]

confusion of the issues." ' Holmes, supra, 547 U.S. 319.[10] Cope's third party culpability evidence was excluded under the standard rules of admissibility which apply to all evidence by application of Rule 404(b). The attempted showing for using the other act evidence against Sanders was minimally relevant to prove what the defense was seeking it to prove, that Sanders was able to secure entry for his other crimes without a showing of forced entry. The reasoning behind Rule 404(b) is one of relevance balanced against undue prejudice and confusion of the issues. In the state supreme court and trial court's reasoning that the other acts were not sufficiently similar, the trial court reasonably applied standards that did not violate the Constitution and thereby did not deprive him of a meaningful defense.

Petitioner's right to present a defense does not relieve him from his obligation to comply with the rules of evidence, see Clark v. Arizona, 548 U.S. 735, 126 S.Ct. 2709, 2731–32, 165 L.Ed.2d 842 (2006); Scheffer, 523 U.S. at 308. It is true that the Court has held that state evidence rules may not be applied mechanistically so as to prevent a defendant from presenting evidence fundamental to his defense. See Chambers, 410 U.S. at 302, 313. However, Chambers and its progeny "do not stand for the proposition that a petitioner's due process rights are violated any time a state court excludes evidence that the petitioner believes is the centerpiece of his defense. Instead, the cases ... stand for the more limited proposition that a defendant's due process rights are violated when a state court excludes important evidence on the basis of an arbitrary, mechanistic, or per se rule, or one that is disproportionate to the purposes it is designed to serve." Alley v. Bell, 307 F.3d 380, 394 (6th Cir.2002). In other words, application of the rules of evidence constitute a denial of the right to present

[10]It is well-established, however, that "the right to present relevant testimony is not without limitation. The right 'may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.' " Rock v. Arkansas, 483 U.S. 44, 55, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987) (quoting Chambers v. Mississippi, 410 U.S. 284, 295, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973)). Thus, a criminal defendant "does not have an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." Taylor v. Illinois, 484 U.S. 400, 410, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988). "Even relevant and reliable evidence can be excluded when the state interest is strong." Perry v. Rushen, 713 F.2d 1447, 1450 (9th Cir.1983). The Supreme Court has indicated its approval of 'well-established rules of evidence [that] permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury.'

a defense only where it "significantly undermine[s] fundamental elements of the accused's defense," Scheffer, 523 U.S. at 315—that is, where the application of the evidentiary rules "infringe[s] upon a weighty interest of the accused." Scheffer, 523 U.S. at 308.

Here, petitioner has not shown that the exclusion of this testimony undermined a fundamental element of his defense. Cope was still able to assert that there was independent entry by Sanders into the home. In the excluded proffers, the entry into each residence was different. There was no similar and consistent signature pattern of entry allegedly by Sanders. In light of the collateral nature of the Rule 404(b) evidence and the extensive other evidence of Sanders' actual involvement which Cope's defense partially endorsed, it cannot be said that the omitted evidence [evaluated in the context of the entire record] creates a reasonable doubt that did not otherwise exist. See Wynne v. Renico, 606 F.3d 867, 871 (6th Cir.2010) (petitioner not denied right to present a defense by trial court's exclusion of Rule 404(b) evidence where petitioner was able to introduce "considerable non-propensity-based evidence in support of the Peckham-did-it defense."); United States v. Lucas, 357 F.3d 599, 606–07 (6th Cir.2004) (exclusion of third party's prior conviction did not violated defendant's right to present a defense where defendant "was able to explore her theory that [another individual] was in fact the culprit" through other evidence.).The Court "may exclude marginally relevant evidence and evidence posing an undue risk of confusion of the issues without offending a defendant's constitutional rights." United States v. Alayeto, 628 F.3d 917, 922 (7th Cir.2010) (citing Holmes v. South Carolina, 547 U.S. 319, 326–27, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006)). Thus, the South Carolina Supreme Court's determination that the trial court's evidentiary ruling did not deprive petitioner of her right to present a defense was reasonable, and petitioner is not entitled to certiorari and a new trial on this claim.

The Supreme Court of South Carolina agreed with the trial judge that there was no sufficient Rule 404(b) similarity between the other alleged acts of Sanders and the murder of Child A.[11] The

[11] The instant case took place during the middle of the night (between 2 and 4 am. [R. 1115; 9/9/04 Tr.p. 103]), the

Petitioner seeks to equate "no forced entry" and "lone wolf" as a theme to his showing of similarity to suggest a common scheme but his individual proffers revealed dissimilarity in the entry in the other Sanders crimes which varied from just appearing through an open patio door, to knocking on a door and gaining entry through subterfuge by an assertion of car trouble. There was no evidence that a theft occurred in the Child A murder, but it appeared that Sanders seeking money was the theme in the K.D. [Victim 1] and Lee incidents. While a sexual assault occurred in K.D. [Victim 1], it did not possess the mutilation of the vaginal and rectal areas that occurred to Child A. Although the crimes occurred in the Rock Hill area, the assault victims covered the entire range from 12 to 60 years old. Simply put, there was no signature style in the break-ins. Each possessed different traits on how Sanders gained entry and the manner that he exited the scene. The other crimes also revealed differences on how Sanders would react when confronted from immediate flight to fight.

Since the crimes failed to show any "common scheme or plan" the state trial judge did not abuse his discretion in disallowing the introduction by Cope. His assertions that this deprived him of

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sexual mutilation and murder of the twelve year old female victim through abhorrent injuries to both her vaginal and rectal areas by an object. None of these preliminary factors existed in any of the proffered evidence in other cases against Sanders. Here, unlike the other cases, there was saliva, identified to Sanders DNA present around her breast of Child A. No sperm was found in the vaginal area. R. 1078; 9/9/04 Tr.p. 66. There was evidence of a struggle in the bed with significant force consistent with holding Child A down while she was alive. R. 1034-35; 9/9/04 Tr. p 22-23. There were obvious signs of assault on Child A including bruising about the head and abrasions on the back. It appeared that she had been struck from side to side on her head repeatedly. R. 1048-49; 9/9/04 Tr.p. 36-37. There was additional evidence of strangulation on her neck area. R. 1054-57; 9/9/04 Tr.p. 42-45.

The pathologist rejected Cope's original claim that a blanket could have accidentally strangled her based upon the autopsy. R. 1056; 9/9/04 Tr.p. 44. As to the rectal injuries, they were consistent with a blunt object being inserted up to 8 inches into the rectum. R. 1089; 1104-05; 9/9/04 Tr.p. 77, 92-93. Dr. Maynard stated that this object would have been consistent with a broom handle or a dildo. R. 1106-07; 9/9/04 Tr.p. 94-95. He specifically stated the injury could not have been caused by a penis. R. 110; 9/9/04 Tr.p. 106. He also found blows to the abdomen. He opined that Child A was assaulted vaginally, anally and over her entire body with numerous bruises, injuries, and hemorrhages that occurred. The assaults were of an extremely vicious nature to cause the amount of rectal bleeding and were caused by a foreign object with sufficient force to cause deep internal hemorrhages that occurred. R. 1120; 9/9/04 Tr.p. 108. The pathologist described the torquing and deep tissue damage. R. 1120. Her eventual death was the result of strangulation. R. 1120; 9/9/04 Tr.p. 108.

