

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

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April 6, 2012.

James M. Morton, Esquire
Michael B. Smith, Esquire
Morton & Gettys, LLC
P. O. Box 707
Rock Hill, SC 29731

Re: The State v. Cope, Billy Wayne

Dear Counsel:

The following Order has been endorsed on your Consent Motion for Leave to File a Brief of 100 Pages and for Extension of time for filing Appendix and Brief in the above entitled case on appeal.

"Granted.

s/ Costa M. Pleicones A.C.J.
For the Court

April 6, 2012."

Please be advised the Appendix and Brief of Petitioner should be served and filed on April 23, 2012.

Very truly yours,

Brenda F. Shealy
CHIEF DEPUTY CLERK

DES/Ida

cc: Chief Appellate Defender Robert M. Dudek
David I. Bruck, Esquire
Steven A. Drizin, Esquire
Assistant Deputy Attorney General Donald J. Zelenka
Kevin Scott Brackett, Esquire

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

APR - 4 2012

APPEAL FROM YORK COUNTY
Court of General Sessions

S.C. Supreme Court

John C. Hayes, III, Circuit Court Judge

Opinion 4526 (S.C. Ct. App. filed April 02, 2009, and refiled September 29, 2009)

The State.....Respondent,
v.
Billy Wayne Cope.....Petitioner.

**CONSENT MOTION FOR LEAVE TO FILE A BRIEF OF 100 PAGES AND FOR
EXTENSION OF TIME FOR FILING APPENDIX AND BRIEF**

The Initial Brief of petitioner and appendix to be included in the record on appeal are currently due to be filed on April 9, 2012. The appellant respectfully moves for a fourteen day extension in which to serve and file the initial brief of appellant and appendix until April 23, 2012.

While counsel are diligently working to edit and shorten the brief, the fact remains that adequate treatment of the issues in this case will require considerably more than the 50 pages allowed by Rule 208(b)(5), SCACR.

This is an appeal from a conviction for murder, criminal sexual conduct and conspiracy involving a 3500 page record and several issues of first impression in South Carolina. The issues involved, as set forth in the Petition for Certiorari are:

Granted
Justice A.C.P.
for the Court
April 6, 2012

1. The trial Court's exclusion of evidence regarding co-defendant, James Sanders' other crimes constituted reversible error under Rule 404(b), SCRE, and State v. Lyle, and violated Cope's due process right to present his defense..
2. The Court of Appeals erred in affirming the trial court's denial of Cope's motion to sever his trial from that of Sanders so as to facilitate admission of Sanders' other crimes as evidence of Third Party Guilt.
3. The Court of Appeals should have determined that the trial court abused its discretion in excluding testimony from James Hill concerning Sanders' admission to assaulting a "little girl in Rock Hill".
4. The trial court's exclusion of expert testimony about two other similar cases of "coerced internalized" false confessions warrants review.
5. The Court of Appeals majority erred when it reversed itself on rehearing to rule that the evidence sufficed to establish a criminal conspiracy between Cope and Sanders.

Given the number of substantial issues presented and the length of the record, counsel believe that a brief of 100 pages is necessary to fairly present the facts and law relevant to the issues on appeal.

Accordingly, and because completion of the Initial Brief must await the Court's ruling on this motion to relax the 50-page limitation of Rule 208(b)(5), SCACR, counsel finds that he must request and additional extension of time of fourteen days from April 9, 2012, or from the date on which the Court rules on the motion to relax the page limitation, whichever is later.

Counsel is authorized to advise the Court that opposing counsel, Assistant Deputy General Donald J. Zelenka, does not oppose the relief sought by this motion.

WHEREFORE, having set forth his grounds, the undersigned counsel for the petitioner Billy Wayne Cope requests that the Court permit filing of an initial brief of up to 100 pages in length, and that it extend the due date for the service and filing of Initial Brief and Appendix to be included in the Record to April 23, 2012, or to a date fourteen days after the Court acts on this motion, whichever is later.

Respectfully Submitted,

DAVID I. BRUCK
Virginia Capital Case Clearinghouse
Washington and Lee School of Law
Lewis Hall, Room 220
Lexington, VA 24450
540.458.8188

STEVEN A. DRIZIN
Center on Wrongful Convictions
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357 E Chicago Ave
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312.503.6608

JAMES M. MORTON
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Rock Hill, SC 29731
803.366.3388

Attorneys for Appellant

By 
JAMES M. MORTON

Allen, Linda

From: Don Zelenka <AGDZELENKA@scag.gov>
Sent: Friday, April 06, 2012 9:27 AM
To: Allen, Linda
Cc: James Morton
Subject: State v. Billy Wayne COPE - Consent to Request to Extend Brief of Petitioner and Page Limits

Deputy Clerk of Court Linda Allen

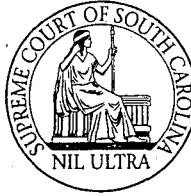
Please be advised that prior to the filing of the motion to extend filing for 14 days and a separate motion to expand to allow filing of 100 pages, counsel James Morton had spoken with me, as counsel for Respondent and obtained my consent to each motion which was filed April 4, 2012.

If further information is necessary, please advise me.

