THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. Supreme Court

APPEAL FROM YORK COUNTY
Court of General Sessions

John C. Hayes, III; Circuit Court Judge

On Writ of Certiorari to the South Carolina Court of Appeals

Opinion No. 4526 (S.C. Ct. App. refiled September 29, 2009)

The State.....Respondent,

v.

Billy Wayne Cope.....Appellant.

# BRIEF OF PETITIONER


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## QUESTIONS PRESENTED

1.

Given that the State's case against Cope depended on convincing the jury (a) that the burglar and rapist Sanders must have collaborated with Cope in order to rape and murder Cope's daughter and (b) that Sanders could not have entered the Cope home without leaving signs of forced entry unless Cope had let him in, did the Court of Appeals err in upholding the exclusion of proof that the crime at the Cope residence was only the first in a series of burglaries and sexual assaults that Sanders committed nearby, alone, and without leaving any signs of forced entry?

2.

Did the Court of Appeals err in upholding the denial of Cope's motion to sever his trial from Sanders' trial on the basis of the trial judge's conclusion that Cope's proffered evidence of Sanders' modus operandi would have been inadmissible as evidence of third party guilt at a separate trial?

3.

Did the Court of Appeals err in affirming the trial court's exclusion of Cope's proffered evidence that Sanders had bragged to fellow prison inmates about the rape and murder of "a little girl in Rock Hill" in such a way as to indicate he had acted alone?

4.

Where Cope's defense required the jury to accept the counter-intuitive but well-documented fact that criminal suspects can be induced to give false confessions to the murders of close relatives, did the Court of Appeals err in upholding the trial court's refusal to allow Cope's false-confessions expert from describing for the jury factually similar cases in which subsequently exonerated suspects had actually made such false confessions?

5.

Absent any evidence of an actual agreement between Cope and Sanders-or even that the two men had ever met-did the Court of Appeals err when it reversed itself on rehearing to find the evidence sufficient to prove that Cope and Sanders conspired together to rape and murder Cope's daughter?

## STATEMENT OF THE CASE

### 1. Introduction and Procedural History

Petitioner Billy Wayne Cope called the Rock Hill Police Department on the morning of November 29, 2001 to advise that he had just found his 12-year-old daughter dead in her bedroom. (R.p. 2939-2940). She had been raped and murdered. Her mother's purse lay opened on the child's bed. (R.p. 1057, lines 16-17; State's Ex. 16). Cope was arrested early the next day and eventually gave a series of confessions that he soon recanted. Nine months later, SLED informed the Rock Hill authorities that DNA found in semen on the child's pants and in saliva from a bite mark on her body came not from Cope, but from one James Sanders (R. p. 2240, lines 15-21), a convicted sex offender who had committed a series of residential burglaries and sexual assaults in the Rock Hill area in the six weeks immediately after the Cope murder. (R.p. 740, lines 14-20; R.p. 759, lines 24-25; R.p. 768, lines 22-25; R.p. 769, lines 1-19). Sanders' other break-ins were all accomplished without leaving signs of forced entry, (R.p. 740, lines 14-18; R.p. 760, lines 10-14; R.p. 767, lines 24-25; R.p. 768 lines 14-16; R.p. 778, lines 6-12; R.p. 780, lines 10-11), and Sanders had no known connection to any member of the Cope family. Rather than admit the obvious---that Rock Hill police had extracted false confessions from an innocent man---the State proceeded to

charge *both* Cope and Sanders with having conspired to commit the child's murder and with having carried it out *together*. (R.p. 82, lines 2-3). After joining the two men for trial, the state obtained a series of evidentiary rulings from the trial court which effectively eviscerated Cope's defense while enhancing the State's conspiracy theory. On September 22, 2004, a York County jury convicted both men of murder, criminal sexual conduct, and conspiracy, and Cope appealed his convictions and life sentence.

A divided panel of the Court of Appeals initially reversed both defendants' conspiracy convictions due to the lack of any evidence of an actual agreement between them. State v. Cope, No. 4526 (S.C. Ct. App. filed April 2, 2009) ("Cope I"). However, the Court of Appeals unanimously upheld Cope's convictions for murder, criminal sexual conduct, and child neglect, holding that Judge Hayes had acted within his discretion in excluding as irrelevant large swathes of Cope's defense that would have shown

(a) that Sanders operated alone,

(b) that he never left any signs of forced entry during his opportunistic sexual attacks on female burglary victims, and

(c) that he later bragged of having gotten away with the rape and murder of a "little girl in Rock Hill." Id.

Both the State and Cope petitioned for rehearing, with Cope pointing out that since the conspiracy charge comprised the State's entire theory of pros-

ecution against him, his acquittal of that charge necessarily required dismissal or retrial of the murder and criminal sexual conduct charges as well. The Court of Appeals majority denied Cope's rehearing petition but granted the State's and reinstituted the conspiracy conviction, concluding for the reasons originally set out in Judge Short's dissenting opinion, Cope I, *supra,* slip op. at 12, that the evidence of conspiracy was sufficient after all. State v. Cope, 385 S.C. 274, 684 S.E.2d 177 (S.C. App. 2009) ("Cope II"). Cope filed a petition for writ of certiorari to review this decision on December 9, 2009, and on March 9, 2012, the Court granted his petition and ordered briefing pursuant to Rule 242(i), SCACR.

**2. Factual background**

The evidence against Cope is summarized in the Court of Appeals' opinion, 385 S.C. at 280-283, 684 S.E.2d at 199-181, and need not be exhaustively detailed here. In sum, the State's evidence showed that Cope seemed to the police to have reacted strangely and evasively to his daughter's death, that he initially offered an implausible explanation that she had accidentally strangled herself with a blanket from her bed (R.p. 970, lines 5-13, 1827, lines 1-5), that the Cope home showed no signs of forced entry (R.p. 89, lines 11-17) and was so cluttered that a burglar would have had difficulty navigating it in the dark (R.p. 1823, lines 23-25; R.p. 1824, lines 1-14), that

a towel containing Cope's semen was hidden in a hallway bookcase near Amanda's door, (R.p. 1624, lines 3-9; 2244, lines 10-17) (R.p. 2933, line22 to 2934, line 17), and that the victim's younger sister stated she and the victim had locked the front door before going to bed. (R.p. 2079, lines 7-23). Although he denied guilt hundreds of times over the course of three interrogations on the day of his daughter's death (R.p. 1781, lines 13-19), Cope broke down the next day after being told that he had failed a polygraph examination (and after asking the polygrapher whether he could have committed the crime but forgotten about it). (R.p. 1501, lines 21-23, R.p. 2980, lines 20-23; R.p 2981, lines 3-10; R.p. 2982, lines 9-25).[1] He eventually gave three different confessions, one featuring a videotaped re-enactment, only to recant and reassert his innocence a few days later. (R.p. 2995, lines 10-14; R.p. 1798, lines 5-25; R.p. 1816, lines 6-25; R.p. 1817-1818). The State also presented medical evidence---disputed by a highly-respected defense expert (R.p. 2817 to 2854, line 13 (testimony of Clay Nichols, M.D.))---that the victim's body showed signs of chronic sexual abuse and that she had been raped by an object that could have been the broomstick that Cope referred to

[1] The defense also presented expert testimony that Cope had in fact passed the polygraph test, contrary to what the police told Cope before he confessed. R.p. 2368, line 22 to 2369, line 12.

in one of his confessions (but that the police never found). (R.p. 1827, lines 18-23).

The Court of Appeals' recitation of the evidence is notable for its failure to so much as mention James Sanders, with the exception of a passing acknowledgement that "[u]pon testing, it was discovered that the saliva [from a bite mark on the victim's breast] matched co-defendant James Sanders' DNA," and that "[t]he police also discovered semen on Child's pants, which matched Sanders' DNA." Cope II, *supra*, 385 S.C. at 280-81, 684 S.E.2d at 180. But these brief references obscure more than they reveal, because they misleadingly suggest that the police took the presence of Sanders' DNA into account as they built their case against Cope. In reality, they did not, because the police did not learn that Sanders was the man who actually raped Amanda until some nine months after they had obtained Cope's various confessions. And by then, the State's theory against Cope had long since hardened like concrete. The real significance of all the suspicious circumstantial evidence detailed by the Court of Appeals is not that it proves Cope's guilt despite the presence of Sanders' DNA, but that it explains why the police and the prosecution had become so immovably convinced of Cope's guilt within days of the murder, and why they were so unwilling to recognize their mistake even after it was demonstrated by irrefutable DNA

evidence. By burying the critical fact of the nine-month interval between Cope's confessions and the identification of Sanders' DNA on the victim under a pile of relatively inconsequential details about Cope, the Court of Appeals' opinion obscures the central fact about this case: Billy Wayne Cope *did not murder his child.* He is a victim of law enforcement "tunnel vision" and is now serving the second decade of a life sentence for a horrific crime that was actually committed—alone---by James Sanders, a man who was a complete stranger to Cope.

In summarizing the evidence, the Court of Appeals also failed to mention the single most implausible aspect of the State's theory that Cope, a socially isolated, 333-pound white man, had served up his own daughter to be assaulted and murdered by an African-American stranger whom he did not know---and who just happened to be operating in Cope's neighborhood as a burglar and opportunistic rapist. While each of Cope's three confessions was different from the other two, (R.p. 1778, lines 8-12; R.p. 1823, lines 10-14; R.p. 1826, line 14 to p.1827), and none was corroborated by undisputed physical evidence, (R.p. 1777, lines 2-25; R.p. 1056, lines 6-14; R.p. 1130, lines 4-10; R.p. 1778, lines 1-12), they all had this in common: *they made no mention of James Sanders*, or of the existence of any other accomplice. (R.p 1781, lines 20-24; R.p. 1858, line 20 to 1860, line 19). Since Sanders

was unquestionably present and participating in the crime (as shown by DNA from his saliva and semen on the victim's skin and clothing), it makes no sense that Cope would have confessed to having acted alone---unless, of course, his confessions were false.

Especially telling in this regard is Cope's December 3, 2001 confession---that he acted in a dream-state in attacking his daughter---because he clearly intended it to lessen his culpability. (R.p. 1841, line 14 to 1842, line 6.) But if Cope hoped to lessen his culpability at any point during his spate of inconsistent confessions, why did he not simply tell the police what we now know to be true---that his daughter had actually been raped, bitten, and murdered by a black stranger? In the more than 10 years that it has prosecuted Cope, the State has never produced a plausible answer to this question. But without one, the State's conspiracy theory collapses.

The remaining facts necessary for an understanding of this and the other legal issues raised by this appeal are summarized at the beginning of each argument section.

## QUESTION ONE

**Given that the State's case against Cope depended on convincing the jury**

**(a) that the burglar and rapist Sanders must have collaborated with Cope in order to rape and murder Cope's daughter and**

**(b) that Sanders could not have entered the Cope home without leaving signs of forced entry unless Cope had let him in,**

**the Court of Appeals erred in upholding the exclusion of proof that the crime at the Cope residence was only the first in a series of burglaries and sexual assaults that Sanders committed nearby, alone, and without leaving any signs of forced entry.**

Perhaps the most egregious error committed by the trial court and condoned by the Court of Appeals was the exclusion of the evidence of James Sanders' other crimes pursuant to Rule 404(b), SCRE, and State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). This evidence was Cope's only means by which to prove his vital---but superficially implausible-contention that Sanders, acting alone, had broken into Cope's home and attacked his daughter without leaving signs of forced entry and without waking her father or younger sisters.

