

IN THE  
SUPREME COURT OF THE UNITED STATES

October Term, 2013

---

No. 13-\_\_\_\_\_

---

Billy Wayne Cope,

Petitioner,

v.

State of South Carolina,

Respondent.

---

PETITION FOR WRIT OF CERTIORARI  
TO THE SUPREME COURT OF SOUTH CAROLINA

---

DAVID I. BRUCK \*  
Washington & Lee School of  
Law  
220 Sydney Lewis Hall  
Lexington, Virginia 24450  
540-458-8188

STEVEN A. DRIZIN  
Northwestern University School of  
Law  
357 E. Chicago Avenue,  
Chicago, IL 60611  
(312) 503-6608

JAMES M. MORTON  
MICHAEL B. SMITH  
Morton & Gettys, LLC  
Post Office Box 707  
Rock Hill, SC 29731  
(803) 366-3388

ATTORNEYS FOR PETITIONER

\* Counsel of Record

## QUESTIONS PRESENTED

Under police interrogation, petitioner confessed to sexually abusing and strangling his 12-year-old daughter. According to his custodial statements, he committed these crimes by himself, in the middle of the night, in the child's bedroom. But several months later, DNA testing revealed that saliva and semen found on the child's body actually belonged to a serial burglar and rapist named James Sanders who had been released on parole shortly before the child's murder. Sanders and petitioner were strangers to one another, but the prosecution nevertheless theorized that they must have somehow conspired in the sexual assault and murder, and put both men on trial together before the same state court judge who had presided over the trial in Holmes v. South Carolina, 547 U.S. 319 (2006). Petitioner's defense at trial was that his confessions were false and that Sanders had acted alone. To support that defense of actual innocence, he offered conclusive and undisputed evidence that Sanders committed four other burglaries and sexual assaults at nearby homes within six weeks of the murder, and that in all four instances Sanders had acted alone, and without leaving signs of forced entry. Petitioner also offered testimony from a jail inmate that while awaiting trial on his other burglary and rape charges, but before he was charged with the Cope murder, Sanders had bragged about raping and smothering the victim after breaking into her home. However, the trial judge excluded the Sanders other-crimes evidence under Rule 404(b), SCRE, and also excluded Sanders' jail admissions as irrelevant. In a three-two decision, the South Carolina Supreme Court affirmed the trial

judge's exclusion of Cope's evidence concerning Sanders' numerous other offenses, reasoning that Sanders' other crimes were too dissimilar to admit under Rule 404(b). It also held that Sanders' jailhouse admissions were insufficiently corroborated under Rule 804(b)(3), in part because they did not mention Cope. The questions presented are:

1.

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?

2.

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?

## TABLE OF CONTENTS

QUESTIONS PRESENTED.....	i
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES .....	v
CITATIONS TO OPINIONS BELOW .....	1
JURISDICTION.....	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED .....	1
STATEMENT OF FACTS .....	2
1. The DNA exoneration that came too late.....	2
2. The excluded evidence of Sanders’ other crimes.....	6
3. The excluded evidence of Sanders’ jailhouse admissions .....	9
4. The defense case and closing arguments .....	10
5. Cope’s appeals in the South Carolina state courts .....	12
WHY THE WRIT SHOULD BE GRANTED .....	18
A. By subordinate ng the federal constitutional issue to its restrictive analysis of the admissibility of Cope’s evidence under Rules 404(b) and 804(b)(3) of the South Carolina Rules of Evidence, the state court failed to afford Cope’s federal claim the independent assess- ment that this Court’s precedents require. ....	19
B. South Carolina violated petitioner’s federal constitutional right to present his complete defense under <u>Holmes v. South Carolina</u> by evaluating the logical relevance of petitioner’s evidence with reference only to the prosecution’s theory of his guilt, rather than in light of all of the evidence, including evidence of his innocence. ..	26
C. Given the strong biasing effect of confession evidence, the state court’s error exacerbated the already grave risk that the state’s unreliable confession evidence would trump unassailable DNA- based proof of petitioner’s innocence. ....	36
CONCLUSION.....	39

## APPENDIX

<u>State v. Cope</u> , 405 S.C. 317, 748 S.E.2d 194 (2013) .....	App. 1a
<u>State v. Cope</u> , Order of the South Carolina Court of Appeals granting state’s petition for rehearing, (Sept. 29, 2009) .....	App. 33a
<u>State v. Cope</u> , 385 S.C. 274, 684 S.E.2d 177 (Ct. App. 2009) (opinion on <u>rehearing</u> ) .....	App. 34a
Rule 404, South Carolina Rules of Evidence .....	App. 54a
Rule 804(b)(3), South Carolina Rules of Evidence.....	App. 54a

## TABLE OF AUTHORITIES

CASES	Page
<u>Arizona v. Fulminante</u> , 499 U.S. 279 (1991) .....	36
<u>Bruton v. United States</u> , 391 U.S. 123 (1968) .....	36
<u>California v. Trombetta</u> , 467 U.S. 479 (1984) .....	20
<u>Chambers v. Mississippi</u> , 410 U.S. 284 (1973) .....	14, 18, 19, 26
<u>Commonwealth v. Jewett</u> , 467 N.E.2d 155 (Mass. 1984) .....	33
<u>Corley v. United States</u> , 556 U.S. 303 (2009) .....	36
<u>Crane v. Kentucky</u> , 476 U.S. 683 (1986) .....	15, 19, 20
<u>Green v. Georgia</u> , 442 U.S. 95 (1979) (per curiam) .....	19, 20
<u>Holmes v. South Carolina</u> , 547 U.S. 319 (2006) .....	passim
<u>Nevada v. Jackson</u> , 133 S.Ct. 1990 (2013) .....	19
<u>Old Chief v. United States</u> , 519 U.S. 172 (1997) .....	21, 38
<u>Rock v. Arkansas</u> , 483 U.S. 44 (1987) .....	15, 19, 20, 23
<u>State v. Cope</u> , 385 S.C. 274, 684 S.E.2d 177 (Ct. App. 2009) .....	1, 12
<u>State v. Cope</u> , 405 S.C. 317, 748 S.E.2d 194 (2013) .....	passim

<u>State v. Williams</u> , 518 A.2d 234 (N.J. 1986) .....	33
<u>Taylor v. Illinois</u> , 484 U.S. 400 (1988) .....	35
<u>United States v. Moccia</u> , 681 F.2d 61 (1 <sup>st</sup> Cir. 1982).....	21
<u>United States v. Nixon</u> , 418 U.S. 683 (1974) .....	36
<u>United States v. Scheffer</u> , 523 U.S. 303 (1998) .....	20
<u>United States v. Stevens</u> , 935 F.2d 1380 (3rd Cir. 1991) .....	33
<u>Washington v. Texas</u> , 388 U.S. 14 (1967) .....	18,19, 25, 26, 35
<b>STATUTE AND RULES</b>	
28 U.S.C. § 1257(a) .....	1
Rule 404(b), S.C. Rules of Evidence .....	passim
Rule 804(b)(3), S.C. Rules of Evidence.....	passim
<b>OTHER AUTHORITIES</b>	
Keith A. Findley & Michael S. Scott, The Multiple Dimensions of Tunnel Vision in Criminal Cases, 2006 Wis. L. Rev. 291 (2006) .....	26
Joan L. Larsen, <u>Of Propensity, Prejudice, and Plain Meaning: The Accused's Use of Exculpatory Specific Acts Evidence and the Need to Amend Rule 404(b)</u> , 87 NW. U. L. Rev. 651 (1993).....	33
Adam Liptak, <u>Out of Prison, For Some That Might Mean Out of Luck</u> , New York Times (April 1, 2013).....	37
Andrew Martin, <u>The Prosecution's Case Against DNA</u> , New York Times (November 25, 2011).....	37

The petitioner Billy Wayne Cope prays that the Court issue a writ of certiorari to review the judgment of the Supreme Court of South Carolina in this case.