Sincerely,

Don Zelenka

Donald J. Zelenka
Assistant Deputy Attorney General
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, South Carolina 29211
803-734-3601
803-734-4035(FAX)
agdzenka@scag.gov



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
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April 6, 2012

James M. Morton, Esquire
Michael B. Smith, Esquire
Morton & Gettys, LLC
P. O. Box 707
Rock Hill, SC 29731

Re: The State v. Cope, Billy Wayne

Dear Counsel:

The following Order has been endorsed on your Motion to Associate Counsel in the above entitled case on appeal.

"Granted.

s/ Costa M. Pleicones A.C.J.
For the Court

April 6, 2012."

Please be advised that by copy of this letter we are advising all interested parties of the action by the Court.

Very truly yours,

Brenda F. Shealy

CHIEF DEPUTY CLERK

DES/lda

cc: Chief Appellate Defender Robert M. Dudek
David I. Bruck, Esquire
Steven A. Drizin, Esquire
Assistant Deputy Attorney General Donald J. Zelenka
Kevin Scott Brackett, Esquire

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM YORK COUNTY
Court of General Sessions

John C. Hayes, III, Circuit Court Judge

RECEIVED

APR - 4 2012

S.C. Supreme Court

Opinion 4526 (S.C. Ct. App. filed April 02, 2009, and refiled September 29, 2009)

The State.....Respondent,
v.
Billy Wayne Cope.....Petitioner.

MOTION TO ASSOCIATE COUNSEL

1. The petitioner was convicted September 22, 2004, of murder, criminal sexual conduct, criminal conspiracy, and unlawful conduct towards a child. He has been incarcerated since November, 2001.
2. Petitioner's convictions were affirmed by the South Carolina Court of Appeals on April 2, 2009 and petitioner petitioned for certiorari on December 9, 2009.
3. This Court granted certiorari on March 9, 2012.
4. The petitioner has no source of income; he owns no real estate; he has no personal property nor banking/investment/retirement account(s). The petitioner is indigent and petitioner's affidavit of indigency is attached.
5. The petitioner's trial counsel was appointed and along with David Bruck, esquire and Steven A. Drizin, esquire, has represented him throughout the appellate process *pro bono* and continues to represent him *pro bono*.

Granted
[Signature]
For the Court

April 6, 2012

6. The petitioner does not have the financial ability to pay the costs of the copies of the record on appeal and other documents needed to be filed with this Court.
7. The petitioner wishes to associate the Office of Appellate Defense (Appellate Defense) for purposes of these costs. Appellate Defense has consented to the appellant's request. Appellate Defense, however, respectfully requests the filing and granting of this motion beforehand.

WHEREFORE, the appellant seeks an order of this court allowing Appellate Defense to be associated for purposes of cost.

Respectfully Submitted,

DAVID I. BRUCK
Virginia Capital Case Clearinghouse
Washington and Lee School of Law
Lewis Hall, Room 220
Lexington, VA 24450
540.458.8188

STEVEN A. DRIZIN
Center on Wrongful Convictions
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MICHAEL B. SMITH
Morton & Gettys, LLC
PO Box 707
Rock Hill, SC 29731
803.366.3388

Attorneys for Appellant

By James M. Morton
JAMES M. MORTON

Allen, Linda

From: Robert M. Dudek <RDudek@sccid.sc.gov>
Sent: Friday, April 06, 2012 10:18 AM
To: Allen, Linda
Subject: RE: Billy Wayne Cope

Ms. Allen:

After reviewing the indigency affidavit of Petitioner Billy Wayne Cope, and the motion which shows Mr. Cope had appointed counsel, that his lawyers now represent him pro bono, and since the Appellate Division would have handled this case anyway but for pro bono counsel representing the indigent Mr. Cope in this present action I consent to the Appellate Division being associated for costs in this case. Thank you.

734-1955

Robert M. Dudek
Chief Appellate Defender
Commission on Indigent Defense
Appellate Division
PO Box 11589
Columbia, South Carolina 29211
(803) 734-1330

-----Original Message-----

From: Allen, Linda [mailto:LAllen@sccourts.org]
Sent: Friday, April 06, 2012 9:38 AM
To: Robert M. Dudek
Subject: Billy Wayne Cope

Bob, this is the Motion to associate counsel we talked about. Thanks Linda

-----Original Message-----

From: MP7500@sccourts.org [mailto:MP7500@sccourts.org]
Sent: Friday, April 06, 2012 9:48 AM
To: Allen, Linda
Subject:

This E-mail was sent from "RNPD33440" (Aficio MP 7500).

Scan Date: 04.06.2012 09:48:18 (-0400)
Queries to: MP7500@sccourts.org

STATE OF SOUTH CAROLINA

COUNTY OF YORK

AFFIDAVIT OF INDIGENCY

Case Name The State of South Carolina vs Billy Wayne Cope

Criminal Case No. 04-GS-46-2614-2618; 04-GS-46-3232-3234; 04-GS-46-200

Current Address: 990 W. Sackville Hwy, Bishopville, SC 29010

Are you incarcerated? ☒ Yes (If "Yes") Where? Lee C. I.
☐ No

What were you convicted of? Murder 1st, CSC (2 counts), Child Neglect, Conspiracy

What was your sentence? Life + 30 yrs

Are you appealing from
☒ a trial, ☐ a guilty plea ☐ a post-conviction relief hearing?

In what county was this trial/hearing/guilty plea held? York County

Presiding Judge's name? John Hayes III

Date of trial/guilty plea or post-conviction relief hearing Sept 7 - 24, 2001

Were you represented by
☒ a court-appointed attorney ☐ public defender or ☐ retained counsel?