Amanda Cope was raped and murdered in her Rock Hill home on November 29, 2001. As discussed above, she had been beaten, strangled, and evidently robbed; there were no apparent signs of forced entry. Just thirteen days later, and less than one mile away,( R.p. 767, lines 6 -15; R.p. 876,

lines 1-3), Katherine Davis would also be attacked in her home by an intruder who robbed and raped her, (R.p. 770, lines 2-6; R.p. 767, line 24), and who also left no signs of forced entry. (R.p. 767, lines 24-25; R.p. 768, lines 14-16). Four days after that attack, (R.p. 775, lines 15-17), and just under five miles from the Cope home, Sarah Phillips would be assaulted, (R.p. 776, lines 7-9; R.p. 876, line 1-3), when an intruder entered her house, attempted to rape and perhaps rob her, (R.p. 834, lines 10-25; R.p. 835, lines 1-7), and, again left no signs of a forced break-in. (R.p. 778, lines 6-7; R.p. 780, lines 10-11). Three days after the attack on Ms. Phillips, (R.p. 739, lines 18-22), and just four-tenths of a mile from the Cope residence, (R.p. 738, line 25; R.p. 876, line 1-3), Alicia Lowery would be assaulted in a virtually identical manner. ( R.p. 740A, lines 14-20; R.p. 749, line 7). And three weeks after the attack on Ms. Lowery, and a few blocks from the Cope residence, Sara Hagman would be robbed and assaulted in her own home by an intruder who left no signs of forced entry. (R.p. 740, lines 13-19; R.p. 753, lines 4- 5; R.p. 738, line 25; R.p. 876, lines 1-3).[2]

[2] Cope also proffered evidence regarding a fifth residential break-in committed by Sanders during this same time period and in this same area. In that incident---which occurred on the very same night as the attack on Sara Hagman---an intruder entered the home of the White family without leaving any sign of forced entry but fled upon being detected. Sanders was identified as this intruder based on fingerprints lifted from the scene. (R.p. 109, lines 14-18, Defense Exhibit 5).

Evidence would eventually establish conclusively that James Sanders committed all of these crimes.[3] Evidence would also establish that when Sanders attacked these people – in their homes, often without waking other family members, leaving no signs of forced entry – he acted alone. (R.p. 738-751; R.p. 752-756, all lines; R.p. 767-774; R.p. 774-786).

At trial, Cope sought repeatedly to introduce evidence of these other crimes in support of his defense that Sanders, and Sanders alone, had raped and murdered his child. Just as Sanders had attacked these other women – by attempting to sexually assault and rob them, by employing strangulation to subdue them, by entering their homes without leaving any signs of forced entry – so, too, Cope sought to tell the jury, had Sanders attacked Amanda, in the same manner, in the same neighborhood, and during the very same time period. Just as Sanders had attacked these other women – acting alone and as a complete stranger to his victims – so, too, Cope sought to tell the jury, had Sanders attacked Amanda just blocks and days away. Just as Sanders had attacked at least two of his other victims without waking any-one in the house, so, too, Cope sought to tell the jury, had Sanders attacked

[3] DNA would link Sanders to the Hagman and Davis attacks; positive identification would identify him as the attacker on Lowery and Phillips. Sanders' fingerprints were discovered at the White home. (R.p. 879, lines 11-14; Defense Exhibit 5). Sanders was also indicted by the State with respect to each crime. (R.p. 80, lines 9-13; R.p. 879, lines 18-21).

and killed Amanda as Cope lay sleeping in his bedroom, with a loud mechanical device – a "CPAP" machine required to treat his sleep apnea[4] – strapped across Cope's face. Cope also sought to present testimony from a disinterested inmate who had been incarcerated with Sanders and heard Sanders confess, quite graphically, to raping and murdering a "little girl in Rock Hill." (R.p. 225, lines 8-17; see Question III infra).

Despite Cope's repeated efforts to introduce this critical information, the jury heard none of it. The court first rebuffed Cope's efforts to introduce Sanders' other crimes pursuant to State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923) and Rule 404(b), SCRE. The court then denied Cope's motion for a severance in order to introduce the Sanders information as third party guilt evidence. See Question II, infra. In the end, the jury was told nothing of Sanders' pattern of criminal activity, nothing of Amanda's place in that pattern, and nothing of the serial and solitary crime spree that began with Sanders' brutal attack on Amanda.

Cope was thus prevented from offering any evidence corroborating his claim that Sanders had come into his home, unbeknownst to Cope, and had

[4] Cope's CPAP machine, which continuously generated and blew oxygen into his nose and mouth, consisted of an external oxygen generator that made a "loud" whirring sound, (R.p. 2930, line 13), and a mask carrying oxygen from the generator and blowing it across his face. (R.p. 2926, lines 15-19). Cope wore his CPAP mask strapped to his face all night long. (R.p. 2926, line 16).

attacked Amanda without leaving any trace of forced entry. This claim, which was the heart of Cope's defense, appeared dubious, to say the least, absent evidence that Sanders had in fact repeatedly committed exactly such acts in the Copes' Rock Hill neighborhood around the same time, and had in fact bragged about committing the Cope murder. The exclusion of this evidence accordingly undermined Cope's entire defense, amounted to reversible error under South Carolina law, and violated Cope's federal due process rights.

### A. The Trial Court Erred In Denying Cope's Motion To Admit Evidence Of Sanders' Other Crimes Pursuant To Rule 404(b), SCRE, And State v. Lyle

Sanders' prior crimes were admissible under not one but two of the enumerated Lyle/404(b) exceptions: they tended to establish the existence of a common scheme or plan, and they were probative of the identity of the perpetrator. The crimes were also proved by clear and convincing evidence, cf. State v. Fletcher, 379 S.C. 17, 664 S.E.2d 480 (2008), and their probative value far outweighed any potential prejudicial effect on Sanders' trial. The evidence of Sanders' other crimes thus satisfied every criterion for admission under Lyle and Rule 404(b). Indeed, the exclusion of evidence of Sanders' other crimes directly contravened the purpose of both Rule 404(b), SCRE, and of Lyle, misapplying a rule intended to protect a defendant's

right to a fair trial as a means of shoring up what would otherwise have been exposed as a weak and misconceived prosecution theory, and thereby frustrate Cope's effort to present his defense.[5]

### 1. Evidence Of Sanders' Other Crimes Qualified For Admission Under Two Separate Lyle/404(b) Exceptions - To Establish The Existence Of A Common Scheme Or Plan And To Establish The Identity Of The Perpetrator

South Carolina law excludes evidence of a defendant's other crimes when offered to show criminal propensity or bad character of a defendant. State v. Beck, 342 S.C. 149, 536 S.E.2d 679 (2000). Such evidence is admissible, however, when it is necessary to prove a material fact or element of the crime charged. State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996). Other crimes may accordingly be introduced when they are offered to prove motive, intent, the absence of mistake, a common scheme or plan, or the identity of the perpetrator. Rule 404(b), SCRE; Lyle, 118 S.E. at 807. In this case, Cope produced testimony – from both of the victims of Sanders'

[5] As a threshold matter, it is clear that other crimes evidence may be offered by one defendant against another. In State v. Good, 315 S.C. 135, 432 S.E.2d 463 (1993), the Court affirmed introduction of evidence by one defendant that his co-defendant had previously robbed the murder victim. Rejecting all objections to the admissibility of this evidence, the Court noted that "[t]here would be little question about admissibility [of the other crime] if the State had attempted to introduce this evidence," and, as such, "the trial judge did not err in allowing the...[co-defendant] to introduce it," Good, 315 S.C. at 140, 432 S.E.2d at 466. Furthermore, all three parties in this case agreed at trial that a defendant may properly offer other crimes evidence against a co-defendant. (R.p. 79, lines 9-25).

other attacks as well an expert–which was probative of both a common scheme and the identity of the perpetrator.

To begin, the level of similarity between Sanders' other crimes and the attack on Amanda Cope exceeds the degree of similarity found in numerous cases wherein these Lyle/404(b) exceptions have been applied. In State v. Hallman, 298 S.C. 172, 379 S.E.2d 115 (1989), for example, a case involving sexual abuse perpetrated while the victim was a foster child in the defendant's home, this Court upheld admission of evidence that the defendant had sexually abused three other women who had been fostered by the defendant. Even though the other crimes in that case occurred seven years prior to the charged offense, the complainants ranged in age from four to thirteen, the abuse occurred in a variety of locations, and the manner and severity of alleged abuse varied amongst the incidents, this Court nonetheless found that the charged offense and the prior crimes were committed in "the same manner under similar circumstances," Hallman, 298 S.C. at 173-175, 379 S.E.2d at 116-117, and thus admissible under Lyle as evidence of a common scheme or plan. Similarly, in State v. Blanton, 316 S.C. 31, 446 S.E.2d 43 (1994), the Court rejected a claim by a man convicted of sexually molesting his eight year old granddaughter that the trial judge should have excluded, as too dissimilar and remote in time, evidence that he had sexually

molested two other unrelated females seven and eight years prior to the molestation of his granddaughter, 316 S.C. at 32-33, 446 S.E.2d at 439. Blanton held that the seven to eight year time difference between the other crimes and the charged offense was not too great for the prior acts to be considered part of a common scheme or plan. Id, 316 S.C. at 32, 446 S.E.2d at 440.

The similarity between Sanders' other crimes and the attack on Amanda Cope far exceeds the similarities found in Blanton and Hallman. Indeed, numerous similarities exist between Sanders' other crimes and the charged offense, as established by Cope's detailed in camera proffer. First, Sanders' other crimes all involved breaking into a stranger's home without leaving signs of forced entry, (R.p. 831, lines 11-22; R.p. 1642, lines 8-25; R.p. 1643, lines 1-9; R.p. 3562, lines 12-15), a similarity that ought to bear particularly great weight given that the state suggested throughout the trial that residential break-ins without evidence of forced entry were extremely rare. In addition, all of the proffered crimes occurred during a brief, six-week period between November 29, 2001 and January 12, 2002 (R.p. 831, lines 12-13), and all but one occurred less than a mile away from the Cope home, (R.p. 831, line 25). Moreover, all the other crimes were committed in private residences, (R.p. 832, lines 8-9; R.p. 852, lines 12-16), all were committed against complete strangers,( R.p. 833, lines 3-15), and in three of the

four other crimes, as in the attack on Amanda, Sanders utilized choking or asphyxiation, (R.p. 838, lines 5-6), and evidenced a dual motive of theft and sexual assault, (R.p. 834, lines 8-17). Finally, in two of the other crimes, as in the attack on Amanda, Sanders committed or attempted to commit his assaults despite the presence of others in the residence. ( R.p. 884, lines 1-7).[6]

This Court has repeatedly relied on just one or two such similarities when applying Lyle exceptions. See, e.g., Lyle, 118 S.E. at 808 (close geographical concentration of offenses); Beck, 342 S.C. at 136-137, 536 S.E.2d at 683 (concentrated timeline of offenses); Hallman, 298 S.C. at 175, 379 S.E. at 117 (similarity of method of commencing crimes); Blanton, 316 S.C. at 33, 446 S.E. 2d at 439 (similarity in type of abuse perpetrated). The striking commonalities between the attack on Amanda and Sanders' other crimes are accordingly more than sufficient to satisfy the identity and common and scheme exceptions of Lyle and Rule 404(b).