The evidence was inadmissible under state law because there is no similarity or pattern evident in the Child A assaults that existed in any of the proffered crimes against Sanders. No crime resulted in death. No crime involved a child. No crime involved rectal penetration. No crime involved strangulation by hand on the neck. No crime involved similar vaginal penetration and bruising by an object. No crime involved a sexual assault from 2 to 4 am.

his right to show that Sanders, by habit, acted alone in his entry and the committing crime does not entitle him to enter evidence that simply does not satisfy the evidentiary standards of Lyle and Rule 404(b). Absent a sufficient showing, the Court properly denied admissibility. This issue was properly denied by the Supreme Court.

In rejecting the severance motion issue, the Supreme Court of South Carolina noted how third party guilt issue did not provide a vehicle for the admission of this challenged evidence:

> The admissibility of evidence of third-party guilt is governed by State v. Gregory, 198 S.C. 98, 16 S.E.2d 532 (1941). In Gregory, we held evidence of third-party guilt that only tends to raise a conjectural inference that the third party, rather than the defendant, committed the crime should be excluded. 198 S.C. at 105, 16 S.E.2d at 534. Furthermore, to be admissible, evidence of third-party guilt must be "limited to such facts as are inconsistent with [the defendant's] own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence." Id. at 104, 16 S.E.2d at 534 (internal quotations omitted). **Pursuant to this standard, we find the proffered testimony in this case would only produce speculation as to whether Sanders acted alone in Child's rape and murder and would therefore have been excluded in a separate trial. Evidence of Sanders' guilt is not inconsistent with Cope's guilt, nor does it raise a "reasonable inference"—and certainly not a presumption—of Cope's innocence. We therefore affirm the court of appeals in finding that the trial court did not err in refusing to grant a severance to allow Cope to admit this evidence.**

Cope, 405 S.C. at 341, 748 S.E.2d at 206 (emphasis added).[12]

The trial court did not deny the admission of the other act evidence based upon the "prejudice" to co-defendant Sanders or the strength of the prosecution's case, but rather concluded it was inadmissible where Cope failed to show the existence of any common scheme or plan, either among the proffered crimes or Child A's death. Cope attempts to bootstrap that these matters may otherwise

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[12] In the Court of Appeals earlier opinion, it explained the trial court's rejection more fully:

> Cope sought to introduce evidence of Sanders' other crimes in a separate trial to prove Sanders' guilt and his ability to enter victims' homes without signs of forced entry. The jury in this case was aware Sanders was involved in Child's murder due to the presence of his DNA. The jury was made aware of evidence that the Cope house could have been entered without signs of forced entry as Cope presented testimony from a locksmith that the lock could have been picked or a credit card could have opened the door lock without leaving signs of forced entry. The evidence of Cope's involvement, such as his confessions and the evidence of the lack of forced entry, would still have been admitted in a separate trial. We find the introduction of the evidence of Sanders' other crimes would not have been inconsistent with Cope's guilt, even if offered in a separate trial, and would not have raised an inference as to Cope's innocence. Accordingly, we find no error by the trial court in denying Cope's motion for severance.

State v. Cope, supra. App.p.50a.

be admissible as evidence of "third party guilt" under state law. This argument, though at first blush compelling, still does not override the evidentiary inadequacy it suggests.

The Supreme Court and Court of Appeals properly evaluated third party guilt issues consistent with the Court's earlier analysis set out in State v. Gregory, 198 S.C. 98, 104, 16 S.E.2d 532, 534 (1941) as limited by the constitutional analysis set out by the United States Supreme Court in the Holmes v. South Carolina, 547 U.S. 319 (2006) opinion.[13] Under the Gregory test (affirmed as appropriate by the U.S. Supreme Court and not challenged therein), the evidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible." State v. Gregory, 198 S.C. 98, 104, 16 S.E.2d 532, 534 (1941) (citing 16 C.J. 560).

Ultimately, the fatal flaw in Cope's train of logic in support of the admission of the other

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[13] In Holmes, the Court determined that the exclusion of the third-party perpetrator evidence violated Holmes' federal constitutional rights by the appellate court decision where such evidence was excluded *due to the existence of strong forensic evidence in favor of the Holmes' guilt.* Holmes, 126 S.Ct. at 1735. The Court reasoned that such an approach inappropriately focused on the prosecution's case: "The point is that, by evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt." Id. The Court's judgment required that third party guilt issues be evaluated consistent with the analysis set out in State v. Gregory, 198 S.C. 98, 104, 16 S.E.2d 532, 534 (1941) as limited by the constitutional analysis set out by the United States Supreme Court in the Holmes opinion.("Because the rule applied by the State Supreme Court in this case did not heed this point, the rule is "arbitrary" in the sense that it does not rationally serve the end that the Gregory rule and other similar third-party guilt rules were designed to further"). Under the Gregory test (affirmed as appropriate by the U.S. Supreme Court and not challenged therein), the ***evidence*** offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible." State v. Gregory, 198 S.C. 98, 104, 16 S.E.2d 532, 534 (1941) (citing 16 C.J. 560). The Gregory court went on to cite from 20 Am. Jur. 254:

> But before such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party. Remote acts, disconnected and outside the crime itself, cannot be separately proved for such a purpose. An orderly and unbiased judicial inquiry as to the guilt or innocence of a defendant on trial does not contemplate that such defendant be permitted, by way of defense, to indulge in conjectural inferences that some other person might have committed the offense for which he is on trial, or by fanciful analogy to say to the jury that someone other than he is more probably guilty.

Id., 198 S.C. at 104-105, 16 S.E.2d at 535.

crimes under a third party guilt theory is that the state in this case proved Sanders' guilt conclusively in its case in chief. Cope does not seek to establish the guilt of another party but rather seeks to introduce this evidence to support his theory that Sanders may have acted alone.

The evidence of Sanders' others crimes is so dissimilar from the attack on Child A it can never amount to anything more than the "bare suspicion...or...conjectural inference" that Gregory forbids. How does this logic apply to the defendant's case? Apparently according to the Petitioner, if the jury believes that Sanders committed all of the subsequent attacks in Rock Hill for which he was charged, Cope could not have been guilty of participating in the very first assault in the series which involved his daughter and to which he confessed? This does not logically follow and it is this logical fallacy that justifies Judge Hayes' exclusion of this information under either a 3rd party guilty theory or a 404(b) analysis. Even if severed, this particular other act evidence would not be admissible because it still did not satisfy the Rule 404(b) "common scheme" threshold.