Name of attorney/public defender? A. Philip Baity, James Morton

If retained, how much did you pay for attorney fees? \$ 0

If you still owe money to your attorney, how much? \$ 0

1. Are you presently employed? Yes ☐ No ☒

a. If "yes," state the amount of your salary or wages per month, and give the name and address of your employer. _____

b. If "no," state the name and address of last employment, date of termination of employment, and amount of your salary or wages per month. Steakout, Robbie Velazos, 11-29-01, \$1400.00 Month

2. List by name, age and relationship to you, any persons who are dependent upon you for support. Indicate beside each how much you contribute toward their support. None

3. Have you received within the past twelve months any money from any of the following sources?

a. Business, profession or form of self-employment?

Yes _____ No ✓

b. Rent payments, interest or dividends?

Yes _____ No ✓

c. Pensions, annuities or life insurance payments?

Yes _____ No ✓

d. Gifts or inheritance?

Yes _____ No ✓

e. Any other sources?

Yes ✓ No _____

If the answer to any of the above is "yes," describe each source of money and state the amount received from each during the past twelve months. 400 dollars from my Dad

4. Do you own cash, or do you have any money in a checking or savings account?

Yes _____ No ✓

If the answer is "yes," state the total amount of the cash owned. \$ _____

5. Do you own any real estate, stocks, bonds, notes or other valuable property (excluding ordinary household furnishings and clothing)? Yes _____ No ✓

If the answer is "yes," describe the property and state the appropriate value of the items owned. _____

6. What kind of motor vehicle do you own? None

Is it paid for? Yes _____ No _____

If not, what are the monthly payments? \$ _____

7. How much to you owe (on liens, mortgages, other encumbrances or debts)? None

I do solemnly swear that the account by me delivered into this Court does contain a true and full account of all my real and personal estate, debts, credits and effects whatsoever without exception, which I, or any person in trust for me, have or at the time of my possession had, or am, or was, in respect, entitled to, in possession, remainder or reversion and that I have not at any time since charges were made against me or before, directly or time since charges were made against me or before, directly or indirectly sold, leased, assigned or otherwise disposed of or made over, in trust for myself or otherwise, other than is mentioned herein.

I understand that the State shall file a claim against me in an amount equal to the cost for representation, but that such claim shall not constitute a lien against my property, unless, the claim is reduced to judgment by the Order of the Court after giving me at least thirty days' notice.

Under penalty of perjury, I certify that the information give by me on this affidavit is true and correct, and I understand that I will be subject to civil and/or criminal penalties if I knowingly furnish false information.

I am financially unable to employ counsel.

This 28th day of March, 2012

Billy W. Cope
Defendant

I understand that I am entitled to at least thirty days' notice before a claim against me may be reduced to judgment, and I do hereby waive the right to such notice.

This 28th day of March, 2012

Billy Cope
Defendant

SUBSCRIBED AND SWORN to before
me this 28th day of March, 2012

Jessie L. Meeton
NOTARY PUBLIC FOR SOUTH CAROLINA

My commission Expires: 4-26-2014

MORTON & GETTYS
ATTORNEYS AT LAW

JAMES M. MORTON

JOHN P. GETTYS, JR. *

MICHAEL B. SMITH †

JOSHUA B. VANN

ELIZABETH S. OWEN

J. RICHARDS MCCRAE, III

WALTER G. DUSKY §

MICHAEL K. HATCH ‡

Certified Civil Court Mediator *
Certified Family Court Mediator †
Licensed in NC & SC §
Licensed in NC, SC, GA, & FL ‡
(GA & FL inactive)

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APR - 4 2012

S.C. Supreme Court

April 4, 2012

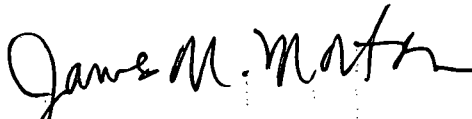
Attention: Filing
South Carolina Supreme Court
Post Office Box 11330
Columbia, SC 29211

Re: *South Carolina vs. Billy Wayne Cope*
Opinion No.: 4526

Dear Sir/Madame:

Enclosed please find a Consent Motion For Leave To File A Brief Of 100 Pages And For Extension Of Time For Filing Appendix And Brief, along with a Motion To Associate Counsel. I was appointed at trial and, along with co-counsel, have continued and will continue to serve pro-bono as co-counsel. Please call me should you have any questions. Thank you for your consideration.

Sincerely,


James M. Morton
Attorney at Law

Enclosures

ROCK HILL OFFICE

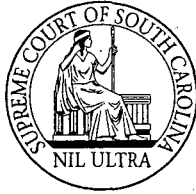
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The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
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March 9, 2012

James M. Morton, Esquire
Michael B. Smith, Esquire
Morton & Gettys, LLC
P. O. Box 707
Rock Hill, SC 29731

Re: The State v. Cope, Billy Wayne

Dear Counsel:

Enclosed is the Order granting your Petition for Writ of Certiorari in the above entitled matter.

It will be necessary for you to furnish this office with an additional thirteen (13) copies of the appendix within thirty (30) days from the date of this letter.

Brief of Petitioner should be served and filed on or before April 9, 2012. The brief is not properly filed until we have proof of service.

Brief of Respondent should be served and filed within thirty (30) days after petitioner's brief is filed. We must have proof of service. Any reply brief should be served and filed within ten (10) days after filing of respondent's brief.