#### CITATIONS TO OPINIONS BELOW

The majority and dissenting opinions of the South Carolina Supreme Court are reported at State v. Cope, 405 S.C. 317, 748 S.E.2d 194 (2013), and are reprinted in the Appendix to this petition at App. 1a to 32a. The order of the South Carolina Court of Appeals granting the state's petition for rehearing is unreported, and is reprinted at App. 33a. The opinion of the South Carolina Court of Appeals on rehearing affirming petitioner's convictions is reported at State v. Cope, 385 S.C. 274, 684 S.E.2d 177 (Ct. App. 2009), and is reprinted in the Appendix to this petition at App. 34a to 53a. The original majority and dissenting opinions of the South Carolina Court of Appeals affirming petitioner's convictions in part and reversing in part are unreported.

#### JURISDICTION

The judgment of the Supreme Court of South Carolina was entered on August 28, 2013. On November 8, 2013, the Chief Justice extended the time to file a petition for writ of certiorari to and including January 25, 2014. This Court has jurisdiction under 28 U.S.C. § 1257(a).

#### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth and Fourteenth Amendments to the United States Constitution, which provide in pertinent part as follows:



**Amendment VI:** In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . . .

**Amendment XIV, Section 1:** No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

It also involves Rules 404 and 804(b)(3) of the South Carolina Rules of Evidence, which are reprinted in the Appendix at App. 54a to 55a.

### STATEMENT OF FACTS

#### 1. The DNA exoneration that came too late

Early on the morning of November 29, 2001, petitioner Billy Wayne Cope found his 12-year-old daughter murdered in her bed in the Cope family home in Rock Hill, South Carolina. DNA in saliva recovered from a bite mark on the child's breast and in semen on her sweatpants turned out to belong to one James Sanders. Cope did not know Sanders, a cocaine-dependent career criminal who had been paroled from a North Carolina prison just six weeks before the crime. R. 57, 75, 3687-88. The record conclusively establishes that over the six weeks following the Cope murder, Sanders committed at least four additional burglaries and opportunistic sexual assaults in the Rock Hill area, three of them within about a mile of the Cope home, before he was finally arrested.

The reliability of the DNA evidence tying Sanders to the Cope child's body has never been questioned, and the state used it to convict him of her sexual assault and murder.<sup>1</sup> Had that evidence been identified at the start of the police investiga-

---

<sup>1</sup>As the prosecutor told the jury in closing argument, “. . . Ladies and gentlemen, Sanders is bought and paid for. Mr. Sanders' DNA, his semen, is on a dead 12 year

tion, this might have been a simple case: Sanders would have been indicted, tried and convicted as the sole perpetrator, and Cope would never have been charged.

But as events actually unfolded, several weeks would elapse before the police learned that the DNA found on the victim did not match Cope, and another nine months passed before law enforcement identified Sanders as the DNA's source. By then, the police had already extracted a "strange series of confessions" from Cope, State v. Cope, App. 26a, 405 S.C. 317, 352, 748 S.E.2d 194, 212 (2013) (Kittredge, J., dissenting), in which he admitted to sodomizing and strangling his own daughter – by himself. And although Cope retracted his confessions almost immediately after making them, the prosecution's belief in his guilt had already hardened like quick-setting cement.

Cope's "strange series of confessions" began the day after his arrest, following several hours of tape-recorded interrogation in which he had steadfastly denied involvement and repeatedly asked to be given a polygraph test. Eventually police did arrange for a polygraph test, after which Cope was told—likely falsely—that he had failed. Compare id., App. 4a, 405 S.C. at 327, 748 S.E.2d at 199 (stating that polygrapher "determined Cope had not answered truthfully") with App. 26a, 405 S.C. at 352, 748 S.E.2d at 212 (dissenting opinion) (stating that "Cope also agreed to take a polygraph examination, which he apparently passed. The examiner, however, informed Cope that he had failed."). Cope then gave a confession which the police

---

old girl. His saliva is on her breast over a bruise that is roughly the same age as the choke marks that killed her. Mr. Sanders is guilty. There is no question about that. That cannot seriously be disputed, not with a straight face." R. 3559.

did not record. According to the officer who took the first confession, Cope gave it only after asking whether he could have committed the crime in his sleep; he concluded by stating that “these are the images that come into my mind.” App. 5a, 405 S.C. at 328, 748 S.E.2d at 199. Two days later, Cope volunteered (and the police partially videotaped) a second version of the crime in which he offered a naïve mental state “defense,” which was that he had attacked his daughter while in a dream-state, and that he thought he was actually taking revenge on a former girlfriend who had aborted his unborn child. Later the same day, he gave yet another confession in which he abandoned the “dream” story, and described the murder as having occurred when his daughter woke up while he was sexually molesting her. App. 5a to 7a.

While Cope’s three confessions varied from each other, and also varied in many respects from the physical evidence found at the scene, they were consistent in this respect: none of them included any mention of a second perpetrator. Thus, once Rock Hill authorities finally identified James Sanders’ semen and saliva on the victim’s body, one might have supposed that they would acknowledge the falsity of all of Cope’s confessions and release him.<sup>2</sup> But instead, the prosecution gradually constructed a new theory that would attempt to accommodate both Sanders’ and Cope’s guilt, and after a further delay of well over a year, App. 7a, charged both

---

<sup>2</sup> For a very recent example of such a case in South Carolina, see Tonya Brown, “He was not involved in the crime”: Rape charge against one man dropped, another arrested, <http://www.carolinalive.com/news/story.aspx?id=945498#.UmLCIhD4uSp> (last visited January 18, 2014) (detailing Marlboro County, S.C. authorities’ prompt dismissal of all charges against a suspect who was cleared by DNA test results after he had confessed to raping an elderly woman in her home).

men with the murder and sexual assault. Indictment No. 2004-GS-46-0200 (January 22, 2004), Amended Supp. R. at 44-45. Despite the absence of any evidence that Cope and Sanders knew each other or had even met (Cope was a socially isolated 385-pound white man, while Sanders was an African-American career criminal and drug addict who, as mentioned earlier, had been released from a North Carolina prison just six weeks before the murder), the prosecution's new theory turned out to be that Cope intentionally ushered Sanders into the family home in the middle of the night, and that "[t]he only logical explanation is that Billy Cope served up his daughter for his and [ ] Sanders' own perverse pleasures and took her life. They did it together . . ." R. 915; App. 7a; 405 S.C. at 330, 748 S.E.2d at 201 (quoting prosecution's opening statement at trial).

The prosecution joined Sanders and Cope for trial, and called their cases before Circuit Judge John C. Hayes, III, who had also been the trial judge in Holmes v. South Carolina, a case tried just a few months before Cope's arrest. To overcome the almost surreal improbability of the state's new theory—that the victim's father had teamed up with an apparent stranger to sexually assault and murder the daughter in her own bed while her two younger sisters slept in the next room—the prosecution relied at trial on Cope's various confessions that he had committed the crime (albeit alone), and on the following circumstantial evidence:

- (1) The police could detect no signs of forced entry in the Cope home, App. 2a, 405 S.C. at 325, 748 S.E.2d at 198, which was so cluttered that a burglar might have had difficulty navigating it in the dark. R. 1823, 1824; App. 25a; 405 S.C. at 349-50, 748 S.E.2d at 211.
- (2) Cope seemed to the police to have reacted strangely and evasively to his daughter's death. App. 24a; 405 S.C. at 325, 748 S.E.2d at 198.

- (3) He initially offered an implausible explanation that she had accidentally strangled herself with a strip of blanket from her bed. App. 3a-5a; R. 970, 1827, 405 S.C. at 325, 748 S.E.2d at 198).
- (4) After being told that semen and saliva (all of which later proved to belong to Sanders) had been found on the victim, Cope directed police to a towel stained with his own semen that was tucked away in a hallway bookcase. App. 5a; R. 1624, 2244, 2933-34.
- (5) The victim's younger sister stated she and the victim had locked the front door and put the chain latch in place before going to bed. App. 7a; 405 S.C. at 331, 748 S.E.2d at 201.
- (6) The victim's clothes appeared to have been pulled partly back on after her death, and the body seemed to have been cleaned up. App. 3a, 25a; 405 S.C. at 326, 748 S.E.2d at 198.