The jury in this case was well aware Sanders was involved in Child A's murder due to the presence of his DNA. The jury was aware of evidence that the Cope house could have been entered without signs of forced entry as Cope presented testimony from a locksmith that the lock could have been picked or a credit card could have opened the door lock without leaving signs of forced entry. The evidence of Cope's involvement, such as his confessions and the evidence of the lack of forced entry, would still have been admitted in a separate trial. Plainly evidence of Sanders guilt was and would be forthcoming by the admission of his DNA evidence.

It was the evidentiary dissimilarity that precluded the particular other act evidence from coming in. Assuming it was preserved as an alternate basis for a severance request, the evidence simply does not meet the limited purpose that he seeks to admit it - to show that the concept of a lack of forced entry is much more common than the police admitted. Again, the disparate circumstances of these cases merely reveal the facts of those four isolated cases, including ones where the culprit was actually

let in through the open door – which was consistent with the state's theory. His interpretation that their wholesale admission now springs as an attempt to impeach a general comment by the police is unfounded.[14] He was not denied the opportunity to present a complete defense under Holmes v. S.C., 547 U.S. 319 (2006). The judge did not abuse his discretion in denying the severance motions where prejudice was not shown.

II. The Supreme Court Properly Excluded Evidence Upon The Objection of Co-Defendant James Sanders To Testimony From Inmate James Hill Concerning Sanders' Alleged Admission To Assaulting A "Little Girl In Rock Hill" Where There Was Insufficient Trustworthiness When There Was No Testimony From Witness Hill As To Time, Place or Other Circumstances To Connect The Hearsay Evidence To The Murder of Child A. Further, Any Error In The Exclusion of the Proffered Evidence Was Harmless Error Where Sanders Was Jointly Convicted of the Crimes and the Other Circumstances Shown By the Evidence.

The second issue before this Court concerns a trial judge's discretion to exclude evidence that he finds is inadequately tied to this particular crime and may lead to confusion and injection of collateral issues.[15] By applying an analysis under S.C. Rule of Evidence Rule 403, Judge Hayes concluded that hearsay evidence that Petitioner Cope sought to present against co-defendant Sanders was inadequately shown to be connected to this case because it was lacking in "time, place or circumstance."[16] The state trial judge did not abuse its discretion in the exclusion of the particular

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[14] The Petitioner in his Brief cites to ROA 1642-43; 9/13/04 Tr.p. 261-262 to suggest the admission of the this evidence was mandated. In cross-examination, Todd Gardner testified that he had found the Cope residence to be secure when he checked the area around the house with doors locked and windows sealed. Contrary to the assertion in the brief, Gardner stated that he had never processed a residential burglary scene where there were no signs of a forced entry, but declared that "I'm not saying it don't happen, but I'm saying I can't recall working one of them ... [and] I guess its possible . . ." R. 1643. See also, R. 3566; 9/22/04 Tr.p. 84, l. 15. (prosecution closing argument). It is difficult to see how this evidence of isolated cases would impeach Gardner's testimony, suggesting that it had deprived him a right to present a defense. However, any error in failing to admit those matters at trial (an issue not raised in this appeal), would have certainly been harmless error . Similarly, these isolated comment did not warrant a severance to be granted.

[15] Certain salient factors are evident, including that it was co-defendant Sanders, *not the State*, that objected to the Hill testimony. When proffered, Cope only asserted that it was "relevant", not that it was admissible under Rule 804(b)(3), SCRE or the federal constitution.

[16] Under Rule 403, the trial judge has discretion to exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE . Rule 403. "Unfair prejudice means an undue tendency to suggest a decision on an improper basis." State v. Lyles, 379 S.C. 328, 338, 665 S.E.2d 201, 206 (Ct.App.2008) (internal quotation marks omitted). A court weighing the prejudicial effect of evidence against its probative value must base its determination upon the entire record and upon the particular facts of the case before it. Id.

evidence which may have been related to a separate crime other than the instant case and led to confusion of the issues. Further, under Rule 804(b)(3), that the proffer lacked a sufficient showing of corroboration and trustworthiness as required. Alternately, even if the trial court erred in the exclusion as a matter of either state law or under the federal constitution, a new trial is not required where there was a lack of a showing or "probable prejudice" by its exclusion, and necessarily that any alleged error was harmless where Sanders was convicted of the crimes and the evidence presented precluded the assertions suggested in the allegedly overheard jail "comments."

HOW THE SUPREME COURT RULED

First, the Supreme Court of South Carolina found that while the evidence of the overheard comment was "relevant," it concluded that it was inadmissible as hearsay which would not fall within the proposed exception under South Carolina Rule of Evidence, Rule 804(b)(3). See 405 S.C. at 342, n. 6, 748 S.E.2d 207 n.6. The Court stated that Rule 804(b)(3), SCRE, provides as exception to the hearsay rule for the admissibility of out-of-court statements against penal interest made by an unavailable declarant. "However, if offered to exculpate the accused in a criminal trial, they are admissible only if corroborating evidence clearly indicates the trustworthiness of the statements" citing State v. Kinloch, 338 S.C. 385, 388, 526 S.E.2d 705, 706 (2000). The Court found that "[T]he rule does not require *that the information within the statement be clearly corroborated*, it means only that there be corroborating circumstances which clearly indicate the trustworthiness of the statement itself, i.e., that the statement was actually made. " The Court found however, that it noted that "[i]n many instances, it is not possible to separate these two considerations in analyzing the matter of corroboration." "Whether a statement has been sufficiently corroborated is a question left to the discretion of the trial judge after considering the totality of the circumstances under which a declaration against penal interest was made." (internal quotations omitted).

The Court concluded in rejecting the claim:

> Accordingly, to fall within this hearsay exception, the statement must be clearly corroborated so as to establish that the statement was made. We find here that it was not. As the trial court noted, there was no testimony on "time, place, [or] other circumstances" to verify this statement was ever made by Sanders. Hill is unsure to whom Sanders allegedly made the statements, which frustrates any ability to confirm Sanders actually said this to anyone. Furthermore, the statement does not detail specifics of the crimes, and even gets some salient facts wrong. There was no evidence oral sex was performed on Child and she was not smothered. Moreover, there is absolutely no mention of Cope, a detail doubtful to be omitted whether Sanders conspired with him, or was only aware he had been arrested for Sanders' crimes. **We accordingly find that although Hill's testimony may have been relevant, it was nevertheless inadmissible as hearsay because it was not clearly corroborated so as to indicate its trustworthiness.**

405 S.C. 342-343, 748 S.E.2d 207-208.

In his brief before this Court, Petitioner asserts the exclusion of evidence that Sanders acted alone in this crime[17] (or a different crime concerning an unidentified girl in Rock Hill) deprived him of a fair trial. He claims the Hill hearsay testimony was relevant because it increased the probability that Sanders had acted alone and that Sanders had committed the crime. In addition, Cope asserts that the fact that Hill's testimony was not highly detailed should not affect its admissibility, only its weight, claiming it was sufficiently tied to this crime. He further asserts that its admission is allowed under Rule 804(b)(3). He further asserts that his constitutional right to present a defense was deprived because the proffered evidence lends credence to his defense theory. For the reasons set forth below, his assertions do not require a new trial.