Very truly yours,



CLERK

DES/lda

cc: David I. Bruck, Esquire
Steven A. Drizin, Esquire
Assistant Deputy Attorney General Donald J. Zelenka
Kevin Scott Brackett, Esquire
The Honorable Tanya Gee

The Supreme Court of South Carolina

The State,

Respondent,

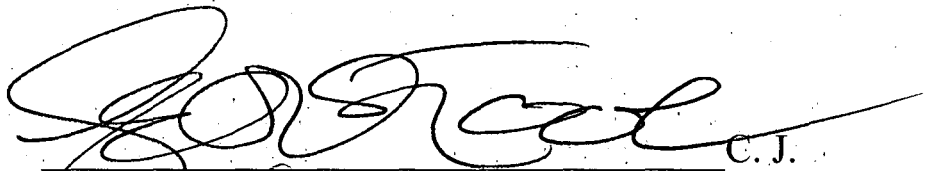
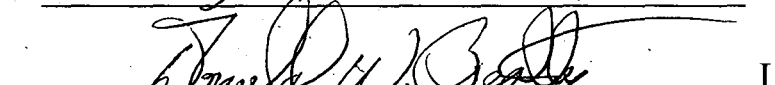
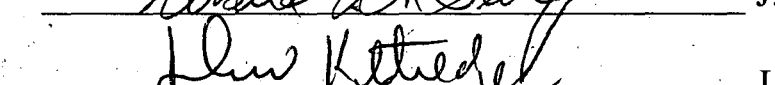
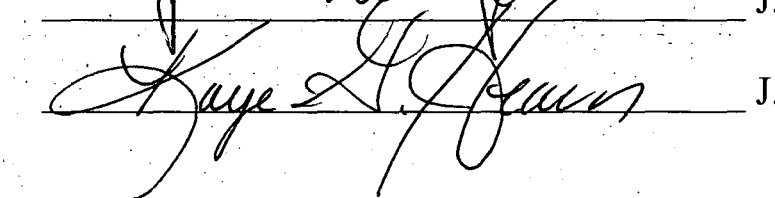
v.

Billy Wayne Cope,

Petitioner.

ORDER

We grant the petition for a writ of certiorari to review the Court of Appeals' decision in *State v. Cope*, 385 S.C. 274, 684 S.E.2d 177 (Ct. App. 2009). The parties shall proceed to serve and file the appendix and briefs as provided by Rule 242(i), SCACR.

 C.J.
 J.
 J.
 J.
 J.

Columbia, South Carolina

March 9, 2012

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

DEC - 9 2009

APPEAL FROM YORK COUNTY
Court of General Sessions

S.C. SUPREME COURT

John C. Hayes, III, Circuit Court Judge

Opinion 4526 (S.C. Ct. App. filed April 02, 2009, and refiled September 29, 2009)

The State.....Respondent,
v.
Billy Wayne Cope.....Appellant.

PETITION FOR A WRIT OF CERTIORARI

Attorneys for Appellant:

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Other Counsel of Record:

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KEVIN BRACKETT
Solicitor, Sixteenth Judicial Circuit
1675 York, Hwy, Suite 1-A
York, SC 29745
803.628.3020

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CERTIFICATE OF COUNSEL

Counsel for petitioner certify that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on September 29, 2009.

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

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 in the family home. 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 and in saliva from a bite mark on the child's body came not from Cope, but from one James Sanders,¹ a convicted sex offender who had committed a series of burglaries and sexual assaults in the Rock Hill area² without leaving signs of forced entry³ immediately after the Cope murder, and who had no known connection to any member of the Cope family. Rather than admit the obvious—that the 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). It then secured a series of evidentiary rulings from the trial court which effectively eviscerated Cope's defense while enhancing the State's conspiracy theory, and on September 22, 2004, a York County jury convicted both men of murder, criminal sexual conduct, and conspiracy.

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

¹ (R. p. 2240, lines 15-21).

² (R.p. 740, lines 14-20; R.p. 759, lines 24-25; R.p. 768, lines 22-25; R.p. 769, lines 1-19).

³ (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).

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 prosecution 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").

The evidence against Cope is summarized in the Court of Appeals' opinion 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. 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), 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).⁴ He eventually gave three different confessions, one featuring a videotaped reenactment, before recanting and reasserting his innocence. (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 a broomstick referred to in one of Cope’s confessions (but which was 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*, slip op. at 1. These brief references obscure more than they reveal because they misleadingly imply that the police took the presence of Sanders’ DNA into account as they built their case against Cope. Of course they did not because Sanders’ identity as the actual rapist would not be discovered until some nine months after police obtained Cope’s various confessions. But 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’

⁴ 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.

DNA on the victim under a pile of relatively inconsequential details about Cope, the Court of Appeals' opinion obscures the most powerful reason why this Court should grant certiorari: Billy Wayne Cope is innocent of the murder of his child, he is a victim of law enforcement "tunnel vision," and he has been sentenced to life imprisonment for a horrific crime that was actually committed-alone-by a complete stranger.

In summarizing the evidence, the Court of Appeals also overlooks 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,⁵ and none was corroborated by undisputed physical evidence,⁶ they all had this in common: *they made no mention of James Sanders*, or of the existence of any other accomplice.⁷ 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's confessions indicate he acted alone-unless Cope's confessions were false. Especially noteworthy in this regard is Cope's second confession-that he acted in a dream-state in attacking his daughter-because it seems designed to lessen his culpability. But if Cope hoped to lessen his culpability at any point during his spate of inconsistent confessions, why did he not tell the police what we now know to be true-that a black stranger had actually raped, bitten, and murdered his child? There is no good answer to this question. But without one, the State's contrived conspiracy theory collapses.