## 2. The excluded evidence of Sanders' other crimes

Cope attempted to counter the force of most of these circumstances by pointing out that they were either inherently subjective (first responders found Cope's initial behavior to be peculiar), ambiguous (Cope insisted that the semen-stained towel had been placed in the bookcase long before the murder, it was not found in the room where the murder occurred, and nothing linked it to the crime), or of doubtful reliability (the victim's sister did not mention securing the front door on the night of the murder until nearly three years after the crime, as prosecutors were preparing her to testify at trial). As for Cope's confessions, they contained no incriminating facts that the police did not already know (or at least think they knew) before he made them, and many of the facts to which he confessed, such as how the strangulation occurred, and his use of a broomstick and (in a later version) a dildo to sodomize the victim, failed to match autopsy results or physical evidence found at the scene. Cope also pointed to physical evidence that contradicted the state's theory, such as the fact that Cope's wife's purse was found opened on the victim's bed (sug-

gesting an attempted robbery), and that police found a flashlight in the victim's room that no member of the Cope household recognized. But the core of Cope's defense to the prosecution's joint-enterprise theory was Sanders' own well-established pattern of criminal activity—that he was a serial burglar and rapist who invariably operated alone when he broke in on and assaulted his female victims, and that he never left signs of forced entry.

At a pretrial hearing to determine whether Cope would be permitted to offer evidence of Sanders' other break-ins and sexual assaults, Cope's attorneys conclusively established that in the six weeks after he left his saliva and semen on Cope's daughter, Sanders attacked four more female victims in the course of nighttime residential burglaries. Cope's evidence of Sanders' other crimes included the following facts (taken from the South Carolina Supreme Court's opinion):

First Incident: At around 11:00 p.m. on December 12, 2001, Sanders knocked on the door of a 60-year-old woman and asked to use her phone. He then pushed his way inside, carried her to the bedroom, kissed her on the mouth and breasts, and raped her. Sanders made her give him twenty dollars from her pocketbook.

Second Incident: Three days after the previous attack, at around 1:00 a.m. on December 16, 2001, Sanders entered another victim's second story apartment through an unlocked patio door. The victim woke up with Sanders standing over her. She screamed. Sanders put his hand over her mouth and trapped her under a rocking chair. She continued screaming and her dog began to bark. One of her daughters ran in to see what was wrong, and Sanders then fled by jumping off her balcony.

Third Incident: A 20-year-old woman testified she returned to her apartment near Cope's home, around 7:30 or 8:00 p.m. on December 19, 2001, and after going to the bathroom, she noticed that her front door was cracked. As she walked towards the door to close it, Sanders came through the door. The victim began fighting him, and he tried to put a plastic bag over her head, which she was able to claw through and remove. Sanders then tried to wrap

a rug around her head, and he turned her over on her stomach, pulled up her shirt, and attempted to unbuckle her belt. The victim was able to stab Sanders several times in his leg with a pen, after which he shoved her into a bedroom and fled. She testified he did not choke her.

Fourth Incident: Around midnight on January 12, 2002, Sanders attacked a 19-year-old woman inside her own home, which was located within a few blocks of Cope's house. During the course of a lengthy struggle, Sanders put her in a choke hold and pulled her off the ground. Sanders tried to steal from the victim's purse, and she attempted without success to spray him with Mace. The victim was eventually able to drive Sanders away after stabbing him repeatedly with a screwdriver. She testified there were no signs of forced entry, and neither she nor the police were able to determine how Sanders gained access to her house.

State v. Cope, App. 11a-12a; 405 S.C. at 335-6, 748 S.E.2d at 203-4. Cope's proffer also established that each of the four victims described Sanders as a lone perpetrator. In none of the four cases, moreover, did Sanders leave any evidence of forced entry while burglarizing his victims' homes, and in the last two break-ins, as in the Cope case, no witness offered any explanation for how Sanders gained entry.

Although Judge Hayes found that Cope had presented clear and convincing evidence that Sanders committed all of these other crimes, he nevertheless refused to admit the testimony, ruling that Sanders' other crimes were too dissimilar from the Cope sexual assault and murder to be admitted under Rule 404(b), SCRE. R. 889-890. The judge also denied Cope's motion to sever his trial from Sanders' in order to eliminate any possibility of prejudice to Sanders, indicating that because he viewed Sanders' other burglaries and sexual assaults as irrelevant to Cope's guilt or innocence, severing Cope's trial from Sanders' would not make them any more admissible. R. 891-893.

3. The excluded evidence of Sanders' jailhouse admissions.

Cope further attempted to introduce testimony concerning incriminating statements made by Sanders after his arrest that contradicted the state's conspiracy theory. In late 2002, a convicted burglar named James Hill was confined with Sanders (who was not yet a suspect in the Cope case) at the Perry Correctional Institution. R. 3426, 3428. Hill testified outside the presence of the jury that in November or December of that year, he overheard Sanders talking to another inmate. According to Hill, Sanders and the other inmate

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 [Sanders] 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. . . . He made remarks about oral and anal sodomy. He made remarks of, I believe, he said smothering the child. . . . His words were that he fucked her. He fucked her good.

R. 3429-30. 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."

R. 3431. Hill prefaced this testimony by describing himself as a reluctant defense witness who had received no inducement to testify, was then recovering from an unrelated prison stabbing, and could expect only increased risk to his personal safety for incriminating Sanders. R. 3427-3428.

After this proffer, Sanders' counsel objected to Hill's testimony concerning Sanders' admissions, arguing that the statements were irrelevant "because there ha[ve] been no identifying characteristics." R. 3432-3433. Although neither Sanders nor the state pointed to any other unsolved rape and murder of a "little girl in



Rock Hill” about which Sanders could have been bragging, Judge Hayes sustained Sanders’ objection, noting that Hill’s proffered testimony did not include any specification by Sanders as to “the time, place, or other circumstances” of the crime. R. 3433.

#### 4. The defense case and closing arguments

Cope testified in his own defense, denied guilt, insisted that his various confessions were false, and claimed never to have met Sanders until their cases were joined for trial. Through 12 additional lay and expert witnesses, Cope also:

- showed that he had actually passed the polygraph test, not failed it (as the police had told him just before he began to confess),
- challenged parts of the state’s pathology evidence,
- established that the front door could easily have been jimmied,
- discredited a supposedly incriminating letter, and
- attacked the reliability of his confession, and through the testimony of Saul M. Kassin, Ph.D., a prominent researcher in the field, highlighted many aspects of both the interrogations and of Cope’s ensuing statements that were characteristic of custodial confessions later demonstrated to be wholly false.

App. 8a-9a; 405 S.C. at 331-334, 748 S.E.2d at 201-202. For his part, Sanders did not testify, and rested without presenting any evidence.

Had the trial court admitted Cope’s evidence about Sanders’ other crimes and his jailhouse admissions, the prosecution would have faced the daunting task of convincing the jury that even though Sanders had unquestionably committed his second, third, fourth, and fifth burglaries as a predatory “lone wolf” who always managed to enter without leaving signs of breaking, in the first crime in the series,

he had instead collaborated with a complete stranger who had invited him to enter the family home in the middle of the night in order to sexually assault the homeowner's child in her bed. But in the absence of all of this readily-available and undisputed evidence about Sanders, the prosecution was free to cite the lack of any apparent forced entry at the Cope home as proof that Sanders could only have gained entry with Cope's assistance. And the prosecutor took full advantage in closing argument, repeatedly stressing to the jury that the lack of visible evidence of a break-in necessarily meant that Cope "must have" let Sanders into the family home on the night of the murder. R. 3575, 3595-99, 3607 ("Sanders came in when Cope opened the front door and took the latch off . . ."), 3628-29 ("And the DNA? . . . It is direct evidence of [Sanders'] presence in the house that day, coupled with the fact of the latch, and the testimony of the house not being broken into . . . it is overwhelming evidence of a conspiracy between these two men"), 3630 ("If Sanders did it alone, what else would have to be true? There is no sign of forced entry . . .").