Despite the uncontroverted evidence that Sanders had committed these other crimes, the Court of Appeals found the evidence inadmissible, listing

[6] That Sanders actually raped only the two most vulnerable victims – Amanda Cope, a 12-year-old girl, and Catherine Davis, a 60-year-old, disabled woman – does not detract from the similarities between his other crimes and the charged offense. It does not matter for the purpose of a Lyle analysis that the ultimate extent of each crime may have differed, as long as the crimes "commenced in the same manner under similar circumstances." Hallman, 298 S.C. at 175, 379 S.E.2d at 117.

three differences between the other crimes and the murder. Without so much as mentioning the reasons why Cope sought to admit Sanders' other break-ins---that they show him to be operating as an opportunistic "lone wolf" who invariably gained entry to his victims' homes without leaving any sign of forced entry, and without even waking other household members---the Court of Appeals emphasized that the other victims were not children, that no other victims were killed, and that the other crimes were not as brutally sexual as that committed on the Cope child. Cope II, supra, 385 S.C. at 286-7, 684 S.E.2d at 183. But these dissimilarities were irrelevant to the purpose for which the evidence was offered—namely, to rebut the prosecution's claim that it would have been impossible for Sanders to commit this sort of crime alone, without waking others in the house, and without leaving signs of forced entry. That all of Sanders' crimes were similar in these crucial respects gave them their probative value and required their admission.

The Court of Appeals' misplaced focus on irrelevant details of Sanders' other break-ins reflects a failure to apply what Lyle itself described as the "acid test" for determining admissibility: the evidence's "logical relevancy to the particular excepted purpose or purposes for which it is sought to be introduced." 125 S.C. at 417, 118 S.E. at 807 (emphasis added). In other words, Lyle requires that an other crimes admissibility analysis be informed-

--as the Court of Appeals' analysis was not---by the purpose for which the evidence is offered.

To be sure, in every case, the proponent of other-crimes evidence must demonstrate two things – that the probative value of such evidence will not be outweighed by its potential for prejudice and that the evidence in question is offered for a legitimate purpose (rather than merely to suggest a criminal propensity on the part of the individual who is alleged to have committed the crimes). These standards, however, are necessarily fact-dependent and turn upon the specific rationale offered in support of admission of the evidence.

As a practical matter, because other crimes evidence is almost always offered by the prosecution in support of its efforts to secure a conviction, these constraints normally operate to require that the evidence at issue actually tend to connect the person who committed the other crime to the crime charged and necessitate rigorous scrutiny of any potential prejudice to the criminal defendant. But in a case such as this one, where the other crimes were being offered not to implicate a defendant in the crime at issue (as the connection between Sanders and the attack on Amanda Cope was already well-established by Sanders' own DNA) but by a defendant himself in his own defense, the admissibility analysis is necessarily different.

Lyle itself describes the other-crimes admissibility standard as a requirement that the proffered evidence be "logically relevan[t] to the particular excepted purpose or purposes for which it is sought to be introduced." 118 S.E. at 807 (emphasis added); see also State v. King, 349 S.C. 142, 153, 561 S.E.2d 640, 645 (Ct. App. 2002) ("[t]o admit other bad acts ... under the Lyle exception, there must be a logical relevance between the acts in question and the purpose for introduction") (emphasis added). Lyle accordingly sets forth a purpose-dependent test that asks whether, in view of the proponent's intended use for the other crimes evidence, such evidence "reasonably tends to prove a material fact at issue." Lyle, 118 S.E. at 807.

Here, Cope offered Sanders' other crimes pursuant to the "common scheme or plan" exception identified in Lyle and 404(b), SCRE. He did not, however, as is usually the case with such evidence, offer the other crimes with the purpose of further implicating Sanders in the crime at issue, as Sanders' own DNA had already clearly established that link. Rather, Cope offered evidence of Sanders' other criminal behavior in support of material facts essential to his own defense. Specifically, Cope sought to introduce evidence regarding Sanders' other crimes because (1) the fact that Sanders had committed other late-night residential break-ins and assaults – without leaving any signs of forced entry and without waking members of his other

victims' households – supported Cope's argument that Sanders was capable of having gained access to the Cope home in the same way and (2) the fact that Sanders had committed these other crimes by himself supported Cope's argument that Sanders was capable of perpetrating such break-ins and assaults without an inside accomplice. These points were no small matter; the state expressly argued to the jury that Cope "had to" have conspired with Sanders given the circumstances of the crime and the apparent lack of forced entry into the Cope home. (R.p. 3562, lines 8-15; R.p. 3595, lines 3-25). Indeed, despite what the state's own investigation of Sanders had revealed, state witnesses testified, (R.p. 1642, lines 5-25), and the solicitor argued, (R.p. 3562, lines 17-25; R.p. 3595, lines 3-25), as if the notion of James Sanders gaining access to a Rock Hill home without leaving signs of forced entry was patently ridiculous.

Under normal "common scheme" circumstances, the state is seeking to establish a signature modus operandi on the part of the defendant and to argue that, by virtue of their similarity alone, the defendant's past crimes tend to prove that the defendant also committed the crime charged. In such cases, the extent and import of the alleged similarities is the very gravamen of admissibility as it is the similarities alone that make the other crimes relevant to the crime at issue. For this reason – and because in such situations there

is great risk that a jury will be prejudiced against a defendant by exposure to other bad conduct on his part – a very high level of similarity is required before such evidence becomes legitimately indicative of something other than criminal propensity, and thus more probative than prejudicial.

In this case, by contrast, the similarities between Sanders' other crimes and the attack on Amanda were not being offered as proof that Sanders committed the latter assault. Rather, various specific facts of the other crimes were offered as support for various specific factual arguments essential to Cope's theory of defense – namely, that Sanders was capable of gaining access to a house without breaking locks or doors or windows, without waking members of his victims' households and without an inside accomplice. Moreover, in this case, there was no risk of prejudice to the defendant as the defendant himself sought admission of the other crimes evidence.

Because Cope's ultimate purpose in pursuing the Sanders evidence was different than the purpose to which such common scheme evidence is most often put, and because Lyle and its progeny require that Cope's specific purpose be kept in mind when evaluating the admissibility of his evidence, the lower courts' admissibility analyses should have reflected the uniqueness of Cope's motion. That is, the trial court and the Court of Appeals should have recognized that while Cope needed to demonstrate that

Sanders' other crimes were similar enough to the charged offense to support the argument that Sanders had proven himself capable of committing the attack on Amanda in the manner advanced by Cope, it was not necessarily for Cope to establish the level of near-identical similarity that is required when a proponent argues that the similarities alone support the conclusion that the same person must have committed each offense. In other words, while a high degree of similarity is properly required when the proponent claims that similarities, alone, prove what a particular person *always* does when committing a crime, less is required when the proponent relies on the other crimes merely to show what a particular person has proven himself *capable of* doing in certain circumstances.

The appropriate admissibility question, then, ought to have been not whether there existed such remarkable similarity between the other crimes and the attack on Amanda as to establish a unique modus operandi or an unmistakable criminal signature, but whether the features of the other crimes that Cope sought to highlight logically supported the specific factual arguments he wished to make. The record makes clear that such facts were indeed present in the other crimes proffered by Cope – every one of which Sanders committed alone and without leaving any physical signs of his illegal and uninvited entry. ( R.p. 740, lines 9-19; R.p. 755, lines 9-19; R.p.

767, lines 24-25; R.p. 768, line 1; R.p. 778, lines 1-18; R.p. 780, lines 10-13), and two of which Sanders committed without waking other members of his victims' households, (R.p. 754, lines 6-20; R.p. 779, lines 12-13). Applying Lyle's "acid test," the evidence of Sanders's other break-ins should have been admitted.

### 2. Sanders' Other Crimes Were Established Through Clear and Convincing Evidence

If not the subject of a conviction, other crimes or acts must be established by clear and convincing evidence in order to be admissible. State v. Gillian, 360 S.C. 433, 602 S.E.2d 62 (Ct. App. 04). The other crimes evidence at issue in this case easily met that standard. Alicia Lowery identified Sanders as her assailant in a line-up. (R.p. 744, lines 22-25; R.p. 745, lines 1-9). Sanders was linked to the attack on Sara Hagman by an identification and by DNA. (R.p. 879, lines 11-12). DNA evidence also linked Sanders to the rape and robbery of Catherine Davis. (R.p. 879, lines 11-12). That Sanders broke into Sarah Phillips' home was established by both in-court and photographic line-up identifications. (R.p. 776, lines 23-25). Indeed, Sanders had been indicted by the state in each of these cases. (R.p.80, lines 9-13; R.p. 879, lines 18-21). For these reasons, the trial court found that there was clear and convincing evidence that Sanders perpetrated the crimes

against Ms. Lowery, Ms. Hagman, Ms Phillips, and Ms. Davis. (R.p. 889, lines 12-17; R.p. 891, lines 6-7). This finding is well supported by the evidence and should be affirmed. See State v. Wallace, 364 S.C. 130, 136, 611 S.E.2d 332, 335 (Ct. App. 2005) (trial court's determination of clear and convincing evidence in context of other crimes must not be disturbed on appeal if ruling is supported by any evidence).

### 3. The Probative Value Of Sanders' Other Crimes Substantially Outweighed Any Prejudicial Effect

Even where evidence satisfies one or more Lyle/404(b) exceptions and is supported by clear and convincing evidence, the evidence is nonetheless inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice to a defendant. Rule 403, SCRE; State v. Braxton, 343 S.C. 629, 634, 541 S.E.2d 833, 836 (2001). The evidentiary value to Cope's defense of evidence of Sanders' other crimes, however, substantially outweighed any prejudice to Sanders, such prejudice being marginal at best in light of the DNA evidence that already linked Sanders indisputably to the attack on Amanda.

As noted earlier, the prosecution was only able to reconcile the fact that Cope had confessed to a crime that, according to DNA, Sanders had in fact committed, by alleging that Cope and Sanders somehow attacked Amanda together. Evidence of Sanders' other crimes in the six weeks fol-

lowing Amanda Cope's murder would have powerfully undercut this rather farfetched theory. Due to the total lack of evidence linking Cope and Sanders, the state argued that Cope "had to" have conspired with Sanders given the apparent lack of forced entry into the Cope home. ( R.p. 3562, line 15). Evidence that Sanders, acting alone, had, on a number of occasions, broken into Rock Hill homes without leaving any signs of forced entry would therefore have virtually demolished the state's case. In assessing whether Sanders would have been unfairly prejudiced by this evidence, moreover, it must be kept in mind that Sanders was already undeniably tied to Amanda's attack by the DNA he left behind on her body and her clothing. Given this, Sanders' other crimes were thus merely cumulative evidence that paled in comparison to the power of DNA, and any prejudice to Sanders resulting from admission of evidence of his other crimes would have been minimal. Moreover, as discussed below, any prejudice to Sanders could have been eliminated entirely by granting Cope's request for severance so that Sanders' other crimes could have been admitted as evidence of third party guilt.