⁵ (R.p. 1778, lines 8-12; R.p. 1823, lines 10-14; R.p. 1826, line 14 to p.1827).

⁶ (R.p. 1777, lines 2-25; R.p. 1056, lines 6-14; R.p. 1130, lines 4-10; R.p. 1778, lines 1-12).

⁷ (R.p. 1781, lines 20-24; R.p. 1858, line 20 to 1860, line 19).

In the remainder of this petition, Cope will demonstrate that his case presents “special reasons” warranting the exercise of certiorari review, see State v. Lyles, 381 S.C. 442, 443, 673 S.E.2d 811, 812 (2009), and satisfies each of the criteria for granting certiorari set forth in Rule 242(b), SCACR: it presents novel questions of law, the Court of Appeals’ opinion is in conflict with prior decisions of this Court, the Court of Appeals panel was initially divided on the proper resolution of the case, there are substantial constitutional questions directly involved, and the Court of Appeals’ decision conflicts with Holmes v. South Carolina, 547 U.S. 319 (2006), a recent decision of the United States Supreme Court.

ARGUMENT

1. THE TRIAL COURT’S EXCLUSION OF EVIDENCE REGARDING SANDERS’ OTHER CRIMES CONSTITUTED REVERSIBLE ERROR UNDER RULE 404(b), SCRE, AND STATE v. LYLE, AND VIOLATED COPE’S DUE PROCESS RIGHT TO PRESENT HIS DEFENSE.

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.

Whether the restrictions of Lyle and Rule 404(b) apply when a criminal defendant offers evidence of a co-defendant’s similar crimes is an issue of first impression in South Carolina, and the importance of that issue is a sufficient reason for this Court’s exercise of its discretion to grant certiorari. 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). To be sure, "evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible." 198 S.C. at 104; 16 S.E.2d at 534 (parentheses in original). The corollary of this, of course, is that evidence of third party guilt should be admitted when it does support a claim of innocence, does clearly indicate the guilt of another, and is itself supported by credible foundational facts. Holmes v. South Carolina, *supra*. The information that Cope sought to introduce in this case regarding Sanders was precisely such evidence. Not just a critical component of his defense, the truth about Sanders *was* Cope's defense, as it provided the only evidence available to support 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.

South Carolina courts have not yet addressed expressly the admissibility of "other crimes" as third party guilt evidence, and the manifest importance of this issue provides an additional reason to grant certiorari. At a minimum, nothing in South Carolina law indicates that the standard for admitting third party guilt evidence is heightened in any way when the proffered evidence relates to a third party's other crime or crimes. In addition, other courts have addressed this precise question and have reversed convictions in cases very similar to Cope's. See, e.g., State v. Cotton, 351 S.E.2d 277 (N.C. 1987) (relying on a standard nearly identical to South Carolina's third party guilt rule in finding that it was an abuse of discretion to prevent the defendant from presenting to the jury evidence of a co-defendant's other, similar crimes); see also State v. Garfole, 388 A.2d 587, 591 (N.J. 1978). Pursuant to the rule in Gregory, Cope's evidence regarding Sanders' other crimes should have been admitted as evidence of third party guilt, and it should not have been analyzed under Rule 404(b), SCRE.

Even assuming that evidence of a co-defendant's other crimes is not admissible as third party guilt evidence, Sanders' prior crimes nonetheless were admissible under one of the enumerated Lyle/404(b) exceptions because they tended to establish the existence of a common scheme or plan. See State v. Fletcher, 363 S.C. 221, 609 S.E.2d 572, 582 (2005). The crimes also were proved by clear and convincing evidence, and their probative value far outweighed any potential prejudicial effect on Sanders' trial. See id. at 244-46, 609 S.E.2d at 584. The evidence of Sanders' other crimes thus satisfied every criterion for admission under Lyle and Rule 404(b), and the exclusion of such evidence requires that Cope be granted a new trial.⁸

To determine whether evidence is admissible as a common scheme or plan, the trial court must weigh the similarities against the dissimilarities: "[w]hen the similarities outweigh the dissimilarities, the bad act evidence is admissible under Rule 404(b)." State v. Wallace, 384 S.C. 428, 433, 683 S.E.2d 275, 278 (2009). To begin, the level of similarity between Sanders' other crimes and the attack on Cope's daughter exceeds the degree of similarity found in numerous cases wherein these Lyle/404(b) exceptions have been applied. See, e.g., State v. Hallman, 298 S.C. 172, 379 S.E.2d 115 (1989) (upholding admission of common scheme evidence when crimes occurred seven years apart, the victims 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 incidents). Sanders' other crimes all involved breaking into a strangers' homes without leaving signs of forced entry, (R.p. 833, lines 19-25; R.p. 834, line 1), a similarity that bears particularly great weight given the State's repeated assertion at trial that residential break-ins without

⁸ 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), this Court affirmed admission of evidence by one defendant that his co-defendant previously had 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." Id. at 140, 432 S.E.2d at 466. Furthermore, all three parties in this case agreed at trial that a defendant properly may offer other crimes evidence against a co-defendant. (R.p. 79, lines 9-25).