##### 5. Cope's appeals in the South Carolina state courts

The jury convicted both Cope and Sanders of all charges, including murder, criminal sexual conduct, and conspiracy, and Judge Hayes sentenced both men to life imprisonment without possibility of parole. Cope appealed to the South Carolina Court of Appeals. That court initially rejected all but one of his claims, including that the trial court had violated his federal due process right to present a defense by excluding his evidence about Sanders' other break-ins and jailhouse admissions. In its first opinion, however, the Court of Appeals sustained Cope's attack on

the sufficiency of the evidence of conspiracy, noting that the prosecution had presented no direct or circumstantial evidence of an actual agreement between Cope and Sanders, and holding that “[a]ny inference that they made an agreement to accomplish a shared, single criminal objective would be speculative at best.” Quoted in App. 28a; State v. Cope, 405 S.C. at 353, 748 S.E.2d at 213 (2013) (Kittredge, J., dissenting). But after both parties sought rehearing (and after Cope pointed out that without proof of a conspiracy, there remained no viable theory under which both men could be guilty of the same murder and sexual assault), the appeals court “reversed course,” id., and ruled that the evidence of conspiracy was sufficient after all. App. 50a-53a; State v. Cope, 385 S.C. 274, 684 S.E.2d 177 (Ct. App. 2009).

Cope appealed to the South Carolina Supreme Court. By a vote of 3-2, that court rejected Cope’s claims regarding the exclusion of evidence of James Sanders’ other crimes and jailhouse admissions, and affirmed. Although the state supreme court acknowledged Judge Hayes’ finding that petitioner had proven that Sanders committed each of the four other break-ins and assaults by clear and convincing evidence, it held that the judge did not abuse his discretion in excluding them because Sanders’ other crimes differed from the Cope murder.

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 dif-

ferences, we cannot conclude the trial judge abused his discretion in finding the evidence was inadmissible under a Rule 404(b)/Lyle analysis.

App. 13a-14a; 405 S.C. at 338, 748 S.E.2d at 205. Addressing petitioner's federal constitutional objection to the exclusion of this evidence under Holmes v. South Carolina, the state court noted that in Holmes the defendant's evidence of third party guilt had been erroneously excluded based solely on the strength of the prosecution's case, and continued:

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. 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.

App. 15a; 405 S.C. 339-340, 748 S.E.2d at 205-206.

The majority then went on to reject Cope's related argument that Judge Hayes should have severed his trial from Sanders' so as to allow the other-crimes evidence to be admitted as proof of "third-party guilt." Without any discussion of the unusual context in which Cope's third-party guilt claim arose, and the fact that Sanders' own guilt was already conclusively established, the state court held that the proffered evidence concerning Sanders' other crimes "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," and that the evidence was inadmissible because "[e]vidence 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.” Id. (internal quotation omitted).

As for Judge Hayes’ refusal to admit any evidence concerning Sanders’ jail-house admissions concerning how he broke in, apparently alone, to rape and murder a “little girl in Rock Hill,” the state supreme court began by rejecting the judge’s holding that the evidence was irrelevant. App. 18a; 405 S.C. at 342, and n. 6, 748 S.E.2d at 207, and n.6. However, analyzing the statements as out-of-court admissions against Sanders’ penal interest under Rule 804(b)(3), the state court majority held that they were properly excluded as hearsay because Cope failed to show that “corroborating evidence *clearly* indicates the trustworthiness of the statements.” App. 18a-19a; 405 S.C. at 342, 748 S.E.2d at 207 (emphasis in original).

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.

App. 18a-19a; 405 S.C. at 343, 748 S.E.2d at 207. In excluding the Hill testimony on this basis, the state supreme court failed to address Cope’s additional claim that such a rigid application of the hearsay rule would violate Cope’s federal constitutional right to present his defense under Chambers v. Mississippi, 410 US 284

(1973), Crane v. Kentucky, 476 U.S. 683 (1986), and Rock v. Arkansas, 483 U.S. 44, 61-62 (1987). State v. Cope, Brief of Petitioner at 53-55.

Justice Kittredge, joined by Justice Pleicones, dissented. He agreed with the majority that the admission of Sanders' other sexual assaults under Rule 404(b) was a matter of judicial discretion, but cautioned that "[i]n examining the issue, a trial court must exercise its evidentiary discretion in the context of the situation presented, not in a formulaic manner." The dissent continued,

Here, the context that must be considered is a criminal defendant's attempt to present evidence that a co-defendant committed these offenses alone, which was entirely consistent with the co-defendant's practice of committing similar offenses alone. Respectfully, it strikes me that the academic considerations of the majority ignore the reality of the unique facts presented . . . .

More to the point, a myopic approach to matters such as the similarities or lack of similarities between the charged crime and other crimes serves little purpose in this case. Any suggested dissimilarities are of no moment, for it is not seriously challenged that Sanders raped and murdered Child and, by clear and convincing evidence, committed the four other crimes. Because it is beyond serious dispute that Sanders committed all of the offenses, I see no reason to determine whether the similarities provide a suitable nexus between the other crimes and the charged offense. The relevance of this evidence is unmistakable—Sanders, as a serial rapist, always acted alone.

App. 28a-29a; 405 S.C. at 354-355, 748 S.E.2d at 213-214 (emphasis added, citation omitted). Then, in a footnote, the dissenters implicitly underscored the similarity between the South Carolina court's error here and the one it committed in Holmes:

With great respect, it appears the majority has permitted the State's "theory" of the case to dictate the admissibility or inadmissibility of a defendant's alleged exculpatory evidence. In my view, by considering only the State's theory in the 404(b) analysis, the majority has essentially all but assured Cope, or any other defendant, would be unable to present evidence in his defense when prosecutors cast wide theories of guilt and conspiracy.

App. 29a; 405 S.C. at 355, n. 11, 748 S.E.2d at 214 n. 11 (emphasis supplied). Next, the dissent argued that even if Cope had to establish a high degree of similarity between the murder and all of Sanders' other crimes, he had carried that burden.

Responding to the majority's list of supposed differences between the murder and Sanders' subsequent attacks, Justice Kittredge wrote,

I am unpersuaded by the suggestion that Sanders' other sexual attacks were not sufficiently similar to the rape and murder of the twelve-year-old child. I do not understand why it is so remarkable for a rapist who assaults women ranging from age nineteen to sixty to also assault a twelve-year-old female child. The notion that these acts are “dissimilar” is especially troubling here, where it is clearly established Sanders committed all the assaults, including the rape and murder of Child.

\* \* \* \* \*

I find there is a striking similarity between the facts of this case and the proffered evidence of Sanders' other sexual assaults. All five incidents occurred within a six-week period, and each of the four other incidents occurred within five miles of Cope's home. Moreover, in all five cases, Sanders was a stranger to the victim, yet there were no signs of forced entry to any victim's home. In light of the testimony that the assailant is acquainted with the victim in the vast majority of sexual assault cases, the presence of these two common features is significant. In my view, the other four incidents present a compelling pattern in terms of time, geography and commonality of features—a pattern which is entirely consistent with the facts of this case and material to Cope's theory that Sanders acted alone.

App. 30a; id. (footnote omitted). Finally, citing this Court's unanimous decision in Holmes, Justice Kittredge concluded that “in light of the importance of the proffered evidence to Cope's theory of the case . . . the exclusion of Sanders' other crimes violated Cope's due process guarantee of ‘a meaningful opportunity to present a complete defense.’ Holmes v. South Carolina, 547 U.S. 319, 324 (2006).” App. 31a-32a; 405 S.C. at 356-357, 748 S.E.2d at 215.

The dissent also disagreed with the majority's rejection of Cope's claim regarding the exclusion of Sanders' jailhouse statements. Noting that the prosecution did not even object to the evidence at trial, and that the majority had now rejected the relevancy rationale of both Sanders' trial objection and Judge Hayes' ruling, the dissent continued:

I would not strain to such lengths to sustain the exclusion of this evidence. There is no plausible deniability as to Sanders' guilt, as he left a bite mark on Child's breast and his semen was found on Child's pants. . . . The supposed lack of specificity in Hill's testimony is unavailing, for there is no evidence of another young girl in Rock Hill who was raped and murdered during the same time frame.