**B. The exclusion of Sanders' other-crimes evidence so devastated Cope's defense as to violate his federal constitutional right to due process of law.**

While this case can comfortably be decided on the basis of long-settled South Carolina evidence law, the exclusion of Cope's other-crime ev-

idence also violated his fundamental due process right to present a defense. Indeed, Cope's case bears uncanny similarities to Holmes v. South Carolina, 547 U.S. 319 (2006), a unanimous United States Supreme Court decision arising from a trial prosecuted in the same York County courtroom by the same solicitor's office, and presided over by the same trial judge. As Holmes reaffirmed,

> [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. 683,] 690 [1986], (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)).

547 U.S. at 324. State evidentiary rulings may accordingly rise to the level of a due process or Sixth Amendment violation when they result in unjustified denial of a defendant's fundamental right to defend himself. Montana v. Egeloff, 518 U.S. 37, 43 (1996). Evidentiary rules that have the effect of excluding essential defense evidence must therefore be narrowly tailored to serve valid countervailing interests, Egeloff, 518 U.S. at 52, and state courts dually charged with applying these rules and safeguarding a defendant's constitutional rights may not impose these rules without first determining

whether the interests served by the rules justify any resulting curtailment of a defendant's fundamental rights. For all of the reasons set out in this section and the next one, any evidentiary rule that worked to exclude evidence as crucial to a fair and reliable verdict as the Sanders other crimes evidence in this case would violate these federal constitutional guarantees, and for this additional reason, the Court should reverse the judgment of the Court of Appeals.[7]

To be sure, a very strict rule of exclusion regarding other crimes evidence may pass constitutional muster (and, indeed, may be constitutionally compelled) when introduction of such evidence would jeopardize a defendant's right to a fair trial. But mechanistic application of that very same rule is constitutionally prohibited in a case where no defendant would be prejudiced by admission of the evidence, and where, on the contrary, prejudice results from exclusion rather than admission.

Indeed, as Cope noted earlier in this section, 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 given the absence, in such cases, of the very prejudice against

[7] While the trial judge did not have the benefit of Holmes v. South Carolina at the time of Cope's trial, Holmes was handed down some three years before the Court of Appeals decided Cope's appeal. However, the Court of Appeals' opinion does not mention Holmes, nor (as Cope pointed out in his petition for rehearing) does it even acknowledge Cope's federal constitutional claims concerning the exclusion of so much of the defense case.

which the standard is designed to guard. But regardless of whether the same or different standards are applied to Lyle/404(b) issues depending on whether a criminal defendant is the proponent of such evidence, Holmes v. South Carolina reaffirms that evidentiary rules adversely affecting 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." Holmes, 547 U.S. at 330. No such rationale supports the trial court's exclusion of the Sanders evidence in this case, as the evidence was not merely connected to a central issue in the case but, indeed, essential to Cope's entire defense. Denied the full truth about Sanders, it appeared to the jury that no evidence whatsoever supported the defense theory that Sanders had entered his home and brutally assaulted and murdered his daughter without leaving any apparent signs of forced entry and without waking Cope. The excluded evidence, however, demonstrated that Sanders was indeed capable of – and repeatedly committed – precisely such acts, close in both time and location, to the attack on Amanda.

The protections of Lyle and Rule 404(b), SCRE, are designed as a shield for a defendant against the risk that his jury might be distracted and inflamed by evidence of his own other crimes. It would pervert the rule to

allow the state to use these protections as a sword with which to deprive a defendant of evidence essential to his own defense. And where, as here, this deprivation denies a defendant his constitutional right to present his defense, the Court should order a new trial so as to ensure that justice is done.

## QUESTION TWO

**The Court of Appeals erred in upholding the denial of Cope's motion to sever his trial from Sanders' trial on the grounds that Cope's proffered evidence of Sanders' modus operandi would not have been admissible as evidence of third party guilt at a separate trial.**

### A. Information regarding Sanders' other crimes would have been admitted as evidence of third party guilt in a severed trial.

"[T]he Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." Crane v. Kentucky, supra, 476 U.S. at 690. "Few rights," of course, "are more fundamental that that of an accused to present witnesses" on his behalf. Chambers v. Mississippi, 410 U.S 284, 302 (1973) (citing Webb v. Texas, 409 U.S. 95 (1972). Indeed, "where constitutional rights directly affecting the ascertainment of guilt are implicated," the "ends of justice" must override "mechanistic" application of evidentiary rules. Chambers, 410 U.S. at 302; see also United States v. Scheffer, 523 U.S. 303, 316 n.12 (1998).

For this reason, South Carolina law provides that defendants be permitted to introduce evidence of a third party's guilt whenever such evidence

shows facts that are "inconsistent with [the defendant's] own guilt . . . [and] rais[e] a reasonable inference or presumption as to . . . [a defendant's] own innocence." State v. Gregory, 198 S.C. 98, 104-05, 16 S.E.2d 532, 534 (1941); accord State v. Gay, 343 S.C. 543, 541 S.E.2d 541 (2001); State v. Cooper, 334 S.C. 540, 514 S.E.2d 584 (1999); State v. Parker, 294 S.C. 465, 366 S.E.2d 10 (1988). To be sure, "evidence which can have (no) [sic] 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," Gregory, 198 S.C. 98, 104-05, 16 S.E.2d, 532, 534 (internal citation omitted), nor is evidence lacking "a train of facts or circumstances, as tends clearly to point out such other person as the guilty party." Id. Evidence, however, that does support a claim of innocence, does clearly indicate the guilt of another and is itself supported by credible foundational facts, is admissible when offered by a defendant. Indeed, such evidence becomes essential where, as here, other affirmative evidence of innocence–such as alibi testimony or exonerative forensics–is not available or applicable.

The information that Cope sought to introduce in this case regarding Sanders was just such essential evidence. Not just a critical component of his defense, the truth about Sanders was Cope's defense, as it provided the only evidence to be had in support of his claim that someone had broken into

his home and attacked his daughter without leaving signs of forced entry and without waking other family members.

Although this Court has not yet addressed the admissibility of "other crimes" as third party guilt evidence, nothing in South Carolina law indicates that the standard for admitting third party guilt evidence is altered in any way when the proffered evidence relates to a third party's other crime or crimes. In addition, many other courts have addressed this precise question and have reversed convictions in cases very similar to Cope's. In State v. Cotton, 351 S.E.2d 277 (N.C. 1987), for example, the defendant, who was charged with rape and burglary, sought to introduce evidence of two similar attacks committed by an unidentified individual on the same evening and in the same neighborhood as the assault in question. The North Carolina Supreme Court reversed the trial court's exclusion of this evidence, relying on a standard nearly identical to South Carolina's third party guilt rule. Specifically, Cotton held that where a series of similar assaults appears to have been committed by a lone third party in a manner and location that suggest that the third party, and not the defendant, could have committed the offense

at issue, it is an abuse of discretion to prevent the defendant from presenting those other crimes to the jury. Id. at 280.[8]

Similarly, in State v. Williams, 518 A.2d 234 (N.J. Super. 1986), a New Jersey appellate court reversed the attempted murder conviction of a defendant who had sought to introduce evidence of two other assaults committed nearby both before and after the offense at issue. Although these other assaults were far from identical to the crime with which the defendant was charged, the appellate court ruled that their exclusion nonetheless "eviscerated the defense entirely and denied [the] defendant a fair trial," Id. at 235. Noting that "a lower standard of similarity of offenses is required to justify the use of such evidence by a defendant than is required when the state offers . . . [other crimes] evidence," the Williams court found sufficient correspondence between the charged offense – an outdoor stabbing wherein no sexual assault occurred – and the other crimes – rape abductions wherein only one victim was stabbed and wherein both victims were transported to off-street locations – to rule exclusion of the other offenses reversible error.[9] Id. at 238.

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[8] After eleven years in prison, Cotton was eventually exonerated by DNA. See President's DNA Initiative website, located http://www.dna.gov/case_studies/convicted_exonerated/cotton.

[9] Notably, the level of similarity required in these cases is generally deemed considerably lower than the standard applied to other crimes evidence offered against the accused.

In so doing, the Williams court relied on a case that even more closely resembles this one – State v. Garfole, 388 A.2d 587, 591 (N.J. 1978). In Garfole, a defendant accused of molesting a teenager sought to introduce evidence regarding four other similar assaults. The defendant had an alibi for two of those four other offenses and wanted to argue that, to the extent the similarity of the crimes indicated that one person had committed them all, that person could not have been the defendant. Citing both Wigmore and McCormick and noting that third party other crimes evidence is particularly significant where each of the crimes in question occurs within a "close time sequence" and geographical vicinity, the Garfole court found the exclusion of the other crimes information to have been reversible error. Id. at 449-453.

Numerous other appellate courts have also found reversible error where material and substantiated evidence of similar third party crimes has

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While the prosecution must establish a virtually unique modus operandi to introduce such evidence against a defendant, "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)); accord Perry v. Watts, 520 F. Supp. 550, 560 (N.D. Cal. 1981); 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).

Thus, the trial court erred in presuming that its determination that Sanders' other crimes were not sufficiently identical to satisfy the modus operandi Lyle exception foreclosed any analysis of Sander's other crimes under a third party rubric. (R.p. 893, lines 1-6).

been excluded.[10] Significantly, in each of these cases, neither the evidence linking the third party to the proffered other crimes nor the evidence linking the third party to the crime with which the defendant was charged was nearly as strong as the DNA evidence that has linked James Sanders to both the other crimes at issue here and to the brutal attack and murder of Amanda Cope. If, then, as these cases show, it is reversible error to exclude defense evidence regarding a third party merely suspected of similar crimes, surely it must be reversible error to exclude Cope's evidence, which proved by DNA that a particular third party, James Sanders: (1) was serially and solitarily

[10] See, e.g., United States v. Stevens, 935 F.2d 1380, 1401-06 (3rd Cir. 1991) (reversible error to exclude evidence that victim of similar crime did not identify defendant as assailant); Kucki v. State, 483 N.E.2d 788 (Ind. Ct. App. 1985) (reversible error to exclude fact that third party was suspected of committing similar crimes in the area, even though evidence suggested third party was out of state at time of offense at issue); State v. Burge, 487 A.2d 532, 545 (Conn. 1985) (reversible error to exclude evidence regarding third party who "lived in the vicinity of the scene of the crime . . . [and who] had confessed to the recent commission of a similar assault under similar circumstances at a location near to the place where the victim in this case had been assaulted and killed"); Commonwealth v. Jewett, 458 N.E.2d 769, 771 (Mass. Ct. App. 1984) aff'd 467 N.E.2d 155, 158 (Mass. 1984) (reversible error to exclude evidence that man who resembled defendant had recently committed similar sexual assault under similar circumstances); People v. Bueno, 626 P.2d 1167 (Colo. Ct. App. 1981) (reversible error to exclude information regarding similar crimes from which the defendant had been excluded as a suspect); Commonwealth v. Rini, 427 A.2d 1385, 1388 (Pa. Super. 1981) (reversible error to exclude "evidence that someone else committed a crime which bears a highly detailed similarity to the crime with which the defendant is charged"); State v. LeClair,425 A.2d 182, 187 (Me. 1981) (reversible error to exclude evidence about similar crime occurring at home of third party on the day following crime at issue); Commonwealth. v. Keizer, 385 N.E.2d 1001, 1003 (Mass. 1979) (reversible error to exclude evidence of a crime committed by similar method while defendant was in custody); State v. Bock, 39 N.W.2d 887, 458 (Minn. 1949) (reversible error to exclude "crimes of a similar nature [that] have been committed by some other person when the acts of such other person are so closely connected in point and time and method of operation as to cast doubt upon the identification of the defendant as the person who committed the crime charged against him").

committing similar crimes at the time of offense at issue, and; (2) participated in the offense at issue. This remains the case – given the extraordinary evidentiary strength of these two connections – even in a jurisdiction such as South Carolina where the nexus between the third party and the crimes at issue must be relatively robust.