evidence of forced entry were extremely rare. R.p. 103, lines 5-10; R.p. 2597, lines 12-16). In addition, all of the proffered crimes occurred in a six-week period between November 29, 2001 and January 12, 2002 (R.p. 831, lines 12-21), and all but one occurred less than a mile away from the Cope home (R.p. 831, lines 24-25). Moreover, all the other crimes were committed at night and 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 the Cope child, Sanders' utilized choking/asphyxiation (R.p. 838, lines 4-6), and evidenced a dual motive of theft and sexual assault, (R.p. 754, lines 8-12; R.p. 777, lines 15-16). Additionally, in two of the other crimes, as in the attack on the Cope child, Sanders committed or attempted to commit his assaults despite the presence of others in the residence. (R.p. 754, lines 6-16; R.p. 779, lines 15-16).). Finally, Sanders was positively identified as the perpetrator of the other crimes by DNA (R.p. 889, lines 7-10), and by both in-court and photographic line-up identifications (R.p. 741, lines 15-21; R.p. 776, lines 23-25). These striking commonalities between the Cope murder and Sanders' other crimes are accordingly more than sufficient to satisfy the common scheme exception of Lyle and Rule 404(b). See Lyle, 125 S.C. at 427, 118 S.E. at 811 ("Proof of a common plan or system . . . is merely an evidential means to the end of proving identity or guilty intent, and involves the establishment of such a visible connection between the extraneous crimes and the crime charged as will make evidence of one logically tend to prove the other as charged.").

Despite the uncontroverted evidence that Sanders had committed these other crimes, the Court of Appeals found the evidence inadmissible, listing three differences between the other crimes and the murder. Without even 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*, 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. See Lyle, 125 S.C. at 417, 118 S.E. at 807 ("The acid test is [the evidence's] logical relevancy *to the particular excepted purpose or purposes for which it is sought to be introduced.*") (emphasis added).

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. 2004). As noted, Sanders had been positively identified (and indicted) as the perpetrator of the other crimes, and the trial court accordingly found that there was clear and convincing evidence that Sanders perpetrated the other crimes. (R.p. 889, lines 12-17; R.p. 891, lines 6-7). This finding is well supported and was not disturbed by the Court of Appeals.

Finally, even where evidence satisfies a Lyle/404(b) exception 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 of Sanders' other crimes to Cope's defense substantially outweighed any prejudice to Sanders. Evidence of Sanders' other crimes in the six-week period following the murder would have

powerfully undermined the State's entire theory of the case against Cope, as the prosecution was only able to reconcile the fact that Cope had confessed to a crime that DNA showed Sanders had committed by alleging that Cope and Sanders somehow attacked Cope's daughter together. Faced with a complete lack of evidence linking Cope and Sanders, the State argued that the apparent lack of forced entry into the Cope home proved that Cope "had to" have conspired with Sanders. (R.p. 3562, lines 14-15). But this inference would have been virtually demolished by evidence that Sanders, acting alone, had repeatedly broken into other nearby homes without leaving any signs of forced entry. And any prejudice to Sanders resulting from admission of this evidence would have been minor because Sanders was already undeniably tied to the murder by the saliva and semen he left behind on the victim's body and clothing. See, e.g., State v. Parker, 315 S.C. 230, 234-35, 433 S.E.2d 831, 833 (1993) (holding that erroneous admission of prior bad act evidence against defendant was harmless, where evidence of defendant's guilt was overwhelming without any reference to the prior bad act evidence). Moreover, as discussed below, any conceivable prejudice to Sanders could have been eliminated entirely by granting Cope's request for severance.

2. THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT'S DENIAL OF COPE'S MOTION TO SEVER HIS TRIAL FROM THAT OF SANDERS SO AS TO FACILITATE ADMISSION OF SANDERS' OTHER CRIMES AS EVIDENCE OF THIRD PARTY GUILT.

Because the trial court excluded evidence of Sanders' other crimes, Cope repeatedly sought to sever his trial from that of Sanders so that he could introduce evidence of Sanders' other crimes in a separate trial. Whether severance can be required to allow admission of a co-defendant's other crimes as third party guilt evidence is a question of first impression in South Carolina and one of sufficient constitutional importance to warrant the granting of certiorari.

“[T]he Constitution guarantees criminal defendants ‘a meaningful opportunity to present a complete defense.’” Crane v. Kentucky, 473 U.S. 683, 690 (1986) (quoting California v. Trombetta, 467 U.S. 479, 485 (1984)). “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.” Holmes v. South Carolina, *supra*, 547 U.S. at 325 (quoting United States v. Scheffer, 523 U.S. 303, 308 (1998) (additional internal quotation marks omitted)). The Court of Appeals erred in upholding the trial court’s refusal to sever the joint trial because that refusal denied Cope the “meaningful opportunity to present a complete defense” guaranteed by the Due Process Clause of the Fourteenth Amendment. Crane, 473 U.S. at 690.

As discussed in Argument 1, *supra*, evidence of Sanders’ other crimes meets the necessary requirements for admission as evidence of a third party’s guilt. Nonetheless, the Court of Appeals upheld the denial of Cope’s motion for a severance to enable him to introduce this evidence of Sanders’ guilt in a separate trial, reasoning that “the introduction of evidence of Sanders’ other crimes would not have been inconsistent with Cope’s guilt, even if offered in a separate trial, and would not have raised an inference as to Cope’s innocence.” Cope II, *supra*, 684 S.E.2d at 187. The court based this conclusion in part on a finding that “[t]he evidence of Cope’s involvement, such as his confessions and the evidence of the lack of forced entry, would still have been admitted in a separate trial.” Id. But as the United States Supreme Court reasoned in Holmes v. South Carolina, *supra*, “[j]ust because the prosecution’s evidence, *if credited*, would provide strong support for a guilty verdict, it does not follow that evidence of third-party guilt has only a weak logical connection to the central issues in the case.” 547 U.S. at 328 (emphasis in original).