How the Issue Was Presented At Trial

The Cope defense team called James Hill as a defense witness concerning a statement purportedly made by co-defendant Sanders to another detainee in late 2002. Hill had been a pre-trial detainee confined in the segregation unit of the York County Detention facility in the latter couple of

[17]In his Brief of Petitioner below, he describes the Hill comments "about getting away with an apparently solo act of rape-murder that was almost certainly that of [Child A]. Brief of Petitioner, p. 45. However, this assertion was determined by the trial court to be lacking when he ruled the proffer was inadequate as to time, place and circumstance.

months in 2002.[18] ROA 3426, 3428. 9/21/04 Tr. 222, ll. 13-20, p. 224, l. 10-13. During an in camera hearing, Hill testified that while he was in his cell in 2002, he overheard a conversation by Sanders[19] and another unidentified detainee/inmate whose name was possibly Holly. According to Hill's testimony, Sanders and the other unidentified inmate/detainee:

> got to the subject of crimes and criminal history and they got to joking about how the . . . police force . . . weren't doing their jobs, that it was easy to get away from them, to delude them [sic], and he made the comment that he was going to get away with what he did to that little girl in Rock Hill, and he went on to describe explicitly what he had done and then in getting away and at the time I didn't think nothing of it.

R. 3429, l. 6-17. Hill stated that Sanders made "remarks about oral and anal sodomy" and "he made remarks, I believe , he said smothering the child." ROA 3429, ll. 19-21. When asked what he had specifically said, Hill quoted Sanders as stating that "his words were that he (Sanders) f____d her. F____d her good." ROA 3430, l. 3-4. Hill further testified that Sanders "alluded to the fact that he had got in through a window in the house and that he had left through the same window and proceeded to go to another individual's house." R. 3431, l. 13-18.[20]

Sanders' counsel [Leland Greeley] objected to Hill's testimony concerning Sanders' admissions as irrelevant "because there has been no identifying characteristics." He noted that there was no identification with this particular case, i.e. the death of Child A. Counsel Greeley noted that

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[18]Hill testified that he was convicted and sentenced to 18 years for burglary- 2nd on August 28, 2003. ROA 3426, l. 12-25. It is noted that "burglary in the second degree" carries a sentence of "not more than fifteen years . . ." S.C. Code §16-11-312 (1985). At the time of his testimony, he was serving the sentence at Perry Correctional Institution. He claimed he had no other charges pending at the time.

Hill also stated that he met Cope [in 2003] four or five months after the discussion he overheard by Sanders. Hill stated he was housed with Cope in the Life Skills Christian Block (F-Unit). Hill claimed he overheard a discussion between Cope and Michael Kennedy about Cope's case. Hill recalled that Kennedy mentioned Sanders's name and said that he was in C-Block. Hill testified that when Sanders' name was mentioned between Cope and Kennedy concerning Cope's case, Hill's memory of the earlier discussion came back. He stated that he then told Cope that he had something to tell him and that he was not going to like it. ROA p. 3430-31. Hill stated that he told Cope about the conversation. He said after that, Cope's lawyers got back to him. ROA p. 3431.

[19]He described Sanders as having a "raspy-ish" " old man's voice." ROA 3428.

[20] As set forth in the harmless error section of this argument, these comments were not supported by the record.

Sanders had many allegations against him in regard to other things (implicitly other criminal charges).[21] He contended that there was nothing that made it relevant in this particular case. ROA p.3432-33. The trial judge sustained Sanders' objection, noting that Hill's proffered testimony did not include any specification by testimony as to "the time, place, or other circumstances" of the crime, accepting Sanders' counsel's assertions. ROA p. 3433, ll. 5-7.

ANALYSIS

When assessing the corroborating circumstances of a statement, a court can make an assessment of the evidence. U.S. v. Lowe, 63 F.3d 1137 (4th Cir. 1995)("Even though the assessment of such evidence is the responsibility of the jury in determining the defendant's guilt, such evidence may also be considered by the court when ruling on the trustworthiness of hearsay, an evidentiary question which is committed to the court for decision."). The trial judge did not abuse his discretion in excluding this potentially confusing testimony upon objection of co-defendant Sanders in the discrete circumstances presented in this case. The Supreme Court found as a matter of state evidentiary law that Cope failed to satisfy the requirements for admissibility of Rule 804(b)(3).[22] Rule 804(b)(3) provides:

> (3) Statement Against Interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. **A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.**

Nontestimonial statements against the interest of the declarant at the time when made are admissible as

[21] The context of the "allegations of other things" statement by counsel Greeley is clear. As noted in argument one, Sanders had a series of other criminal charges that he was facing. However, none of those charges involved young children. Assuming arguendo that the statement was made - particularly where the comments were not consistent with the relevant facts in this case - a jury could have been confused and treated it as a different crime committed by Sanders unrelated to the present case. These differences are set out in the harmless error section.

[22] The state never objected to the evidence. Defense counsel for Sanders objected in the midst of the proffer by Cope. As stated above, the Petitioner never argued a Rule 804(b)(3) issue below so the trial judge never addressed the issues that current counsel attempt to articulate.

an exception to the hearsay rule if the declarant is unavailable and the circumstances show that a reasonable person would not have made the statement unless believing it to be true. See Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

Whether a statement has been sufficiently corroborated is a question left to the discretion of the trial judge after considering the totality of the circumstances under which a declaration against penal interest was made. State v. McDonald, 343 S.C. 319, 540 S.E.2d 464 (2000); State v. Kinloch, 338 S.C. 385, 526 S.E.2d 705 (2000). Rule 804(b)(3) does not require that the information within the statement be clearly corroborated, it means only that there be corroborating circumstances which clearly indicate the trustworthiness of the statement itself, i.e., that the statement was actually made. State v. Kinloch, 338 S.C. 385 at 389, 526 S.E.2d 705 at 707 (2000). The corroboration requirement "goes not to the truth of the statement's contents, but rather to the making of the statement." McDonald, 343 S.C. at 323, 540 S.E.2d at 466. The corroboration requirement is a preliminary determination as to the statement's admissibility, not an ultimate determination about the statement's truth. Kinloch, 338 S.C. at 389, 526 S.E.2d at 707.Accord United States v. Salvador, 820 F.2d at 561 (inference of trustworthiness from proffered corroborating circumstances must be strong, not merely allowable, not an insignificant hurdle); United States v. MacDonald, supra (notwithstanding defendant was able to point to a number of corroborating circumstances, he did not demonstrate, finally, that declaration was trustworthy); see also Mueller and Kirkpatrick, Modern Evidence § 8.64 at p. 1393 (1995) (suggesting corroboration requirement may be partly satisfied by additional proof statement was made but that doubts on this score can undercut other corroborative circumstances). Collins, Danny R., South Carolina Evidence 2nd Edition (2000), p. 556-558, citing U.S. v. Lowe, 65 F.3d 1137 (4th Cir. 1995). "The requirement of corroborating circumstances was designed to protect against the possibility that a statement would be fabricated to exculpate the accused." United States v. Brainard, 690 F.2d 1117, 1124 (4th Cir.1982). The court must make "a finding that the circumstances clearly indicate that the

statement was not fabricated." Id.