Moreover, courts have found that a defendant's right to present third party other crimes evidence is particularly strong when offered to rebut a conspiracy theory by demonstrating the third party's pattern of acting alone. In People v. Cruz, 643 N.E.2d 636, 655 (Ill. 1994), for example, the Illinois Supreme Court reversed a capital rape-murder conviction where, inter alia, the trial court excluded evidence that a third party had committed crimes similar to those with which the defendant had been charged, and that the third party had previously acted alone. Recognizing the heightened need for such evidence when the prosecution argues that the defendant and the third party acted together, the court held that the exclusion of third party other crimes evidence warranted overturning the defendant's conviction.[11] Id., at 655-656.

Thus, while it may be permissible to exclude third party other crimes

[11] After spending almost eleven years on death row, Cruz, like Cotton, was ultimately exonerated by DNA. See President's DNA Initiative website, located at http://www.dna.gov/case_studies/convicted_exonerated/cruz_hernandex .

evidence where witnesses or other evidence tend to rule out the third party from the crime at issue, see, e.g., Daniel v. State, 395 S.E.2d 638 (Ga. 1990), or where the evidence of third party crimes is inadmissible hearsay, see, e.g., Gates v. United States, 481 A.2d 120 (D.C. 1984), where, as here, the predicate evidence is uncontradicted, entirely competent,[12] highly probative, and essential to the defense, it must be admitted in order to accord the defendant a fair trial.

Finally, even assuming, arguendo, that the trial court properly denied Cope's request to inform the jury of Sanders' other crimes, Cope ought to have been allowed to enter evidence of those crimes without reference to Sanders, as he sought to do in the wake of trial court's expression of concern regarding impact of such evidence on Sanders' fair trial rights. The trial court, however, denied both Cope's efforts to resolve this conflict via severance, (R.p. 891, lines 18-19; R.p. 892, lines 13-25); as well as his proposal to avoid the conflict entirely by referring to Sanders' other crimes without mentioning Sanders – i.e. by offering evidence that some unnamed third party was committing a string of assaults and robberies in Rock Hill in which the perpetrator would enter homes without leaving signs of a forced break-in

[12] Cope sought to introduce information regarding Sanders' other crimes via testimony directly from the victims of those crimes and via DNA and fingerprint evidence.

and often without waking other occupants. (R.p. 2308, lines 22-25; R.p. 2309, lines 1-21). This evidence, offered not only as evidence of third party guilt but also to counter the state's arguments that it would have been virtually possible for anyone to enter the Cope home without leaving signs of forced breaking unless Cope had invited them in, was also erroneously excluded by the court.

### B. Severance Should Have Been Granted So That Information Regarding Sanders' Other Crimes Could Have Been Admitted As Evidence Of Third Party Guilt

The admissibility of Sanders' other crimes as third party guilt evidence required the trial court to grant Cope's motion for severance. Although criminal defendants who are jointly charged are not entitled to separate trials as a matter of right, State v. Walker, 366 S.C. 643, 656, 623 S.E.2d 122, 128 (2005) (internal citations omitted), severance is required where "there is a serious risk that a joint trial would compromise a specific trial right of a codefendant or prevent the jury from making a reliable judgment about a codefendant's guilt." Id. at 129; see also State v. Harris, 351 S.C. 643, 572 S.E.2d 267 (2002); State v. Dennis, 337 S.C. 275, 523 S.E.2d 173 (1999). Thus, a trial court must "act cautiously in allowing a joint trial[,] . . . consider problems that may arise from a joint trial . . . and . . . assure protection of each defendant's constitutional right[s]," Walker, 366 S.C. at 657 (citing

State v. Singleton, 303 S.C. 313, 400 S.E.2d 487 (1991)), and is subject to "a continuing duty at all stages of the trial to grant a severance if prejudice" to a particular defendant will be caused by a joint trial. Schaffer v. United States, 362 U.S. 511, 516 (1960). This duty mandated that the trial court in this case sever the trials of Cope and Sanders; its refusal to do so was reversible error.

**1. Severance must be granted where one defendant's constitutional right to defend himself via the presentation of certain evidence or argument is in direct conflict with a co-defendant's constitutional right to defend himself via exclusion of that same evidence or argument.**

The narrow severance issue in this case – granting severance to allow admission of information regarding a co-defendant's other crimes as third party guilt evidence – is a matter of first impression in South Carolina. However, the larger question of how to resolve situations where co-defendants' constitutional rights are at direct odds with one another is a matter that has been addressed by the South Carolina Supreme Court, as well as by courts in other jurisdictions with virtually identical severance standards.

In State v. Green, 269 S.C. 623, 239 S.E.2d 646 (1977), a defendant wanted to comment on his co-defendant's exercise of his right to remain silent. Although the Court ultimately held that, due to the lack of mutually antagonistic defenses, the trial court did not abuse its discretion by denying

severance in that case, the Court also recognized that severance is required whenever one co-defendant's right to present certain evidence or argument conflicts with another co-defendant's right to a have that evidence or argument excluded. Id. at 625, 646-47.

Federal courts[13] have similarly held that where a conflict exists between co-defendants' respective trial rights, "for each of the defendants to see the face of Justice[,] they must be tried separately." De Luna v. United States, 308 F.2d 140, 141 (5th Cir. 1962), reh'g denied, 324 F.2d 375 (5th Cir. 1963) (severance required where one co-defendant's right to a fair trial required court to allow him to comment on co-defendant's silence).[14] Largely in the context of cases where a defendant seeks severance in order to call his co-defendant as a witness, these courts have addressed precisely the conflict at issue here: the dilemma that arises when one defendant cannot present essential and otherwise admissible evidence solely because he is being

[13] In federal courts, as in South Carolina, the question of severance is left almost entirely to the discretion of the trial judge. See, e.g. Zafiro v. United States, 506 U.S. 534, 541 (1993).

[14] See also United States. v. Mardian, 546 F.2d 973, 980 (D.C. Cir. 1976) (severance required where one co-defendant's need for a continuance based on incapacitating illness of his attorney conflicted with co-defendants' right to speedy trial); Bruton v. United States, 391 U.S. 123, 136-137 (1968) (either severance or exclusion of offending statement is required when government seeks to introduce the statement of non-testifying co-defendant in joint trial); United States v. Truslow, 530 F.2d 257, 261 (4th Cir. 1975) (reversible error to deny severance upon introduction of Bruton statement); United States v. Harris, 409 F.2d 77, 81 (4th Cir. 1969) (same).

jointly tried. Applying the principle that "a single joint trial, however desirable from the point of view of efficient and expeditious criminal adjudication, may not be had at the expense of a defendant's right to a fundamentally fair trial," United States v. Echeles, 352 F.2d 892, 896-97 (7th Cir. 1965) (internal citation omitted), these courts have held that severance must be granted when "a fair trial for . . . [one co-defendant] necessitate[s] providing him the opportunity of getting . . . evidence before the jury" that would be inadmissible in a joint proceeding. Echeles, 352 F.2d at 898. See also Tifford v Wainwright, 588 F.2d 954, 956 (5th Cir. 1979), reh'g denied 592 F.2d 233 (severance required where one co-defendant's right to a fair trial required court to allow him to call other co-defendant as a witness). These courts have also noted that conspiracy charges quite often create such conflicts amongst the rights of the co-defendants. See, e.g., Mardian, 546 F.2d at 977; Echeles, 352 F.2d at 898 (citation omitted); Glasser v. United States, 315 U.S. 60, 76 (1942).

In sum, both South Carolina and federal courts have acknowledged that severance must be granted when a joint trial creates a conflict amongst the constitutional rights of the defendants. In this case, Cope was denied a fair trial by the trial court's exclusion of evidence of Sanders' other crimes, a decision which was based on Sanders' right to a fair trial. Even accepting

Sanders' dubious claim of unfair prejudice from the other crimes evidence, the failure to grant severance in this situation was a violation of well-established law.

### 2. Cope was prejudiced by the exclusion of evidence of Sanders' other crimes

Cope was clearly prejudiced by exclusion of evidence of Sanders' other crimes. In fact, exclusion of Sanders' true background distorted the factual landscape so severely as to make it appear to the jury that no evidence whatsoever supported Cope's claim that Sanders entered his home and brutally assaulted and murdered his daughter without leaving any apparent signs of forced entry and without waking Cope.

Just as the authorities found that proposition preposterous enough, before they knew about Sanders' activities, to arrest Cope for Amanda's murder, so, too, must the jury have rejected this seemingly baseless defense from the outset based on the sheer improbability of such a scenario. Indeed, stripped of its factual foundation, Cope's entirely accurate contention that James Sanders was capable of – not to mention, serially committing – precisely the acts his defense alleged, not only failed to support Cope's defense but affirmatively damaged it, causing him and his counsel to lose credibility with the jury from the very first moment of the trial. Compounding this perverse turn of events was the prosecution's exploitation of the jury's misim-

pression. Despite what the state's own investigation of Sanders had revealed, state witnesses testified, (R.p. 1642, lines 1-8: R.p. 1643, lines 1-9), and the solicitor argued, (R.p. 3562, line 15), as though the notion of James Sanders breaking into a Rock Hill home without leaving signs of forced entry was patently ridiculous.

Corroboration is vital in any legal proceeding. It is all the more essential in a case where the theory of the defense appears implausible at first blush, and where the prosecution relies upon and exacerbates this false impression. As this Court long ago recognized, any evidence that buttresses a defendant's otherwise uncorroborated version of events is highly material and can mean the very difference between a guilty verdict and an acquittal. State v. Wiley, 106 S.C. 437, 437, 91 S.E. 382, 382 (1917) (granting new trial upon discovery of new evidence corroborating manslaughter defendant's previously uncorroborated self-defense claim); see also Roviaro v. United States, 353 U.S. 53, 63-64 (1957) (defendant "faced with the burden of explaining or justifying" his conduct has a "vital need for access to any material witness" that will corroborate his otherwise uncorroborated claims). Failure to sever in this case thus did more than merely "compromise a specific trial right," Walker, 623 S.E.2d at 129, it entirely prevented Cope from exercising his most fundamental of rights – the right to present a defense.