In Holmes-another York County case involving the same trial judge and prosecutor as this one-this Court had initially held that “where there is strong evidence of an appellant’s guilt, especially where there is strong forensic evidence, the proffered evidence about a third party’s alleged guilt does not raise a reasonable inference as to the appellant’s own innocence.” State v. Holmes, 361 S.C. 333, 342-43, 605 S.E.2d 19, 24 (2004). Unanimously reversing, the United States Supreme Court criticized this Court’s focus on the strength of the prosecution’s case rather than on the probative value or potential adverse effects of admitting evidence of third-party guilt, and invalidated this Court’s ruling as “arbitrary . . . [because] it [did] not adequately serve the end that the Gregory rule and other similar third-party guilt rules were designed to further.” Holmes, 547 U.S. at 331. In fairness, it should be noted that the trial judge did not have the benefit of the Holmes decision at the time of Cope’s trial. But, the Court of Appeals did, and by nevertheless focusing on the strength of the prosecution’s evidence against Cope, rather than on whether the evidence of Sanders’ other crimes supported a critical aspect of Cope’s defense, the Court of Appeals violated Holmes’ fundamental due process principle.

Analyzed under the appropriate standard for evidence of third party guilt, Sanders’ other crimes should have been presented to the jury. To the extent that concern over undue prejudice to Sanders would nevertheless have weighed against their admission, the trial court’s failure to sever Cope’s trial from that of Sanders constituted reversible error. Severance is required where “there is 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.” State v. Walker, 366 S.C. 643, 657, 623 S.E.2d 122, 129 (2005). Thus, a trial court must “act cautiously in allowing joint trial[,] . . . consider problems that arise from a joint trial, . . . and . . . assure protection of each defendant’s constitutional right[s],” id., and has “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 Court has recognized that when one co-defendant’s right to present certain evidence or argument conflicts with another co-defendant’s right to have that evidence or argument excluded, the trial court should grant a severance. See State v. Green, 269 S.C. 623, 625-26, 238 S.E.2d 646, 647 (1977) (citing favorably De Luna v. United States, 308 F.2d 140, 141 (5th Cir. 1962), for the proposition “that in the event one co-defendant’s lawyer must draw the jury’s attention to a possible inference of guilt arising from a co-defendant’s silence, the trial judge should order separate trials.”).

By affirming the denial of Cope’s motion for severance to present third-party guilt evidence that corroborated his defense, the Court of Appeals denied Cope the opportunity to present a complete defense. This was error of federal constitutional dimensions, Crane v. Kentucky, 473 U.S. 683, 690 (1986), and warrants the granting of a writ of certiorari, and a new trial.

3. THE COURT OF APPEALS SHOULD HAVE DETERMINED THAT THE TRIAL COURT ABUSED ITS DISCRETION IN EXCLUDING TESTIMONY FROM JAMES HILL CONCERNING SANDERS’ ADMISSION TO ASSAULTING A “LITTLE GIRL IN ROCK HILL.”

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 the Cope child. The evidence was relevant and admissible under the South Carolina Rules of Evidence, and its exclusion by the trial court further violated Cope’s federal due process right to present a full defense. This substantial constitutional question warrants the granting of certiorari review.

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 at 183.

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 Cope's 12-year-old daughter, a

victim who certainly could be 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. Cope’s defense was supported strongly by Sanders’ admission, which was notable for its lack of any reference to an accomplice or co-perpetrator. James Hill’s testimony clearly tended to increase the probability that Sanders assaulted and killed the victim 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 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’ admission went to the very heart of the case, and Hill’s testimony was therefore relevant under Rule 401, SCRE.

Moreover, no rule of law limits admission of defendants’ incriminating statements to highly detailed narratives of the offense charged. See, e.g., State v. Tufts, 355 S.C. 493, 499 585 S.E.2d 523, 526 (Ct. App. 2003) (holding that defendant’s statement to officer that he “had a problem with his sexual desires” was admissible as a confession by defendant to the charged crime of criminal sexual contact). 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, but only went to its weight as evidence of Cope’s innocence (and of Sanders’ guilt). Indeed, incriminating statements lacking specificity commonly are used by the State to link defendants to crimes, See, e.g., State v. Caulder, 287 S.C. 507, 510, 339 S.E.2d 876, 878 (Ct. App. 1986) (noting that the State presented testimony from a jailhouse informant claiming that the defendant commented that he got “away with killing this woman”), and it is almost inconceivable that this statement would have been excluded as

irrelevant had the *State* offered it against Sanders. By deeming Hill's testimony irrelevant for lack of specificity, however, and not otherwise analyzing its relevancy, the trial judge improperly excluded admissible and highly probative testimony, and the Court of Appeals compounded the error by summarily upholding the exclusion of Sanders' confession.