Moreover, the majority finds it significant that "there is absolutely no mention of Cope" in Hill's proffered testimony. It seems to me, however, that the absence of any reference to Cope in Sanders' alleged jailhouse confession serves to enhance, rather than diminish, the statement's relevance and corresponding prejudice to Cope by its exclusion. This is especially evident where Cope expressly sought to refute the claim of a conspiracy with Sanders.

405 S.C. at 357-58, 748 S.E.2d at 215 (citation and parenthetical omitted). And in a footnote, referring back to the majority's rationale for upholding the exclusion of Sanders' other crimes, the dissenting justice remarked, "Again, I believe it improper for the State's theory of a case alone to control the admissibility or inadmissibility of a co-defendant's exculpatory evidence." App. 31a-32a; 405 S.C. at 358, n. 13, 748 S.E.2d at 215, n. 13.

#### WHY THE WRIT SHOULD BE GRANTED

In rejecting Cope's claim that the exclusion of all of his evidence regarding the actual perpetrator Sanders violated Cope's federal constitutional right to present his full defense, the state supreme court committed three serious errors war-



ranting intervention by this Court.

First, the state court failed give effect to a line of decisions by this Court stretching from Washington v. Texas, 388 U.S. 14 (1967), and Chambers v. Mississippi, 410 U.S. 284 (1973), to Holmes v. South Carolina, 547 U.S. 319 (2006), establishing that whether the exclusion of a criminal defendant's evidence at his trial violated his right to present a complete defense under the Due Process Clause of the Fourteenth Amendment is a separate question from whether the evidence was admissible under state law.

Second, the South Carolina Supreme Court replicated the error it committed in Holmes v. South Carolina, by evaluating the excluded evidence of Sanders' jailhouse admissions and his pattern of similar criminal behavior through the lens of the prosecution's theory of the case, rather than in light of the record as a whole.

Third, the state court's opinion fails to take into account, and to some extent itself exemplifies, the tendency of even unreliable confessions to trump unassailable DNA-based proof of innocence due to the uniquely powerful biasing effect of confession evidence in criminal cases.

**A. By subordinating the federal constitutional issue to its restrictive analysis of the admissibility of Cope's evidence under Rules 404(b) and 804(b)(3) of the South Carolina Rules of Evidence, the state court failed to afford Cope's federal claim the independent assessment that this Court's precedents require.**

In a series of cases beginning with Washington v. Texas, 388 U.S. 14 (1967), this Court has made clear that when a state evidentiary rule conflicts with a criminal defendant's fundamental right to present evidence in his own defense, due pro-

cess requires that the state evidentiary rule give way. Some of these conflicts have involved state law rules that “could not be rationally defended,” Nevada v. Jackson, 133 S.Ct. 1990, 1993 (2013), and that were thus probably unenforceable in any case. Washington v. Texas (striking down state rule that barred defendants (but not prosecutors) from calling co-defendants as witnesses); Chambers v. Mississippi (holding that an archaic “voucher” rule unfairly prevented the defendant from calling and cross-examining a witness to establish the witness’s out-of-court admission that he, not the accused, was the guilty party); Crane v. Kentucky, 476 U.S. 683 (invalidating Kentucky rule that barred evidence about the taking of a confession as an improper attempt to relitigate the trial judge’s pretrial voluntariness ruling). However, on other occasions the Court has sustained challenges to the application of relatively commonplace state evidentiary rules because they were being enforced in a manner that was disproportionate to the goals the rules were designed to serve. E.g. Rock v. Arkansas, 483 U.S. 44 (1987) (disapproving per se state evidentiary bar to hypnotically-refreshed testimony only because it had been (1) inflexibly applied (2) to a criminal defendant)); Holmes v. South Carolina (reversing state court’s application of evidentiary rule that required exclusion of third-party-guilt evidence based solely on the strength of the prosecution’s case); Green v. Georgia, 442 U.S. 95 (1979) (per curiam) (reversing death sentence due to trial court’s application of hearsay rule to exclude co-defendant’s apparently reliable admission that he, not defendant, had shot the victim). Taken together, these cases establish a bedrock principle that

“[w]hether 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.” Crane [v. Kentucky], 476 U.S. at] 690 (quoting California v. Trombetta, 467 U.S. 479, 485 (1984); citations omitted). 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.” [United States v. Scheffer, 523 U.S. 303,] 325 (1998)], (quoting Rock v. Arkansas, 483 U.S. 44, 58 (1987)).

Holmes, 547 U.S. at 324. And as cases such as Green, Rock, and Holmes make clear, whether otherwise unremarkable or unobjectionable rules have been applied to exclude defense evidence in a manner “disproportionate to the purposes they are designed to serve” requires a case-by-case evaluation of the value of the excluded evidence and the extent to which the exclusion actually serves the purpose of the rules at issue.

Against this backdrop, the inadequacy of the South Carolina Supreme Court’s analysis of Cope’s federal constitutional claim is plain. Not only did the Court fail to recognize the critical importance of the Sanders evidence to Cope’s defense of actual innocence, its decision to exclude it disserved the purposes of the evidentiary rules upon which the state court relied.

The two state law evidentiary rules at issue — Rule 404(b) and the corroboration requirement of the “penal interest” hearsay exception of Rule 804(b)(3) — are, of course, well-established and entirely uncontroversial. Rule 404(b) excludes evidence of criminal propensity because, “[a]lthough ... “propensity evidence” is relevant, the risk that a jury will convict for crimes other than those charged—or that, uncertain of guilt, it will convict anyway because a bad person deserves punish-

ment—creates a prejudicial effect that outweighs ordinary relevance.” Old Chief v. United States, 519 U.S. 172, 181 (1997) (quoting United States v. Moccia, 681 F.2d 61, 63 (1<sup>st</sup> Cir. 1982) (Breyer, J.)). Rule 804(b)(3) creates a hearsay exception for statements against penal interest but erects a special reliability requirement to prevent criminal defendants from fabricating spurious hearsay “confessions” from third parties and then demanding that they be spread before the jury at trial. See F.R.E. 804 advisory committee notes (noting a “distrust” of such confessions “arising from suspicions of fabrication either of the fact of the making of the statement or its contents”).

The South Carolina Supreme Court majority’s discussion of these issues, however, contains no reference to the purposes of either rule. Instead, after interpreting Cope’s 404(b) claim as being that Sanders’ various burglaries and sexual assaults involved a “common scheme or plan,” the state court identified several immaterial variations in Sanders’ series of crimes to hold that the Sanders’ other crimes evidence was properly excluded. The state court never even mentioned the fact that the setting of Cope’s 404(b) argument was utterly different from all the cases cited by the court—Sanders’ guilt of both the murder and of all of the other crimes was undisputed, and Cope offered the other-crimes evidence merely to establish that since Sanders was a burglar who invariably operated alone, it is more likely that he operated alone when assaulting Cope’s daughter. Rather, the state court simply asked whether the other-crimes evidence exhibited that high degree of similarity necessary to prove *a defendant’s guilt* of the crime charged. Then, having rejected

Cope's 404(b) argument—and with it, the heart of his defense—the state court majority summarily dismissed the relevance of Holmes to this case: “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. [W]e find the exclusion of this testimony was appropriate for those exact reasons . . . .” 405 S.C at 339-340, 748 S.E.2d at 205-206.