In considering Rule 804(b)(3) and its effect on the right to a meaningful defense, Chambers v. Mississippi is instructive. The indicia of trustworthiness identified in Chambers, is also embodied in Rule 804(b)(3). The against-interest exception was drafted with Chambers in mind and requires "corroborating circumstances" for statements offered to exonerate defendants, the justification being that they can be fabricated by friendly defense witnesses (and attributed to unavailable speakers) and are hard to rebut even if false.[23] Mueller & Kirkpatrick, Evidence, Section 8.82, at 1118 (1995). Also Fed.R. 804(b)(3), which reflected the concerns in Chambers, and had been consistently upheld by federal courts.

The corroboration requirement of Rule 804(b)(3) rationally serves a legitimate interest in the admission of trustworthy evidence, and therefore exclusion of a defendant's proffered evidence for lack of corroboration does not deprive a defendant of the right to present a complete defense. Through Rule 804(b)(3), South Carolina has addressed one of the principal concerns of cases such as Chambers, which is that a criminal defendant's *reliable* evidence should not be excluded through application of

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[23] When examining whether a statement against interest is trustworthy and reliable, a court must conduct a "sensitive analysis of the circumstances in which the statement was made and the precise nature of the statement." In re Flat Glass Antitrust Litig., 385 F.3d 350, 373 (3d Cir.2004) (quoting United States v.. Boyce, 849 F.2d 833, 836 (3d Cir.1988)). In Chambers v. Mississippi, 410 U.S. 284 (1973), the Supreme Court found that four factors supported the reliability of the hearsay statements at issue: the statements were made "spontaneously to a close acquaintance"; each statement was "corroborated by some other evidence"; the statements were "in a very real sense self-incriminatory and unquestionably against interest"; and the declarant was present in the courtroom and could have been subjected to cross-examination. Id. at 300–01. Other courts have considered similar factors, including: the relationship between the declarant and the exculpatory party; whether the statement was voluntary; whether there is any evidence that the statement was made to "curry favor" with authorities; whether the declarant's statements are contradictory; and whether other evidence corroborated the statement. See, e.g., United States v. U.S. Infrastructure, Inc., 576 F.3d 1195, 1208 (11th Cir.2009); United States v. Jackson, 540 F.3d 587, 589 (7th Cir.2008).

Particular circumstances make certain types of corroborating evidence more persuasive in bolstering the trustworthiness of a statement against penal interest. For example, statements to close family members generally have " 'particularized guarantees of trustworthiness.' " United States v. Westmoreland, 240 F.3d 618, 628 (7th Cir. 2001), quoting United States v. Tocco, 200 F.3d 401, 416 (6th Cir. 2000). " 'Even to people we trust completely, we are not likely to admit serious fault of which we are innocent * * *.' 4 Mueller & Kirkpatrick, Federal Evidence (2d Ed.1994) 822–823, Section 496. Thus, where a declarant makes a statement to someone with whom he has a close personal relationship, such as a spouse, child, or friend, courts usually hold that the relationship is a corroborating circumstance supporting the statement's trustworthiness." (Emphasis sic.) State v. Yarbrough, 95 Ohio St.3d 227, 2002–Ohio–2126, 767 N.E.2d 216, ¶ 53, citing Green v. Georgia, 442 U.S. 95, 97, 99 S.Ct. 2150, 60 L.Ed.2d 738 (1979); United States v. Tocco; United States v. Boone , 229 F.3d 1231, 1234 (9th Cir. 2000); United States v. Westmoreland, 240 F.3d 618, 627–628 (7th Cir. 2001).

hearsay rules that do not adequately protect due process rights. Rule 804(b)(3) strikes a balance between hearsay statements against penal interest which are sufficiently trustworthy to be admissible and those which are not.

Because Rule 804(b)(3) reflects the considerations identified in Chambers, federal courts have consistently rejected claims that the rule arbitrarily or disproportionately deprives defendants of the right to present a complete defense. For example, in United States v. Barrett, 539 F.2d 244, 253 (1st Cir. 1976), the court stated, "Rule 804(b)(3) reflects Congress' attempt to strike a fair balance between exclusion of trustworthy evidence * * * and indiscriminate admission of less trustworthy evidence which, because of the lack of opportunity for cross-examination and the absence of the declarant, is open to easy fabrication. Clearly the federal rule is no more restrictive than the Constitution permits, and may in some situations be more inclusive." Similarly, in LaGrand v. Stewart, 133 F.3d 1253,1268 (9th Cir. 1998), the court concluded that "given the inherent unreliability of corollary exculpatory statements, Rule 804(b)(3)'s requirement that such statements be clearly corroborated is entirely legitimate and reasonable." The corroboration requirement of Rule 804(b)(3) rationally serves a legitimate interest in the admission of trustworthy evidence, and therefore exclusion of a defendant's proffered evidence for lack of corroboration does not deprive a defendant of the right to present a complete defense. Accord, State v. Swann, 119 Ohio St. 3d 552, 895 N.E.2d 821 (2008).

Holmes is distinguishable in this regard and does not affect the conclusion. While the United States Supreme Court declared the South Carolina evidentiary rule at issue in Holmes arbitrary and illogical because it excluded the defendant's exculpatory evidence based on the sheer "strength" of the state's evidence of guilt, here Rule 804(b)(3) focuses on the trustworthiness of the exculpatory evidence itself, just as the United States Supreme Court did in Chambers.

In this case, the Supreme Court of South Carolina ruled that the corroborating evidence did not clearly indicate the trustworthiness of Sanders' alleged statement to an unknown person that was

overheard. While the court's ruling had the effect of precluding a portion of Cope's defense, the holding nonetheless is constitutional. The corroborating evidence in Chambers contrasts markedly with that provided by Cope. Shortly, after the murder, the declarant in Chambers told a friend that he was the shooter. Corroborating circumstances included the declarant's voluntary sworn confession, the testimony of an eyewitness, and the sighting of the declarant with a gun right after the shooting. Id. at 300, 93 S.Ct. 1038. See also Commonwealth v. Burnham, 451 Mass. 517, 887 N.E.2d 222, 228–29 (2008) ("conclud[ing] that the judge would have been warranted in deciding that the circumstances did not clearly support a finding of trustworthiness"); Ingram v. United States, 885 A.2d 257, 266 (D.C.2005) ("The requirement of corroborating circumstances warranting admission of statements against penal interest plainly goes beyond minimal corroboration, for the circumstances must 'clearly' indicate the trustworthiness of the statement.").

A decision whether to admit the hearsay statement of an unavailable declarant pursuant to Rule 804(b)(3) is one within the discretion of the trial court. The trial judge did not abuse his discretion here.