Chambers, 410 U.S at 302; State v. Johnson, 293 S.C. 321, 323, 360 S.E.2d 317, 319 (1987). State v. Schmidt, 288 S.C. 301, 302, 342 S.E.2d 401 (1986).

## QUESTION THREE

**The Court of Appeals erred in affirming the exclusion of Cope's proffered evidence that Sanders had bragged to fellow prison inmates about the rape and murder of "a little girl in Rock Hill" in such a way as to indicate he had acted alone.**

The Court of Appeals also erred in finding that the trial court properly excluded evidence that Sanders had bragged to fellow prison inmates about "getting away" with an apparently solo act of rape-murder that was almost certainly that of Amanda Cope. The evidence was relevant and admissible under the South Carolina Rules of Evidence, was also admissible as a statement against penal interest, and its exclusion by the trial court further violated Cope's federal due process right to present a full defense.

James Hill, a convicted burglar, who in late 2002 was confined with James Sanders in the Perry Correctional facility, (R.p. 3426, lines 13-20; R.p. 3428, lines 8-14), testified outside the presence of the jury that he once 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.

(R.p. 3429, lines 8-17). 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." Id.; (R.p. 3429, lines 19-25; R.p. 3430, lines 1-4; R.p. 3431, lines 13-16). Hill prefaced this testimony by describing himself as a reluctant witness who had received no inducement to testify, was then recovering from an unrelated prison stabbing, and could expect only increased threats to his personal safety for incriminating Sanders as he was doing. (R.p. 3427 to 3428, line 1).

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.p. 3432, lines 21-25; R.p. 3433, lines 1-10). The trial judge 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.p. 3433, lines 16-19). The Court of Appeals affirmed this ruling without any discussion or evaluation of the trial judge's stated reason for excluding Sanders' confession, citing the trial court's "broad discretion in determining

the relevancy of evidence." Cope II, *supra*, S.E.2d at183. The decision of the Court of Appeals was wrong because:

1. Hill's testimony was relevant and admissible under the South Carolina Rules of Evidence;

2. Sanders' statement to Hill statement was admissible as a statement against penal interest; and

3. the exclusion of Hill's testimony violated Cope's federal constitutional rights to present a defense.

### A. Hill's Testimony Concerning Sanders' Confession Was Relevant And Admissible Under The South Carolina Rules Of Evidence

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE; Fed. R. Evid. 401. At issue in the trial of Sanders and Cope was the question of who sexually assaulted and killed 12-year-old Amanda Cope, a victim who certainly could be fairly described as a little girl from Rock Hill. The state's theory was that Cope allowed Sanders – by all evidence a complete stranger – to participate in the sexual abuse and murder of Cope's own daughter. Cope's defense was that Sanders committed the crime by himself.

This defense was strongly supported by Sanders' admission, which was notable for its lack of any reference to an accomplice or co-perpetrator. James Hill's testimony – that Sanders told another inmate that he got away

with the sexual assault and killing of a little girl from Rock Hill – clearly tended to increase the probability that Sanders assaulted and killed Amanda, and that he did it the same way he committed all his other crimes: by a stealthy entering without breaking, and alone. The connection to the Amanda Cope murder is especially strong given the total absence of any evidence of any other unsolved rape and murder of a "little girl from Rock Hill." Sanders' ugly boast was not merely "of consequence" to the case, but, rather, went to its very heart, and Hill's testimony was therefore relevant under Rule 401.

Moreover, no rule of law limits admission of defendants' incriminating statements to highly detailed narratives of the offense charged. Confessions, like any other evidence, are relevant and admissible if there is a logical or rational connection between the confession sought to be presented and the matter of fact in issue at trial. State v. Tufts, 355 S.C. 493, 585 S.E.2d 523 (Ct. App. 2003). Thus, the fact that the statement Hill overheard did not contain still more details regarding the time, place, and circumstances of the attack Sanders was discussing did not render the statement inadmissible. Indeed, incriminating statements lacking specificity are commonly used by the state to link defendants to crimes. See, e.g, State v. Cason, 317 S.C. 430, 431, 454 S.E.2d 888, 889 (Ct. App. 1995) (prosecution witnesses testified

the defendant said he "killed a f_____g n____r b___h" in murder trial involving black female victim); State v. Caulder, 287 S.C. 507, 510, 339 S.E.2d 876, 878 (Ct. App. 1986) (witness who had been incarcerated with the defendant testified at trial that defendant stated he thought he "got away with killing this woman"); see also State v. Cheeseboro, 346 S.C. 526, 548, 552 S.E.2d 300, 312 (2001) (defendant's statement regarding robbery of an establishment with a safe admissible in trial regarding murder that occurred at barbershop with a safe on the premises, despite absence of any other connection between the statement and the crime).

Absent any evidence that Sanders was actually bragging about having gotten away with some unrelated rape and asphyxiation-murder of a different "little girl in Rock Hill," and given the DNA evidence that provided an indisputable link between Sanders and the Amanda Cope murder, his admission was more than sufficiently tied to the Cope case to be considered legally relevant. Indeed, the fact that Sanders' admission provided many, but not all, of the details of this crime went only to the weight the jury should have accorded to the admission, and not to its admissibility. By deeming Hill's testimony irrelevant for lack of specificity, however, and not otherwise analyzing its relevancy, the trial judge improperly constricted the broad standard

of relevancy and erroneously excluded admissible and highly probative testimony.[15]

### B. Hill's Testimony Concerning Sanders' Confession Satisfied The Hearsay Exception Regarding Statements Against Penal Interest

Although neither the state nor Sanders made any hearsay objection to Hill's testimony at trial, nor did the Court of Appeals refer to Hill's testimony as hearsay, it should be noted that Sanders' admissions as related by Hill would have been admissible under the hearsay exception of Rule 804(b)(3), SCRE.

Testimony falls within the exception of 804(b)(3) if the moving party can show that:

(1) the proffered statements were made by an unavailable declarant;

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[15] *State v. Larsen*, 91 Idaho 42, 415 P.2d 685, 692 (1966) cited by the Court of Appeals, actually supports the admissibility of Sanders's confession to Hill. In *Larsen,* the court held that the confession by a third party to a disinterested witness was rightly excluded in the absence of "other substantial evidence" that the third party was, in fact, guilty of the crime for which the accused was on trial. Here, the evidence of Sanders's guilt was overwhelming – his saliva was found on Amanda's breast and his semen was found on her clothing. The other case cited by the Appellate Court, *People v. Cruz*, 162 Ill.2d 314, 205 Ill.Dec. 345, 643 N.E.2d 636, 650 (1994) is even less compelling as a precedent for excluding Hill's testimony. In that case, a trial court's decision to exclude Brian Dugan's numerous confessions that he alone killed and raped Jeanine Nicarico – the ten year old girl who Cruz was charged with murdering and raping – contributed to sending an innocent man to death row in Illinois. After Cruz's conviction and death sentence were reversed, Cruz was acquitted at a third trial. DNA evidence ultimately linked Dugan to the Nicarico rape and murder, causing the State to charge Dugan as the lone killer of Jeanine Nicarico. See http://www.law.northwestern.edu/cwc/exonerations/ilCruzSummary.html

(2) the statement exposed the declarant to criminal liability; and

(3) corroborating circumstances clearly indicate the trustworthiness of the statement.

Hill's testimony regarding Sanders' statement meets these criteria. First, a witness who invokes his Fifth Amendment right to silence is unavailable for hearsay purposes. Rule 804(a)(1), SCRE; State v. Doctor, 306 S.C. 527, 529, 413 S.E.2d 36, 38 (1992). Sanders asserted his privilege when he declined to testify in his own defense at the joint trial. Second, Sanders' admission that he had raped and murdered a child obviously exposed him to the gravest possible criminal liability.

As for the final provision of the Rule, the question of whether corroborating circumstances indicate that the statement is trustworthy must be determined "after considering the totality of the circumstances under which a declaration against penal interest was made." State v. Kinloch, 338 S.C. 385, 391, 526 S.E.2d 705, 708 (2000). In this case, a totality-of-the-circumstances analysis leads to the conclusion that Sanders' statement is sufficiently corroborated for purposes of 804(b)(3). Hill did not receive any reward for his testimony, and had no motive to testify against Sanders. To the contrary, he had a compelling motive not to testify against Sanders – an apparently well-justified fear of retaliation on the part of a witness who was

still recovering from a prison stabbing at the time of his testimony. See United States. v. Lowe, 65 F.3d 1137, 1146 (4th Cir. 1995) ("declarant's motive in making the statement and whether there was a reason for the declarant to lie" is a factor to be considered in 804(b)(3) analysis); cf. State v. Wannamaker, 346 S.C. 495, 552 S.E.2d 284 (2001) (affirming exclusion of 804(b)(3) statement because, inter alia, potential witness was friend and roommate of defendant); State v. McKnight, 321 S.C. 230, 235; 467 S.E. 2d 919, 922 (1996) (affirming exclusion of 804(b)(3) statement because witness with a motive to testify against the alleged declarant); State v. Staten, 364 S.C. 7, 610 S.E.2d 823 (Ct. App. 2005) (noting that potential witness was girlfriend of person accused of crime and thus had motive to fabricate exculpatory testimony).

In addition, the truthfulness of the statement's contents is powerfully corroborated by the biological evidence inculpating Sanders, namely the presence of Sanders' semen and saliva on Amanda's clothing and body. See Lowe, 65 F.3d at 1146 ("nature and strength of independent evidence relevant to the conduct in question" is a factor to be considered in 804(b)(3) analysis); cf. State v. Forney, 321 S.C. 353, 359, 468 S.E.2d 641, 645 (1996) (upholding exclusion because "there is no independent evidence corroborating. . . statements that . . .[the declarant] killed [the victim]"). Thus the re-

quirements of 804(b)(3) are met, and not only would Hill's testimony have survived any hearsay objection, had one been made,[16] but the Court of Appeals should have ruled that the testimony was admissible under 804(b)(3).

### C. The Exclusion Of Hill's Testimony Violated Cope's Federal Due Process Right To Present A Full Defense

In addition to violating well-settled principles of South Carolina evidence law, the exclusion of James Hill's testimony also violated Cope's federal due process right to "a meaningful opportunity to present a complete defense." Crane v. Kentucky, 476 U.S. at 690 (internal quotations omitted). This right includes the right to compel the attendance of witnesses at trial and to present those witnesses in defense of the charges brought. Rock v. Arkansas, 483 U.S. 44, 61-62 (1987). It also includes the right to have an impartial jury serve as the trier of all facts necessary for conviction, with the prosecution bearing the burden of proving to the jury guilt beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 477-78 (2000). Both of

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[16] In addition, even assuming, arguendo, that the Hill statement did not satisfy a well-established exception to the hearsay rule under South Carolina law, an exculpatory confession of a third party offered through hearsay, even if state evidentiary rules prohibit its admission, is admissible on due process grounds when the evidence at issue is reliable and highly relevant to a critical issue in the case. State v. Ard, 332 S.C. 370, 382; 505 S.E. 2d 328, 333 (1998) (overruled on other grounds) (citing Green v. Georgia, 442 U.S. 95 (1979)). Where, as here, "constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." Chambers, 410 U.S. at 302.

these due process entitlements were transgressed by the exclusion of James Hill's testimony.