It is impossible to square such dismissive boilerplate with this Court's cases regarding the right of criminal defendants to present evidence of their innocence. The state court did not explain who would have suffered “unfair prejudice” had the jury been made aware that the man whom the state depicted as Cope's collaborator in the rape of and murder of his 12-year-old daughter was in fact operating as an opportunistic lone-wolf burglar and rapist in the vicinity of the Cope home, and that the absence of signs of forced entry was in reality a signature feature of Sanders' solo burglaries.<sup>3</sup> Nor did the state court offer any hint of which “issues” would have been “confused” by this evidence, or how the jury would have been misled. The issue on which Cope's fate depended was whether Sanders acted alone when he ille-

---

<sup>3</sup>It is unlikely that the court could have been concerned with prejudice to *Sanders*, since any conceivable prejudice to him could have been averted by granting Cope's motion to sever their trials. Severance would also have prevented the prosecutor from beginning his closing argument by citing the two co-defendants' mutually antagonistic defenses as proof that both were guilty. R. 3557 (“How can this be? We've been in trial now for 11 days now and both of these men are innocent? You just heard [Cope's attorney] very persuasively and passionately (pounds on the rail) ‘He's innocent, he's innocent.’ [Sanders' attorney] (pounds), ‘He didn't prove it, folks. He's guilty. My guy is innocent.’ Very artful. Very entertaining.”)

gally entered Cope's home and raped and murdered Cope's daughter, or whether Cope invited Sanders into his home and then assisted Sanders in his crimes against her. This issue would have been illuminated, not confused, by allowing the jury to place Sanders' criminal behavior in context. And the jurors were perfectly capable of evaluating whether the state's joint-enterprise theory still made sense—beyond a reasonable doubt—once they knew exactly whom Cope was supposed to have been collaborating with.

But the state court majority considered none of this. Rather, its entire response to Cope's reliance on Holmes v. South Carolina was to point out a superficial distinction between Holmes and this case, namely, that the state court had relied on the *prosecution's* evidence to exclude Holmes' third-party guilt evidence, whereas here, Cope's critical evidence of Sanders' modus operandi was excluded because it was "not sufficiently similar." But nowhere does the court consider *why* similarity even matters under 404(b), the objectives that Rule 404(b) is designed to serve, or the unfairness of requiring Cope to stand trial alongside Sanders as his co-defendant and alleged co-conspirator, but without the ability to present the most powerful proof of how unlikely the state's conspiracy theory actually was. Had the state court considered any of this, it would have had to acknowledge that, just as in Holmes, Judge Hayes' misapplication of a state evidentiary rule was "arbitrary or disproportionate to the purposes [the rule was] designed to serve." Rock v. Arkansas, 483 U.S. at 56.

As for Cope's federal constitutional claim concerning the exclusion of Sanders' jailhouse admissions, the state court majority limited its analysis to whether Sanders' jailhouse admissions were sufficiently corroborated to qualify under the "penal interest" hearsay exception of Rule 804(b)(3), SCRE. Then having acknowledged that Sanders' admissions were relevant (and thereby rejecting the actual basis upon which Judge Hayes excluded them at trial), the majority went on to conclude that they were not sufficiently corroborated because Hill could not provide the exact date or the names of the inmates to whom Sanders was making the statements, and because Hill's version allegedly "gets some facts wrong," and did not mention Cope. On this basis, the majority concluded 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." App. 19a; 405 S.C. at 343, 748 S.E.2d at 206-207.

The admittedly "relevant" statement by Sanders amounted to an admission that he had murdered "a little girl in Rock Hill" (obviously Cope's daughter) *by himself*, and that he did so after breaking into the girl's home (rather than being welcomed in by Cope, as the state's theory required the jury to believe). The jury could not have convicted Cope unless it either disbelieved Hill's account of Sanders' statement, or else rejected Sanders' unprompted admission for some other reason. As the dissent pointed out, Hill's testimony amounted to "the kind of typical jailhouse confession evidence that is routinely allowed in evidence" when offered by the state, and in those cases the evidence is even less reliable because "the testifying

inmate expects to gain from his assistance to the prosecution.” App. 32a; 405 S.C at 358, 748 S.E.2d at 216-216. This observation echoes Washington v. Texas, 388 U.S. 14 (1967), a case in which this Court underscored the glaring asymmetry of a Texas rule that barred defendants, but not the state, from calling alleged accomplices as witnesses:

The absurdity of the rule is amply demonstrated by the exceptions that have been made to it. For example, the accused accomplice may be called by the prosecution to testify against the defendant. Common sense would suggest that he often has a greater interest in lying in favor of the prosecution rather than against it, especially if he is still awaiting his own trial or sentencing. To think that criminals will lie to save their fellows but not to obtain favors from the prosecution for themselves is indeed to clothe the criminal class with more nobility than one might expect to find in the public at large.

388 U.S. at 22-23.

Given the critical importance of the Sanders admissions to Cope’s defense, one might have expected some justification for their exclusion that actually took into account the reason for Rule 804(B)(3)’s corroboration requirement. But once again, the state court majority treated the issue as one of empty formalism: if a highly skeptical observer could come up with reasons to doubt Hill’s account of Sanders’ self-incriminating statements, then the statements were not sufficiently corroborated to overcome the hearsay rule, and they could properly be kept from the jury. No matter that the underlying subject of the statement—Sanders’ rape and murder of the victim—was conclusively proven by unchallenged DNA evidence. Or that the supposed factual discrepancies in the statements as Hill recalled them could just as easily suggest their authenticity, rather than that they had been con-



trived for Cope's benefit. And no matter that when it is offered by the prosecution, such jailhouse eavesdropping constitutes the daily grist for the mill of the criminal trial courts—and all without a need to meet any preliminary threshold of reliability. See Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 Wis. L. Rev. 291, 345-346, 355-366 (2006).

The South Carolina Supreme Court's summary disposition of Cope's federal claims shows that, even after Holmes, that court continues to minimize the federal constitutional significance of excluding a criminal defendant's evidence that logically tends to prove his innocence, or that makes less probable the state's hypothesis of his guilt. The Court should once again grant review to demonstrate the proper methodology for evaluating claims that a state court evidentiary ruling has denied a criminal defendant a fundamentally fair trial, after accurately weighing the state interest actually served by enforcement of the evidentiary rules at issue against the probative force of the excluded evidence.

**B. South Carolina violated petitioner's federal constitutional right to present his complete defense under Holmes v. South Carolina by evaluating the logical relevance of petitioner's evidence with reference only to the prosecution's theory of his guilt, rather than in light of all of the evidence, including evidence of his innocence.**

The South Carolina Supreme Court compounded its failure to independently evaluate petitioner's federal due process claim under the Washington/Chambers/-Holmes line of cases by a second error. To the extent that the state court did attempt to assess the probative force of Cope's excluded evidence, it replicated the error it committed in Holmes v. South Carolina by evaluating that evidence through

the lens of the prosecution's theory of Cope's guilt, rather than in light of all the evidence and the issues before the jury. It is perhaps not surprising that the trial record reads like a replay of this aspect of Holmes, since the trial judge and the prosecutors in this case did not have the benefit of this Court's 2006 decision in Holmes during petitioner's 2004 trial. What is more surprising, and what cries out for correction by this Court, is the subsequent post-Holmes refusal of the South Carolina Supreme Court majority to apply Holmes to such similar facts, especially in the face of such strong evidence of Cope's innocence and the falsity of his confessions.

As noted earlier, the state supreme court majority distinguished Holmes on the grounds that it was excluding Cope's evidence about Sanders because of differences between Sanders' other crimes and the Cope murder, not (as in Holmes) on the strength of the state's case alone. But if the state court majority had looked more carefully at the factual distinctions between this case and Holmes, it would have seen that they actually weigh in favor of admitting Cope's evidence rather than excluding it. This is so because the state court's primary rationale for exclusion in Holmes—the danger of misdirecting the jury's attention to groundless theories involving farfetched alternate suspects—was not even arguably present here. Sanders was not a far-fetched suspect—he was a co-defendant in the case, he was tried together with Cope, and he was the only suspect whose saliva and semen was found on the victim's body. Nor did discussing Sanders's other crimes have the potential to mislead. As the state supreme court dissenters pointed out, "it is beyond serious dispute that Sanders committed all of the offenses," App. 29a; 405 S.C. at

355, 748 S.E.2d at 214 (emphasis in original), so there is no possibility that admitting evidence of Sanders’ other crimes would have posed any risk of “confusion of the issues, or [had the] potential to mislead the jury.”