The Requirements for Admission under Rule 804(b)(3) were not satisfied by Cope.

It is the third prong of the Rule 804(b)(3) test that the Petitioner failed according to the Supreme Court. In that prong, "[a] statement . . .is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement." Rule 804(b)(3), SCRE.[24] Cope contends that he satisfied this burden based upon his claim that Hill did not receive any reward for his testimony, had no motive to testify against Sanders and claimed fear from retaliation from Sanders. Brief of Petitioner, p. 51-52. Cope also claims the "truthfulness" of his statements is shown by the presence of Sanders

[24] See case cited in Annotation, *When do corroborating circumstances clearly indicate trustworthiness of hearsay statement tending to expose declarant to criminal liability and offered to exculpate accused, so as to permit admission of statement under Rule 804(b)(3) of Federal Rules of Evidence (Fed. Rules Evid., 28 U.S.C.A.),* 125 A.L.R. Fed. 477 (1995) as supplemented (2012).

semen on Amanda's clothing and saliva on her body. Id. Yet Cope must admit that there was no evidence corroborating the alleged declarant's claimed entry through a window or other factors forcefully set out in the harmless error section of this portion of the brief which is incorporated herein by reference.

The South Carolina Supreme Court established the corroboration and trustworthiness issues related to Rule 804(b)(3) were that this preliminary determination is not about the ultimate determination of the statements "truth", but whether the statement was actually made. In looking at this trustworthiness issue, other courts have developed similar guidelines for addressing the concerns of the rule. In U.S. v. Lowe, 65 F.3d 1137, (4th Cir. 1995) the Fourth Circuit describe the burden as a "formidable burden." The rule requires not a determination that the declarant is credible, but a finding that the circumstances clearly indicate that the statement was not fabricated. It is the statement rather than the declarant which must be trustworthy. Id., at 1146.[25]

Working from the premise that Cope had a formidable burden in establishing the corroborating circumstances, Judge Hayes did not abuse his discretion in refusing to admit the Hill statement if it is

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[25] In Chambers v. Mississippi, 410 U.S. 284, 300, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973) the Supreme Court held that to exclude powerfully exculpatory hearsay statements which have substantial assurances of trustworthiness violated the defendant's right to present evidence in his own defense. In describing the trustworthiness of the evidence, the Court explicitly referred to extrinsic corroboration:

> The hearsay statements involved in this case were originally made and subsequently offered at trial under circumstances that provided considerable assurance of their reliability. First, each of McDonald's confessions was made spontaneously to a close acquaintance shortly after the murder had occurred. Second, each one was corroborated by some other evidence in the case— McDonald's sworn confession, the testimony of an eyewitness to the shooting, the testimony that McDonald was seen with a gun immediately after the shooting, and proof of his prior ownership of a .22-caliber revolver and subsequent purchase of a new weapon. The sheer number of independent confessions provided additional corroboration for each. ...

Chambers thus supports the argument that to *foreclose* a criminal defendant from using extrinsic corroboration to demonstrate the trustworthiness of exculpatory evidence would violate his or her rights to due process, to present evidence, and to a fair trial. Ironically, these statements would not be admissible as substantive evidence per Fed. R. Evid. 804(b)(3), because McDonald, the declarant in Chambers, was available, was called as a defense witness, and denied he had shot the officer and testified that he had been pressured by defense attorneys into giving the sworn statement. McDonald's other statements presumably would be admissible, however, as prior inconsistent statements to impeach the declarant under Fed. R. Evid. 613. (Mississippi law precluded use of some of the statements because that state adhered at the time to the common law "voucher" rule which precluded impeaching one's own witness.).

analyzed under a Rule 804(b)(3) standard. The important part of the sentence of Rule 804(b)(3) concerns how and where the statement was made. Here, it was a remark overheard by Hill who was not a participant in the conversation in the jail. In fact, Hill could not accurately identify who he claims Sanders may have been talking to. It is with these initial circumstances that the trustworthiness of the statement comes initially into question. The relationship between Sanders and the unknown person who it is claimed he was speaking with was never developed and does not indicate whether he was speaking to a close acquaintance or otherwise, assuming Sanders made the statement at all.

Further, the claim that Sanders was proven to be involved in the particular crime involving Child A did not mandate the admission of an out of court statement that lacks trustworthiness. There was no evidence presented to corroborate that the alleged entry was gained through any window and no evidence was presented concerning Sanders "proceeding to another home" that night. In addition there was no evidence of "smothering." Even though the assessment of such evidence is the responsibility of the jury in determining the defendant's guilt, such evidence may also be considered by the court when ruling on the trustworthiness of the hearsay, an evidentiary question which is committed to the court for decision under Rule 804(b)(3).

While the alleged declarant (Sanders) was still exposed to culpability at the time, there is no showing that the declarant ever repeated the statement nor made a similar statement. It was allegedly said in a manner of bragging, potentially about a crime that Sanders was ultimately convicted of (or others). Interestingly, it is the additional fact that the statement was made to an unknown party - not Hill - and only overheard by Hill which brings the trustworthiness of the statement ever being said into its strongest question and revealed the lack of corroboration. Who is the person that Hill claims Sanders actually spoke with about the incident? Hill never heard the statement again, never repeated the statement to any law enforcement person contemporaneously to the event or later (ROA 3432), and allegedly only claimed that he repeated the statement to Petitioner Billy Wayne Cope whom he

admittedly had befriended by 2003. ROA 3430-31. See State v. Wannamaker, 346 S.C. 495, 552 S.E.2d 284 (2001)(allows exclusion where potential witness was a friend and roommate of defendant). Thus, Hill had a motive to make up the story about Sanders' statement. In Hill's testimony, other than describing Sanders' raspy voice, he makes no claim to ever having spoken with him directly while in the segregation unit. ROA 3431

The requirement of corroborating circumstances was designed to protect against the possibility that a statement would be fabricated to exculpate the accused. It is precisely these concerns which caused the Advisory Committee to the Federal Rules explained the requirement of corroborating circumstances as follows:

> [O]ne senses in the decisions a distrust of evidence of confessions by third persons offered to exculpate the accused arising from suspicions of fabrication either of the fact of the making of the confession or in its contents, enhanced in either instance by the required unavailability of the declarant.

F.R.Evid. 804(b)(3), Advisory Committee Notes. U.S. v. Lowe 65 F.3d 1137, 1145 -1146.

Respondent urges that its argument in support of the exclusion of the evidence or the conclusion of the Supreme Court is not based upon the strength (or truth) of the government's evidence against Cope. Such an assessment would be in violation of the mandates of Holmes v. South Carolina, supra. Rather it is the question of corroboration and trustworthiness of the statement itself under Rule 804(b)(3) for the admission of the evidence that should be the basis for exclusion.