As discussed above, "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense." Chambers, 410 U.S. at 302 (internal citations omitted). Mr. Cope's defense at trial was that Sanders killed Amanda, and that he acted alone, rather than in some kind of conspiracy with Cope. James Hill would have testified that he heard Sanders bragging about his participation in a murder under circumstances that were materially identical to those surrounding Amanda Cope's death. The similarity between Sanders' statement and Amanda's murder lends credence to Cope's defense theory that Sanders did indeed assault and kill Amanda, and that he did so alone. Amanda Cope was sodomized and raped; Sanders bragged that he sodomized and raped his victim. 9/21/04 Tr. 225, line 19 to 226, line 4. Sanders bragged that he smothered his victim; Amanda had injuries consistent with strangulation.9/9/04 Tr. 33, lines 14-18. Sanders claimed that his victim was a little girl from Rock Hill; Amanda was a little girl from Rock Hill. Sanders also said that he entered through a window, which is consistent with the theory that Sanders entered and exited the Cope residence without leaving apparent signs of forced entry. Most importantly, Sanders' statement did not contain any reference whatsoever to another per-

son – much less the victim's father – observing or participating in the attack and killing. Hill was accordingly a witness whose testimony would have powerfully substantiated Cope's entire theory of defense. Thus, the unwarranted exclusion of Hill's testimony was not only erroneous under South Carolina evidence law, but also violated Cope's fundamental federal due process right to present witnesses in his defense.

## QUESTION FOUR

**The Court of Appeals should have determined that the trial court's exclusion of expert testimony about two other similar cases of "coerced internalized" false confessions was an abuse of discretion.**

Denied the right to present his exculpatory evidence concerning Sanders, Cope's defense attempted to address the only substantial evidence that the State produced against him: his confessions. In order to educate the jury on the phenomena of false confessions, Cope called Dr. Kassin, one of the nation's leading experts in the subject. After a lengthy voir dire, the trial judge qualified Dr. Kassin as an expert on false confessions (R.p. 2437, lines 22-25; R.p. 2438, lines 1-6) but limited his testimony by ruling that he could not testify about "particular cases" of false confessions unless they were "on all fours with this particular case." (R.p. 2438, lines 4-6).

Ultimately, Dr. Kassin made a full proffer of his testimony to the judge outside the presence of the jury. (R.p. 2457, lines 1-15). During this proffer, Dr. Kassin described a particular type of false confession-the coerced internalized false confession. As he explained, such confessions occur when "individuals would not only confess to a crime" under interrogation, but also "come to doubt their own innocence and then ultimately confess to something they didn't do and believe that confession." (R.p. 2460, lines 4-7). Coerced internalized confessions, Dr. Kassin further explained, follow a "predictable script." (R.p. 2460, line 9). Moreover, in each case of a coerced internalized false confession, the common ingredient is that the "presentation of false evidence puts [the defendant] over the edge." (R.p. 2461, lines 21-22).

To help illustrate his expert opinion, Dr. Kassin discussed two cases of coerced internalized false confessions that bore striking resemblances to Cope's first inculpatory statement: the cases of Peter Reilly, (R.p. 2464, lines 18-25; R.p. 2465, lines 1-9), and Gary Gauger, (R.p. 2465, lines 10-25; R.p. 2466, line 1), both of whom falsely confessed to murdering their own parents. With regard to Peter Reilly's case, Dr. Kassin made the following proffer:

> A man by the name of Peter Riley [sic] who came home and found his mother was dead and he called the

police and they arrived and brought him in for questioning and after several hours of questioning they offered to administer a polygraph. He said, fine, I'll take the polygraph. He failed the polygraph and began to doubt his own memory. Asked the question is it possible somebody could commit an act like this and not be aware of it and the detective who is interviewing him said yes, that sort of thing can happen. At which point he started to imagine what he must have done, talked about being angry at his mother for disciplining him and other details and ultimately gave a confession. It turned out that there was exculpatory information and after two or three years in jail he was released and DA's Office didn't go back to retry the case.

9/22/04 Tr. 182, lines 18-25, to Tr. 183, lines 1-9.

Dr. Kassin's proffer with respect to Gary Gauger's case was as follows:

> There was another and I'll just give you one more case because it bears a very close resemblance to this one, of a 41 year old man by the name of Gary Geiger [sic] who comes home to find his parents slaughtered and he calls 911. He is then brought in for interrogation. He is administered a polygraph. After extensive interrogation he is told that he failed the polygraph. At which point he starts to conclude that I must have done it and I blacked out. Ultimately, he confesses to bringing, to coming up behind his parents, yanking their heads back by the hair, and slitting their throat. It turns out that the surveillance tape later picked up a motorcycle gang in which one of the members was bragging about this particular murder in detail and knew all about it and so he was again exonerated.

9/22/04 Tr. 184, lines 10-25; Tr. 185, line 1.

Dr. Kassin then testified that Cope's case, like those of Gauger and Reilly, contained many of the classic ingredients of a coerced internalized

confession: a vulnerable, fatigued subject who is confronted with false evidence of his guilt that causes him to (1) doubt his memory, (2) hypothesize about how he *would have* killed his family member, and ultimately (3) confess that he *must have* killed his family member. (R.p. 2487, lines 14-25; R.p. 2488, lines 1-24). The State objected to any mention of the Gauger and Reilly cases, (R.p. 2492, lines 1-6), and the judge, without analyzing whether the particular cases were "on all fours" with the Cope case, sustained the objection. (R.p. 2492, lines 7-8).

The Court of Appeals found no reversible error in the trial court's exclusion of these illustrative examples, noting that Dr. Kassin was permitted generally to explain the underlying theories of coerced internalized false confessions. Cope II, *supra*, slip op. at 7. In support of the trial court's ruling, the Court of Appeals cited State v. Myers, 359 S.C. 40, 596 S.E.2d 488 (2004), another case in which Dr. Kassin testified about false confessions. As here, the trial court in Myers qualified Dr. Kassin and permitted him to testify, but precluded him from describing two particular cases-a false confession case from Indiana and the very same Peter Reilly case at issue here. Id. at 50-51, 596 S.E.2d at 493-94. This Court affirmed the trial court's decision in Myers, holding that the exclusion of the Indiana case was proper because the case was too dissimilar and that the exclusion of the Reilly case

was not error because, although the case was similar, Dr. Kassin was permitted briefly to talk about the case and in light of this other testimony, the defendant was not prejudiced by the exclusion. Id.

Myers did not erect a categorical bar to case-history testimony from expert witnesses. Rather, it stands for the proposition that a trial court may prevent an expert witness from providing anecdotal testimony regarding cases that are *dissimilar* to the case in which he is testifying. Myers, 359 S.C. at 51, 596 S.E.2d at 494. In Myers, this Court found one of the proffered examples inadmissible because it was dissimilar from the case at hand. Id. But in upholding the trial court's exclusion of the second, similar example, this Court relied on the fact that Dr. Kassin was permitted to talk generally about the case, although he was not allowed to provide the names or location involved. Id.

Myers is distinguishable from this case because the Gauger and Reilly cases were not merely "similar" to the Cope case but were, in fact, nearly identical in many critical respects. These similarities include: (1) that all represent "coerced internalized" false confessions, a relatively rare type of false confession during which an innocent and vulnerable defendant, when confronted with seemingly unassailable evidence of his guilt, begins to doubt his own memory and actually comes to believe that he might have

committed the crime; (2) that Gauger, Reilly and Cope were all vulnerable, sleep-deprived, grief-stricken relatives of the murder victims; (3) that all three men were presented with what was purported to be powerful evidence of their guilt; (4) that the trigger for all three confessions was the same—all three men were told they had failed a polygraph test; (5) that all three, when they began to confess, used tentative language like "I might have" or asked interrogators if they could have killed the victims but not remembered doing so; (6) that all three eventually confessed to murdering loved ones; and (7) that all three men recanted their confessions. Moreover, unlike in Myers, Dr. Kassin was barred from testifying at all about these cases at Cope's trial. The Court of Appeals erred in affirming the trial court's exclusion of these examples and in failing to appreciate these crucial differences between Myers and Cope's case.

The Court of Appeals also erred by failing to appreciate the prejudicial effect of the trial court's ruling on Cope's defense. In order to persuade the jurors that Cope's confession was unreliable, Cope had two huge hurdles to overcome. First, he had to convince jurors that false confessions happen. This is no easy task. Experimental research across a range of settings has demonstrated that juries tend implicitly to believe confessions and to view them as dispositive evidence of guilt. This is so even if the confessions are

completely uncorroborated by other evidence, contain significant errors, and fail to lead police officers to any evidence that they did not already know. See Saul M. Kassin & Gisli Gudjonnson, The Psychology of Confessions: A Review of the Literature and Issues, 5 Psychol. Sci. in the Public Interest at 56 (04) (discussing studies). Studies of actual cases also support the proposition that juries often accept confessions uncritically. In the two largest studies of proven false confessions, false confessors who pled not guilty and took their cases to trial were convicted by juries between 73% and 81% of the time. Richard A. Leo and Richard S. Ofshe, The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation, 88 J. Crim. L. & Crimin. 429, 491-496. (1988); Drizin & Leo, 82 N.C.L.Rev. at 996. The trial court's limitations on Dr. Kassin did not necessarily prevent him from persuading jurors that false confessions exist; although extensive discussion of other false confession cases would have been illustrative of the phenomenon of false confessions, Dr. Kassin's generalized testimony was probably sufficient to disabuse the jury of the notion that false confessions do not happen.

The real prejudice to Cope, however, occurred when one considers the second, even bigger hurdle, that Cope faced. Juries so readily convict innocent defendants in false confession cases because false confessions are coun-

terintuitive –j urors simply cannot imagine that they would ever confess to a crime they did not commit. See Kassin, et al., Police-Induced Confessions: Risk Factors and Recommendations, 34 Law and Hum. Behavior 3, 24 (2010) ("Indeed, most people reasonably believe that they would never confess to a crime they did not commit"). In Cope's case, not only did he have to persuade jurors that false confessions occur as a general matter, he had to persuade them that people can and do falsely confess to murder, a cardinal sin and the most serious crime on the books. Even more to the point, he had to convince jurors that people can and do falsely confess to the most horrific and unimaginable of all murders -- *the murder and sexual assault of their loved ones* – crimes which can, and frequently do, result in death sentences. Abstract or theoretical discussion of false confessions alone could not have convinced Cope's jury that innocent people confess to murdering and raping their own immediate family members. The jury needed concrete case studies of documented false confessions to such crimes in order to accept such a counterintuitive concept.

Like Cope's case, both the Gauger and the Reilly confession cases were "coerced internalized false confessions" in which defendants were presented with false evidence of their guilt in the form of polygraph results. Such evidence, Dr. Kassin would have explained, is a proven trigger for

false confessions – it has been known to cause defendants to doubt their own memory of the events and, through a police-encouraged process of trying to visualize how the crimes were committed, lead them to believe that they might have killed their loved ones. Without these case studies, jurors had no frame of reference to enable them to accept that Cope, or for that matter anyone, could be influenced to confess to killing a loved one.