The only difference between the state supreme court’s decision in Holmes and its other-crimes ruling here is that in Holmes, the state court upheld exclusion of the third-party guilt defense based entirely on the supposed strength of the prosecution’s DNA evidence whereas here, the court’s basis for exclusion rested not only on the supposed strength of the prosecution’s case against Cope but an additional basis that was equally, if not even more, arbitrary; it required a nearly-perfect match between the crime at issue and Sanders’s other crimes, without any regard to whether each similarity or difference related to any actual issue in the case.

Thus the state court found it significant that in Sanders’ other opportunistic sexual assaults, the victims he encountered ranged in age from 19 to 60, whereas the Cope victim was 12, or that Sanders killed only his youngest victim, and not the others. Similarly, the majority discounted the significance of Sanders’ invariable pattern of gaining entry to his victims’ homes at night without leaving signs of forced entry simply because his methods “varied wildly.” This reasoning might make sense if Sanders’ identity had been at issue, but it was not. And the court’s reasoning overlooks that the theory by which the prosecution attempted to reconcile its accusation of Cope with the presence of Sanders’ DNA—that Cope invited Sanders in, in the middle of the night, to have his way with Cope’s daughter—necessarily discounted every mode of entry that Sanders actually used in four subsequent

crimes that he committed close in time and place to the Cope murder. The majority noted that Sanders' other crimes all occurred after the Cope murder, but suggests no reason why the sequence of his crimes matters. Such were the "differences" between Sanders' various crimes on which the holding below rests. Compared to such a rationale, Judge Hayes' decision to exclude the defense evidence of third-party guilt in Holmes appears almost reasonable.

Moreover, the state court's actual analysis reveals the same readiness it displayed in Holmes to credit the state's side of important factual disputes in deciding the admissibility of the defendant's evidence. For example, the state court majority cites the "fact" that the Cope child was penetrated by a foreign object as one of the significant differences between that crime and all of Sanders' other sexual assaults. But (just as the reliability of the state's DNA evidence was credibly attacked in Holmes), the evidence at Cope's trial included strong reasons to doubt that any foreign object was actually used in the sexual assault. A defense forensic pathologist disputed the state's claims that the victim's internal injuries established (or were even consistent with) the use of a long hard object such as a broom handle. And although Cope's first and second confessions referred to his having used a broom handle to sodomize his daughter, and his third substituted a dildo, the police either failed to find such objects or failed to find Cope's daughter's DNA on them. Nevertheless, to the state court, Sanders' failure to employ an inanimate object to sexually attack his last four female victims demonstrates the lack of any common scheme between his other opportunistic crimes and the assault upon the Cope child.

It was this ready acceptance of the state's case to which the dissenters below referred when they observed that "the majority has permitted the State's 'theory' of the case to dictate the admissibility or inadmissibility of a defendant's alleged exculpatory evidence." 748 S.E.2d at 214 n. 11. And this mode of analysis, which assumes as true that which the state must prove, recalls the South Carolina court's uncritical acceptance of the prosecution's DNA evidence in Holmes despite a strong defense challenge to its reliability.

The same inclination to credit the prosecution's theory of Cope's guilt is on display in the South Carolina Supreme Court's affirmance of the lower courts' decision to exclude James Hill's testimony that he overheard Sanders boasting about the murder to other inmates while awaiting trial. In holding that Sanders' out-of-court admissions were not sufficiently corroborated to be admitted as statements against his penal interest under Rule 804(b)(3), SCRE, the court noted that the testimony did not include the "time, place or circumstances" of the crime about which Sanders was boasting, that Hill did not mention to whom the statements were made, and that Hill "even gets some salient facts wrong," because "[t]here was no evidence oral sex was performed on Child and she was not smothered." The state court also inexplicably thought it significant that "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." App. 18a-19a; 405 S.C. at 343, 748 S.E.2d at 207-208 (emphasis added). Leaving to one side for the moment that Sanders' failure to mention Cope is actually exculpatory of Cope, the record does

not support some of the court's criticisms of Hill's testimony (none of which were raised by the prosecution at trial), and others are immaterial. It is true that Hill was "unsure" of the identity of the person to whom Sanders was speaking (he actually stated that he believed him to be an inmate named "Holly"). But Hill testified that he overheard Sanders' statements while trying to remain inconspicuous in his own cell, and that he identified Sanders as the speaker not by sight, but by the distinctive sound of his voice. R. 3482 ("He had like an old man's voice. A raspy-ish voice"). Under these circumstances Hill's inability to identify with certainty the person to whom Sanders was speaking is unremarkable, and hardly suggests that his testimony was fabricated. As for the details that Sanders got "wrong," the fact that police found no evidence of "oral sodomy" does not mean that it did not occur—Sanders did bite the Cope child's breast—and the difference between "smothering" and "strangling" likewise is not so large as to show that Hill did not actually overhear Sanders bragging about the crime. The prosecution chose not to explore these supposed variances between Sanders' alleged statements and the known facts of the crime on cross-examination, R. 3432, and at trial the state pointed to none of the supposed defects in Hill's account that would loom so large for the state supreme court majority on appeal. In fact, the trial prosecutor raised no objection at all to the admission of Hill's testimony concerning Sanders' jailhouse statements, and neither the prosecutor, Sanders' attorney, nor Judge Hayes ever mentioned hearsay or Rule 804(b)(3) as a basis for excluding it. Moreover, whatever discrepancies may be detectable in Hill's recollection of Sanders' statements are minor compared to the

gulf between *Cope's* confessions and the state's actual case against him. For while Cope confessed to assaulting and killing his daughter *by himself*, the state's claim was that he actually did so while participating in a depraved conspiracy with the serial burglar and rapist who deposited his saliva and semen on the victim's body and clothing.

Finally, and most egregiously, the state court stressed that Hill's account of Sanders' jailhouse statements included "absolutely no mention of Cope." But the absence of any reference to Cope is the very reason why the Sanders statements exculpated Cope. Simply put, Hill overheard Sanders boasting about his crime in such a way as to make it clear that Sanders committed it *alone*. As Justice Kirtledge observed in dissent, "the absence of any reference to Cope in Sanders' alleged jailhouse confession serves to enhance, rather than diminish, the statement's relevance and corresponding prejudice to Cope by its exclusion." App. 32a. There is simply no logical basis for the state court majority's expressed belief that Sanders would not have made the statements that Hill overheard without mentioning Cope. Unless, that is, the state supreme court's own confidence in Cope's guilt—based solely on the prosecution's characterization of the evidence—had become so strong that it was not prepared to admit any self-incriminating statement by Sanders that did not also fit the state's conspiracy theory against Cope.

Such heavy-handed prescreening of a defendant's evidence of innocence is exactly what that this Court unanimously condemned in Holmes. Here, as in Holmes, both Judge Hayes and the South Carolina Supreme Court lost sight of the bedrock

principle that a criminal defendant's right to present relevant evidence of his innocence is grounded in the Due Process Clause of the Fourteenth Amendment, and is fundamental to the very concept of a fair trial.

To be sure, a strict rule of exclusion regarding other crimes evidence might be justified when admission of such evidence would jeopardize a *defendant's* right to a fair trial. And testimony about improbable out-of-court "confessions" by alternate suspects that a criminal defendant's confederates appear to have contrived for his benefit can likewise be excluded as hearsay under such rules as Rule 804(b)(3), SCRE. But mechanistic application of those same rules is constitutionally impermissible where no defendant would be prejudiced by admission of the evidence, and where, on the contrary, prejudice and unfairness to the defendant's case results from exclusion rather than admission.