"It is clearly established federal law, as determined by the Supreme Court, that when a hearsay statement bears persuasive assurances of trustworthiness and is critical to the defense, the exclusion of that statement may rise to the level of a due process violation." Chambers, 410 U.S. at 302). However, "Chambers ... does not stand for the proposition that the defendant is denied a fair opportunity to defend himself whenever a state ... rule excludes favorable evidence." United States v. Scheffer, 523 U.S. 303, 316, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998). "While the Constitution ... prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate

to the ends that they are asserted to promote, well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury." Holmes v. South Carolina, 547 U .S. at 320 (citations omitted). Cf. O'Brien v. Marshall, 453 F.3d 13, 19-20 (1st Cir.2006) (no constitutional violation where defendant's evidence that someone else committed the crime was restricted based on traditional hearsay rules); DiBenedetto v. Hall, 272 F.3d 1, 7-9 (1st Cir.2001) (no constitutional violation where defendant's evidence that others had motive in mob killing and that key government witness was lying to regain favor with mob faction was excluded because it was unreliable and tangential).

Holmes prohibits excluding defense evidence under evidentiary rules that infringe upon a weighty interest of the accused and are arbitrary or disproportionate to the purposes they are designed to serve. Holmes, 547 U.S. at 324. "Arbitrary" rules are those that exclude important defense evidence but do not serve any legitimate interests. Id. at 325. A rule ensuring that only reliable evidence is presented at trial serves a legitimate interest and does not unconstitutionally abridge the right to present a defense. See United States v. Scheffer, 523 U.S. 303, 309, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998).Thus, in Holmes the Court found unconstitutional a South Carolina rule that excluded alternative suspect evidence solely if the trial court concluded that the state had submitted strong evidence, including forensic evidence, of the defendant's guilt. See id. at 328-31, 126 S.Ct. 1727. The rule gave no consideration to the probative value of the defendant's alternative suspect evidence. See id. at 329, 126 S.Ct. 1727. Here, the probative value or lack of it due to insufficient trustworthiness under Rule 804(b)(3) was the basis of Judge Hayes exclusion of the evidence under the hearsay ruling.

A meaningful opportunity to present a complete defense is not offended by the exclusion of "evidence that is repetitive, only marginally relevant or poses an undue risk of harassment, prejudice, or confusion of the issues." Id. at 326-27, 126 S.Ct. 1727 (alterations omitted) (quotation marks

omitted). Indeed, in Holmes the Court recognized that " 'well-established rules of evidence [that] permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury' do not normally breach defendants' constitutional rights," and that "one such 'well-established rule' [is] the rule that a court may exclude a defendant's evidence proffered to show that someone else committed the crime in question if that evidence is too speculative, remote, or immaterial." United States v. DeCologero, 530 F.3d 36, 73 (1st Cir.2008) (citing and quoting Holmes, 547 U.S. at 326, 327, 330, 126 S.Ct. 1727); see Holmes, 547 U.S. at 330, 126 S.Ct. 1727. Thus, the Constitution does not prevent a court from reasonably regulating the admission of alternative suspect evidence so long as it serves a legitimate purpose, such as the goal of focusing "the trial on the central issues by excluding evidence that has only a very weak logical connection to the central issues." Holmes, 547 U.S. at 330, 126 S.Ct. 1727.

For the reasons stated above, the application of Rule 804(b)(3) would not violate the federal constitutional right to present a defense in this circumstance where the conditions had not been met. Further, the rejection for confusion due to a lack of an adequate proffer as to "time, place and circumstances would not violate the constitution where its exclusion was based upon a minimal probative value contrasted against the undue prejudice. His belated assertions are without merit.

The basis for the Hill evidence exclusion was different, under Cope's theory, the alleged inculpatory statement was *only tied to this crime*, whereas the trial judge - whose discretion is entitled to deference - found the proffer *was not sufficiently tied to the particular crime* against Child A because it lacked "time, place, or other circumstances." The time, place and other circumstance indicia was necessary because the statement did not described a victim other than "little girl," and although it described "smothering," it did not specifically state she was killed, did not describe when or where, and suggested that it was an unsolved crime. Where the circumstances were not consistent with the crime, co-defendant Sanders' concern about his other problems reflect a concern that the jury might

consider that Sanders committed an additional crime involving a little girl. Thus, the confusion under Rule 403 by its potential admission was real. The prejudicial effect could be seen to outweigh its minimal probative value where Sanders was still being tried as a joint accomplice in the murder of Child A.[26]

The Supreme Court was also applying the Gregory standard in its assessment. Accord, Lorenzen v. State, 376 S.C. 521, 532, 657 S.E.2d 771, 778 (2008).[27] The trial judge did not abuse his discretion in this matter. His basis for sustaining defense counsel Greeley's motion for exclusion was that the proffered evidence was deficient because there was no testimony as to "time, place or other circumstances." This was a Rule 403 assessment in its exclusion. The co-defendant's objection to the testimony was based upon the assertion that the lack of specificity in the comments could be related or infer other actions by Sanders unrelated to the Cope case. As with any Rule 403 assessment they are extremely fact based and unique to the individual case. It is evident that the alleged comments in 2002 do not necessarily relate to the Cope case because the declarant neglected to identify the "little girl" and only that he had raped a little girl in Rock Hill. The declarant did not state when the rape occurred or that he was even charged with the same crime at the time. Simply put, the evidence that he raped a little girl in Rock Hill and left through a window that he entered is insufficient to have mandated

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[26] As to People v. Cruz, 162 Ill.2d 314, 205 Ill.Dec. 345, 643 N.E.2d 636, 650 (1994), the amicus attempts to distinguish the case not by the correctness of the legal ruling in the particular appeal as it relates to the admission of a particular third party's statement, but by the use of anecdotal information that Cruz's death sentence and conviction were reversed and the Cruz was acquitted in a later trial. The standard of law relied upon by the Illinois appellate court - the rule that "[a]n extrajudicial declaration not under oath, by the declarant, that he, and not the defendant on trial, committed the crime is inadmissible as hearsay, though the declaration is against the declarant's penal interest," but allowing an exception "where there are sufficient indicia of trustworthiness of such extrajudicial statements" - remains.

[27] The Fourth Circuit has similarly addressed the admission of such evidence. U.S. v. Lighty, 616 F.3d 321, 358 (4th Cir. 2010). Alternative perpetrator cases thus balance two evidentiary values: the admission of relevant evidence probative of defendant's guilt or innocence under Rule 401 with the exclusion of prejudicial, misleading, and confusing evidence under Rule 403.

admission of the evidence.

Judge Hayes, in his discretion, concluded that this comment related by Hill merely casts a conjectural inference upon Sanders because of its apparent lack of a connection to this incident, particularly where Sanders was the subject of other criminal allegations.