A trial court abuses its discretion in excluding expert testimony when that ruling rests on an error of law or a factual conclusion that is without evidentiary support. Fontaine v. Peitz, 291 S.C. 536, 354 S.E.2d 565 (1987). Moreover, a court's ruling on the admissibility of expert testimony is an abuse of discretion where the exclusion of such evidence is "manifestly arbitrary, unreasonable, or unfair." Ellis v. Davidson, 358 S.C. 509, 524, 595 S.E.2d 817, 825 (Ct. App. 2004). Here, the trial court abused its discretion because it failed to follow its own rule and arbitrarily excluded any testimony about two cases which were "on all fours" with the case before it. And despite this failure of the trial court to analyze the evidence carefully, the Court of Appeals affirmed its decision, finding that "[t]he trial court in this case conscientiously considered the proffered anecdotal evidence before excluding this testimony." Cope II, *supra*, 684 S.E.2d at185.

The trial court's abuse of discretion prejudiced Cope because it prevented him from offering a plausible explanation to the jury not only for why he was influenced to confess to a murder he did not commit, but also for why he confessed to perhaps the most heinous crime imaginable-the rape and murder of his own child.[17] Cope's jury needed not only to learn that false confessions occur as a general matter, it also needed to overcome the natural misconception that a person cannot be influenced to confess to crimes as grievous as murder or rape, and especially not where the victims

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[17] Although the Gauger and Reilly cases are the only two examples referenced by Dr. Kassin, several other cases of fathers who falsely confessed to murdering and raping their daughters have surfaced since Cope's arrest. In June 2004, in Will County, Illinois, Kevin Fox, confessed to and was charged with the abduction, sexual assault and murder of his three year old daughter Riley. DNA evidence later excluded Fox and ultimately was used to link a convicted sex offender to the crime. Steve Schmadeke, *Sex offender pleads guilty to rape, murder of 3 year-old Riley Fox*, Chicago Tribune, November 10, 2010, available at http://articles.chicagotribune.com/2010-11-10/news/ct-met-scott-eby-hearing-1111-20101110_1_riley-fox-scott-eby-melissa-fox. . A report, commissioned by the Will County Sheriff's Office, detailed all of the mistakes made by the authorities, citing police "tunnelvision" as the main cause of the wrongful arrest of Fox. See Kristen Schorsch, *Probe into Girl's Murder Became 'Unguided Missile'*, Chicago Tribune, January 24, 2011, available at: http://articles.chicagotribune.com/2011-01-24/news/ct-met-riley-fox-report-20110124_1_scott-wayne-eby-riley-fox-murder-report-details. In the report, prepared by Andrews International, also blamed police for giving too much weight to two facts, which in retrospect, seemed like "scant" evidence of Fox's guilt – his "flat demeanor" on the day his daughter's body was discovered and the lack of any "signs of forcible entry" at the Fox home. *See* Andrews International, Comprehensive Operational Assessment, Criminal Investigative Unit, Sheriff's Office, Will County, December 16, 2010, at 9, 11-12, available at http://www.scribd.com/full/47496706?access_key=key-d7dvwhg1k4m4ipsr1oi In 2005, in Waukegan, Illinois, detectives charged Jerry Hobbs after he confessed to the murder of his eight-year-old daughter Laura and nine-year-old Krystal Tobias. Hobbs languished in jail for five years until DNA from semen found inside his daughter not only excluded him but was matched to a serial sexual predator. See Tom Jackman and Josh White, *Arlington Rape Suspect's DNA Linked to slayings of two girls in Illinois in 2005,* Washington Post, July 9, 2010, available at: http://www.washingtonpost.com/wp-dyn/content/article/2010/07/08/AR2010070805703.html

are members of the defendants' own families. This is where Dr. Kassin's testimony would have been most critical. The trial court's decision to preclude Dr. Kassin from testifying about two similar cases in which defendants falsely confessed to killing loved ones under nearly identical circumstances thus prevented the defense from filling a critical piece of its defense theory.

## QUESTION FIVE

**Absent any evidence of an actual agreement between Cope and Sanders---or even that the two men had ever met---the Court of Appeals erred when it reversed itself on rehearing to find the evidence sufficient to prove that Cope and Sanders conspired together to rape and murder Cope's daughter.**

The obvious difficulty encountered by the Court of Appeals in deciding whether the State's evidence supported Cope's conspiracy conviction is a testament to the weakness of the State's conspiracy charge (and other charges) against Cope. Criminal conspiracy is defined by statute as a "combination between two or more persons for the purpose of accomplishing an unlawful object." S.C. Code Ann. § 16-17-410 (2003). "The gravamen of the offense of conspiracy is the agreement or combination." State v. Mouzon, 326 S.C. 199, 206, 485 S.E.2d 918, 922 (1997). In its initial decision, the Court of Appeals majority recognized that the evidence in this case, at most, showed that Cope had confessed to crimes to which Sanders was

linked by his own DNA:

> The State's evidence of a conspiracy was entirely circumstantial, consisting of: (1) forensic evidence that the bite mark where Sanders' DNA was found was inflicted within the same two-hour time frame as the injuries that Cope confessed to inflicting, (2) Sister's testimony that she and Child locked the doors before they went to bed and testimony that there was no evidence of forced entry, and (3) the fact that the house was full of debris and passage inside, particularly at night, would have been difficult. These factors, whether considered individually or collectively, raise at most a suspicion that Cope and Sanders intended to act together for their shared mutual benefit. Any inference that they made an agreement to accomplish a shared, single criminal objective would be speculative at best.

Cope I, *supra*, slip op. at 11. But, after Cope pointed out in a petition for rehearing that the failure of the conspiracy count could not be reconciled with the rest of the State's case against him, the Court of Appeals reversed itself and ruled that these same facts, together with police officers' testimony that Cope appeared to have attempted a clumsy cover-up of the crime scene before calling the police and later staged the crime scene to make his daughter's death appear to be an accident, sufficed to prove that Cope and Sanders actually conspired together. Cope II, *supra*, 684 S.E.2d at187-88.

The facts cited by the Court of Appeals, even if credited, have no tendency to prove an *agreement* between Cope and Sanders. Indeed, they added little to the case against Cope alone because the investigating officers' rather subjective initial impressions that Cope was behaving suspiciously at

the time of their arrival on the scene were formed long before the police knew that Sanders had been present in the Cope home. But, assuming that the officers would still have viewed Cope's behavior as suspicious had they known from the beginning that Sanders had left his saliva and semen on the victim's body and clothing, that behavior would have tended to prove only Cope's *individual* guilt, and not that Cope conspired with Sanders.

The Court of Appeals' contrary holding violates the rule that "[b]ecause the actus reus of conspiracy is the agreement, the evidence must prove the agreement, not the object thereof." State v. Crawford, 362 S.C. 627, 641 608 S.E.2d 886, 893 (2005) (emphasis added). The Court of Appeals deduced from the object of the putative "conspiracy"-the rape and murder-and from largely incompatible evidence linking each defendant to those crimes, that the two men must have somehow conspired together to commit them. In so doing, the Court of Appeals failed to heed this Court's warning that courts must "exercise caution to ensure the proof is not obtained 'by piling inference upon inference.'" State v. Gunn, 313 S.C. 124, 134, 437 S.E.2d 75, 81 (1993) (quoting Direct Sales Co. v. United States, 319 U.S. 703, 711 (1943)).

A final point to be made about the Court of Appeals' belated endorsement of the State's proof of conspiracy is that it powerfully underscores the

prejudicial impact of the trial court's evidentiary rulings discussed in the first four sections of this petition. For example, the Court of Appeals cited the lack of evidence of forced entry as tending to prove that Cope must have let Sanders into his home to rape and murder his daughter. But, the jurors would likely have rejected this inference had the trial judge not prevented them from learning that this circumstance simply reflected Sanders' modus operandi-he *never* leaves signs of forced entry when he burglarizes residences and attacks whatever female residents he encounters inside. Likewise, the jury's acceptance of the State's rather outlandish claim of a conspiracy between Sanders and Cope would likely not have survived testimony that Sanders bragged about committing the rape and murder of "a little girl in Rock Hill" after surreptitiously entering her residence and apparently doing so alone. Even if the suspicious circumstances cited by the Court of Appeals added up to proof of a conspiracy between two men who had apparently never met and did not know each other, the Court's reliance on these circumstances as the basis of the conspiracy conviction undermines its earlier determination that the trial judge acted within his discretion in blocking Cope's efforts to show why these circumstances actually proved nothing.

The State's decision to charge Cope with conspiracy was one of expediency – there was simply no other way, short of admitting a grievous error,

for authorities to reconcile the fact that Cope had confessed to a crime that Sanders had clearly committed. Thus the conspiracy charge went forward despite the fact that not a shred of evidence existed to connect Cope, an obese, reclusive white man, with Sanders, an African American, sexual predator. The State admitted that its case was simply built upon a tissue of inference when it argued there "had to be" a conspiracy between Cope and Sanders in order for the state's case to make any sense. 9/8/04 Tr. 195, lines 20-22.

The trial court had the opportunity to direct a verdict for the defense on the conspiracy count. It failed in its obligation to do so. The Court of Appeals had the opportunity to toss out the conspiracy conviction. After initially agreeing to do so, it revised its opinion to reinstate the conspiracy count when it recognized that as the conspiracy charge goes, so goes the rest of the charges against Cope. In the absence of any proof that Cope and Sanders ever met, let alone agreed to rape and murder Cope's daughter, this Court should reverse the conspiracy conviction and all the other charges which necessarily stem from it.

## CONCLUSION

The convictions should be reversed, or in the alternative, the judgment of conviction should be reversed and the case remanded to the York County Court of General Sessions for a new trial.

Respectfully submitted,

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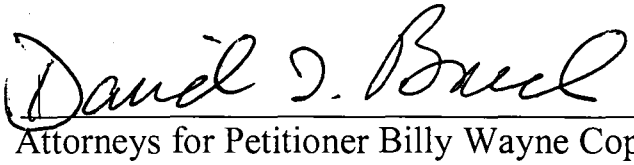
By: 
Attorneys for Petitioner Billy Wayne Cope

April 23, 2012

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM YORK COUNTY
Court of General Sessions

John C. Hayes, III, Circuit Court Judge

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On Writ of Certiorari to the South Carolina Court of Appeals

Opinion No. 4526 (S.C. Ct. App. refilled September 29, 2009)

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The State ..... Respondent,

v.

Billy Wayne Cope ..... Appellant.

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CERTIFICATE OF SERVICE

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The undersigned attorney with this office, which is associated for costs by order of this Court, hereby certifies that a true copy of the brief of petitioner in the above referenced case has been served upon Donald J. Zelenka, Esquire, at Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, South Carolina 29201, this 23rd day of April, 2012.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER.

SUBSCRIBED AND SWORN TO before me
this 23rd day of April, 2012.

(L.S.)
Notary Public for South Carolina
My Commission Expires: August 23, 2014 .