Indeed, many jurisdictions have expressly held that a lower standard of admissibility applies to a defendant's proffer of other-crimes evidence in light of the defendant's right to present a defense and the absence, in such cases, of the very prejudice against which the standard is designed to guard.<sup>4</sup> But regardless of

---

<sup>4</sup> "[A] 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." United States v. Stevens, 935 F.2d 1380, 1403 (3rd Cir. 1991) (quoting State v. Garfole, 388 A.2d 587, 591 (N.J. 1978)); State v. Williams, 518 A.2d 234, 238 (N.J. 1986); Commonwealth v. Jewett, 467 N.E.2d 155, 158 (Mass. 1984); People v. Bueno, 626 P.2d 1167, 1169 (Colo. Ct. App. 1981); see also Joan L. Larsen, Of Propensity, Prejudice, and Plain Meaning: The Accused's Use of Exculpatory Specific Acts Evidence and the Need to Amend Rule 404(b), 87 NW. U. L. Rev. 651, 660-62 (1993). In this case, the South Carolina Supreme Court majority acknowledged that Cope's argument for a less stringent standard for admission of "reverse-404(b)" evidence "has some appeal," but ruled that he had failed to preserve the argument for such a



whether state and federal evidence rules apply the same or different standards depending on whether a criminal defendant is the proponent of such evidence, Holmes v. South Carolina reaffirms that as a matter of federal constitutional law, evidentiary rules of exclusion that adversely affect a defendant's right to present a complete defense must be rationally related to the purpose of such rules, which is to "focus . . . the trial on the central issues by excluding evidence that has only a very weak logical connection to central issues." Id., 547 U.S. at 330.

The Sanders other-crimes and jailhouse admissions evidence did not merely have a "logical connection" to the central issue in Cope's case—whether Sanders acted alone, or in tandem with Cope—but, indeed, was essential to Cope's entire defense. The jury's task in this case was to choose between two alternative theories. The state's theory was that Cope and Sanders teamed up to rape and murder Cope's child, even though they were, so far as anyone knows, total strangers to each other, and the main evidence against Cope—his multiple confessions—failed to even mention Sanders. Cope's defense, by contrast, was that his confessions were false, that Sanders entered his home while the family slept (and while Cope was connected by a mask to a loud, whirring, sleep apnea machine, App. 3a), and that Sanders then murdered Cope's child (after leaving his saliva on her breast and his semen on her

---

modified standard because he had not articulated that precise theory before Judge Hayes at trial. App. 14a; 405 S.C. at 338, 748 S.E.2d at 205. Whatever the validity of this procedural default ruling (the state had never suggested any such default during the nearly 12 years that Cope's case had been pending on direct appeal), it obviously concerns only the construction of Rule 404(b) of the South Carolina Rules of Evidence, and has no effect on Cope's federal constitutional claim, which the state court squarely addressed and rejected on the merits.

clothing) and made good his escape. The issue at trial was thus whether the state's theory had been established—to the exclusion of Cope's defense—beyond a reasonable doubt.

In this setting, any rational jury would have been far less likely to credit the state's theory had it known that Sanders was an opportunistic sexual predator whose crimes at the Cope crime home were only the first in a six-week spree in which he always operated alone, never left signs of forced entry, and attempted to sexually assault any female, of any age, whom he encountered. And the jury would also have been far less likely to credit the state's theory had it known that Sanders had been overheard boasting in jail about how he committed the Cope sexual assault and murder *by himself*. Compared to the excluded evidence in Holmes—which included rather improbable claims that police officers and state prosecutors had gratuitously admitted to suborning perjury and manufacturing evidence against Holmes, 547 U.S. at 323—the Sanders evidence in this case was plainly relevant, highly reliable, and essential to Cope's ability to prove that his confession was false and that he was actually innocent. For this reason, the South Carolina Supreme Court's reliance on Rule 404(b), the "third-party guilt" rule, and the corroboration requirement of Rule 804(b)(3) to exclude all of it was arbitrary, disproportionate, and incompatible with "a fundamental element of due process of law." Washington v. Texas, 388 U.S. at 19. As this Court observed in Taylor v. Illinois, 484 U.S. 400, 411 (1988), "[t]he defendant's right to compulsory process is itself designed to vindicate the principle that the 'ends of criminal justice would be defeated if judgments

were to be founded on a partial or speculative presentation of the facts." United States v. Nixon, 418 U.S. [683], 709 [(1974)].” Because South Carolina’s disposition of this very serious case failed to honor the constitutional principles of Holmes v. South Carolina, and so allowed a criminal judgment to rest on just such “partial or speculative presentation of the facts,” the Court should grant certiorari and reverse.

**C. Given the strong biasing effect of confession evidence, the state court’s error exacerbated the already grave risk that the state’s unreliable confession evidence would trump unassailable DNA-based proof of petitioner’s innocence.**

While the unjustified exclusion of so much exculpatory evidence would have been constitutionality intolerable in any criminal case, its prejudicial impact was particularly acute here because the state’s case against Cope rests on his own custodial confessions. This Court has recognized that “[a] confession is like no other evidence. . . . ‘Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so.’” Arizona v. Fulminante, 499 U.S. 279, 296 (1991) (quoting Bruton v. United States, 391 U.S. 123, 139–140 (1968) (White, J., dissenting)). At the same time, the Court has noted recently that “mounting empirical evidence that the[] pressures [of custodial police interrogation] can induce a frighteningly high percentage of people to confess to crimes they never committed.” Corley v. United States, 556 U.S. 303, 320-321 (2009) (citing Steven A. Drizin & Richard A. Leo, The Problem of False Confessions in the Post-DNA World, 82 N.C.L. Rev. 891, 906–907 (2004)). The “frightening” empirical evidence cited in Corley includes numerous cases in which

seemingly reliable confessions were eventually proven false by DNA evidence. But even more frightening is a phenomenon exemplified by this case: confessions can carry such persuasive power that, for prosecutors willing to so deploy them, they can trump even DNA-based proof of innocence. Saul M. Kassin, Why Confessions Trump Innocence, 76 American Psychologist 431 (Sept. 2012). Thus the last two decades of DNA identification technology (and of DNA exonerations) have produced a subset of cases in which prosecutors have advanced, and in some cases judges and juries have accepted, the most fantastic and improbable theories to “explain away” DNA results that contradict suspects’ confessions. Andrew Martin, The Prosecution’s Case Against DNA, New York Times Magazine (November 25, 2011). See also Adam Liptak, Out of Prison, For Some That Might Mean Out of Luck, New York Times (April 1, 2013) (describing similar case of four U.S. Navy sailors who were convicted of rape and murder based on their confessions, despite the fact that DNA excluded them and matched another man who confessed to having committed the crime by himself).

The reasons why confession evidence can be so resistant to refutation by even such conclusive modes of proof as unchallenged DNA test results are evidenced in this case. They include the counter-intuitive nature of a false confession (especially to so grave a crime as the rape and murder of one’s own child), and its tendency to contaminate the rest of a criminal investigation by producing in both police and prosecutors a self-reinforcing, “tunnel vision” approach to the case. But whatever the reasons for this troubling phenomenon, the Due Process Clause guarantees one

simple and effective remedy. A criminal defendant must be allowed to present not just the DNA identification that undercuts his confession, but also such corroborative evidence as places the DNA evidence in its true context, and so elevates the defense case from a technical disquisition on alleles and DNA markers into a coherent and credible narrative of actual innocence. See Old Chief v. United States, 519 U.S. 172, 183 (1997) (discussing the importance of “evidentiary richness and narrative integrity” in criminal trials). The South Carolina courts refused to permit petitioner Cope to present such a case, and so prevented him from overcoming the prosecution’s “DNA denialism” by putting before the jury the evidence he needed to show that the serial burglar and rapist who murdered Cope’s daughter did so without any help from her father. By granting review and reversing this conviction, the Court could thus clarify the federal constitutional basis of criminal defendants’ right to present evidence of their innocence, correct South Carolina’s persistent practice of excluding such evidence, and correct a grievous miscarriage of justice.

## CONCLUSION

For the foregoing reasons, the Court should grant the writ.

Respectfully submitted,

DAVID I. BRUCK \*  
STEVEN A. DRIZIN  
JAMES M. MORTON  
MICHAEL B. SMITH

By: \_\_\_\_\_  
Attorneys for Petitioner Billy Wayne Cope

\* Counsel of Record

January, 2014