III. The Exclusion of the Evidence Was Harmless Error.

Alternately, assuming the evidence was admissible under Holmes and Gregory, the exclusion of the evidence was harmless error. Simply put, there was no evidence of entry through a window, no evidence of smothering, no evidence of penile penetration of either the vaginal or anal areas, and no evidence that Sanders then went to another house. There was evidence of staging, evidence that Cope claimed his daughter had inadvertently strangled herself with a blanket was medically wrong, evidence of Cope's masturbation at the time of the incident, evidence consistent with Cope's re-enactment as to how Child A died, evidence of Sanders DNA on her pants that were placed back on her. The failure to admit this untrustworthy evidence does not require a new trial.

Even if considered as "constitutional error" an examination of the record in this case reveals that any alleged error in excluding Petitioner's excluded evidence, if it was error at all, was "harmless beyond a reasonable doubt." Chapman v. California, 386 U.S. 18, 24 (1967). As the Court stated in Rose v. Clark, 478 U.S. 570, 579 (1986), a judgment of conviction should be affirmed "[w]here the reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt." Chapman announced that constitutional errors are harmless only if the reviewing court is "able to declare a belief that [the error] was harmless beyond a reasonable doubt." Id.

The exclusion of the proposed evidence was harmless beyond a reasonable doubt. It cannot be ignored that Sanders was convicted by this jury of both murder and criminal sexual conduct, as well as the conspiracy with Cope. There was a plethora of evidence that Cope was also involved in the death of his daughter. As noted - though challenged - Cope's personal statements of guilt and the video

re-enactment of the murder and assault with an object support the harmless error assessment. While the Petitioner and amicus may complain about the "biasing" effect of confession evidence generally, it cannot be disputed that it was powerful evidence here where unknown factors were corroborated.

Although not a predicate to the admissibility of the Hill statement under Holmes, in a harmless error analysis, the proffered statement conflicts with and is contradicted by the other powerful evidence at trial where the alleged comment by Sanders that he "f---- her" was inconsistent with the lack of semen in her body[28] and the claimed alleged entry and exit from the Cope home[29] suggested by the comment as being through the window was inconsistent with the physical makeup of the Cope home (where the windows were secured in some fashion by either screens, plastic or being nailed down and where the windows were dirty, sooty and with spider webs that would have been obvious if anyone had climbed in or out). In fact, the evidence revealed that there was no sign of wiping smudging or anything to suggest that anything had entered through any window. See, R. 988-89, 1236-38.

Although the Hill-Sanders brief jail comments did not indicate any involvement by another person in Sanders' acts, that fact alone does not undermine the powerful evidence which suggests the lack of harmful error by its exclusion. Further, the fact that Hill admitted that when Sanders told him, "I didn't think nothing of it" and later that Hill later befriended Cope at prison and revealed it to him

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[28] The heart of Mr. Hill's testimony claims that Sanders "made remarks about oral and anal sodomy." Hill testified Sanders specifically said, "he f___d her." This is completely inconsistent with the lack of semen or saliva in her vaginal or anal areas. It should also be noted that neither the charges against Sanders nor the evidence produced at trial alleged or indicated oral sex. Sanders' semen was only found on the exterior of Child A's pants which were placed back on Child A after the sexual assault. However, Cope's semen was found in a rag on the floor just outside Child A's bedroom under a bookshelf where Cope told police he threw it. (It was during Cope's final interview where he admitted that on the night of the murder he masturbated into a wash rag while in Child A's room and placed the wash rag under a bookshelf just outside Child A's room where the police ultimately recovered it). (ROA 1809, 1810). The police did not know about this rag until after Cope confessed. It should also be noted that Dr. Maynard, the pathologist who performed the autopsy, testified that the severe injuries to Child A's vagina and anal cavity were produced by a hard foreign object and not a penis. ROA 1116-17.

[29] Mr. Hill's claim that Sanders said he entered and exited through a window was also strongly contradicted by the evidence produced at trial. It was completely inconsistent with the Cope home where the windows were secured in some fashion by either screens, plastic or being nailed downed and where the windows were dirty, sooty and with spider webs that would have been obvious if anyone climbed in or out. In fact, the evidence revealed that there was no sign of wiping, smudging or anything to suggest that anything had entered through any window including no sign of disturbed leaves or debris on the ground outside each window. (State's Exhibits 40 52B , 68 79, 83.1 and 103; [Testimony of Jerry Waldrop and Todd Gardner] ROA 1237-38, 1532-1580, 1589). None of the windows showed any sign of forced entry at all. Each was inspected including the ground beneath them and the dirt, leaves and cobwebs on and below each of them showed no sign of recent disturbance. (ROA 1580, l. 4)

(and apparently no one else), makes Hill's credibility in serious question which further limits the probative impact by the lack of presentation of this evidence in a harmless error test.

The assumption that Sanders' alleged statement to an unknown person has anything to do with the rape and murder of Child A is speculation. In fact, a close look at Mr. Hill's testimony shows that most of the alleged statement contradicts the facts in this case. Nowhere in Mr. Hill's testimony does he allege that Sanders said he actually killed the child. Hill simply said, "He (Sanders) made remarks of, I believe, he said smothering the child." "Smothering" simply indicates the covering of the airway for some period of time. In rape cases, sadly, it is not unusual for the assailant to cover the nose and mouth of a victim for some period of time during the crime. This is often accomplished with a hand, a pillow or other object. Its purpose may be to prevent the victim from screaming and/or identifying the perpetrator. It is not always fatal. Here Mr. Hill did not testify that Sanders smothered her "to death." A further indication that the term "smothering" used by Mr. Hill was not fatal is the fact that right after Hill allegedly heard Sanders describe the crime, Hill said, "at the time I didn't think nothing of it." In addition, the evidence presented during the trial indicates the child was strangled to death - not smothered.

The trial judge correctly excluded the testimony of James Hill. The description James Hill gave of Sanders' alleged out of court statements conflicts with the facts of this case much more than they resemble them. The only resemblance is that a young girl was sexually assaulted in Rock Hill. All other factors are either different or conflict with facts in evidence. It is mere conjecture to associate Sanders' alleged highly undetailed statements with this case. It does not provide any identifying characteristics or any specification as to the time, place, or other circumstance of the crime. Sanders' alleged statement cannot expose him to any criminal liability because it does not provide enough information to be linked to any specific crime especially this one.

The exclusion of Hill's testimony did not violate Cope's federal due process right to present a

full defense. Cope presented numerous witnesses including several expert witnesses during the trial. Hill's testimony regarding Sanders' alleged statement is vague at best. Since there is no solid link between the alleged statement and the crime at hand it would be improper to admit Hill's testimony.

CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari must be dismissed.

Respectfully submitted,

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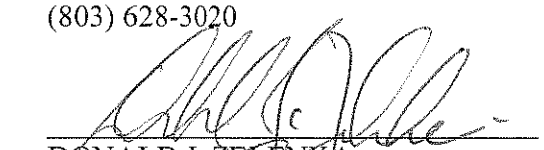
By: 

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May 13, 2014.

CERTIFICATE OF SERVICE

I, Donald J. Zelenka, a member of the Bar of this Court, hereby certify that I have served the Brief in Opposition in the foregoing action by depositing three copies each in the United States mail, postage prepaid, to the following:

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