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, *supra*, 476 U.S. at 690 (internal quotations omitted). "Few rights are more fundamental than that of an accused to present witnesses in his own defense." Chambers v. Mississippi, 410 U.S. 283, 302 (1973) (internal quotations omitted). Cope's defense at trial was that Sanders killed his daughter, 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 the murder of Cope's daughter. Hill's testimony would thus have powerfully substantiated Cope's entire theory of defense. Under these circumstances, the unwarranted exclusion of Hill's testimony was not only erroneous under South Carolina law, but also violated Cope's fundamental federal due process right to present witnesses in his defense. See Rock v. Arkansas, 483 U.S. 44, 61-62 (1987).

4. THE TRIAL COURT'S EXCLUSION OF EXPERT TESTIMONY ABOUT TWO OTHER SIMILAR CASES OF "COERCED INTERNALIZED" FALSE CONFESSIONS WARRANTS REVIEW.

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. 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 doubt his memory, to hypothesize about how he *would have* killed his family member, and ultimately to 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 so 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.⁹ Moreover, unlike in Myers, Dr. Kassin was not permitted to testify at all about these cases at 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.

Case history testimony is essential in false confession cases because it is the only available method by which a defendant can demonstrate that an innocent suspect could admit falsely to doing something as horrible as raping and murdering a loved one. This is due largely to the fact that only a limited number of these cases exist and, consequently, scientific research cannot fully explain what causes them. Because it is difficult to explain abstractly why a defendant might confess falsely to a crime, examples of other cases in which defendants did falsely confess-and which are exactly the same in many respects as the case at hand-provide necessary points of reference for the jury. As a result of the trial court’s ruling regarding the Gauger and Reilly cases, the jury in this case was deprived of the essential information it needed to understand the circumstances that give rise to a coerced internalized false confession, and to appreciate that innocent defendants can be-and have been-persuaded to confess not only to murder, but to murdering their own family members.

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

⁹ 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.

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 at 185.

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. 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 are members of the defendants' own families. This is where Dr. Kassin's testimony would have been most critical. 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, ultimately leading the defendant to believe that he might have killed his loved one. Without these case studies, jurors had no frame of reference to enable them to accept that Cope, or anyone else, could be influenced to confess to killing a loved one. 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.

5. THE COURT OF APPEALS MAJORITY ERRED WHEN IT REVERSED ITSELF ON REHEARING TO RULE THAT THE EVIDENCE SUFFICED TO ESTABLISH A CRIMINAL CONSPIRACY BETWEEN COPE AND SANDERS.

The obvious difficulty encountered by the Court of Appeals in deciding whether the State's evidence supported Cope's conspiracy conviction weighs heavily in favor of granting certiorari. 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 at 187-88.

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. For this additional reason, the Court should grant certiorari.

CONCLUSION

The Court of Appeals' decision warrants review by certiorari not only because it satisfies every one of the criteria set forth in Rule 242, SCACR, but because it failed to correct a manifest miscarriage of justice. When irrefutable DNA evidence shows that police have arrested and charged the wrong man, the usual response is to dismiss the charges. But, in this case, the State avoided admitting its mistake by constructing a theory that Cope intentionally served up his daughter to be raped and murdered by a man he did not know, and whom he never mentioned, whether he was frantically denying his own guilt or elaborately (and inconsistently) confessing. Then, the prosecution concealed the absurdity of its new theory by persuading the trial judge to

exclude most of the evidence that would have led the jury to reject it. The actual innocence of a criminal defendant is not, of course, a requirement or even an articulated consideration governing this Court's exercise of its discretion review.¹⁰ But it surely weighs heavily in the balance, and in this case the manifest likelihood of Billy Wayne Cope's innocence of a heinous crime for which he has already served more than eight years imprisonment requires that review be granted.

Respectfully submitted,

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* Counsel gratefully acknowledge the assistance of Philip Glenn and E. Benton Keatley, Class of 2010, Washington & Lee School of Law, in the preparation of this petition.

¹⁰ During 2009 alone, the Court has published opinions in at least eight criminal cases arising from grants of certiorari to review decisions of the Court of Appeals. State v. Smith, 383 S.C. 159, 679 S.E.2d 176 (2009) (appealability of order granting new trial); State v. Edwards, 383 S.C. 66, 678 S.E.2d 405 (2009) (admissibility of witness intimidation evidence to show consciousness of guilt); Ferguson v. State, 382 S.C. 615, 677 S.E.2d 600 (2009) (prisoner's mental incompetence tolls PCR limitations period); State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009) (reliability of dog-tracking evidence; admissibility of nonscientific expert testimony); State v. Covert, 382 S.C. 205, 675 S.E.2d 740 (2009) (necessity of submitting "not guilty" verdict in criminal case; propriety of submitting criminal statute to jury in writing without including remainder of instructions); State v. Mitchell, 382 S.C. 1, 675 S.E.2d 435 (2009) (affirming Court of Appeals decision that evidence supported armed robbery conviction); State v. Wharton, 381 S.C. 209, 672 S.E.2d 786 (2009) (granting both state's and defendant's petitions to decide various issues regarding propriety of manslaughter and involuntary manslaughter instructions); State v. Douglas, 380 S.C. 499, 671 S.E.2d 606 (2009) (disapproving qualification of doctor who examined child sexual abuse victim as expert in forensic interviewing, but affirming result reached by Court of Appeals).

CERTIFICATE OF SERVICE

I, **James M. Morton**, hereby certify that I have served the *Petition for Writ of Certiorari* and *Appendix of Appellant* in the foregoing action by depositing copies in the United States mail and/or hand delivery to the following:

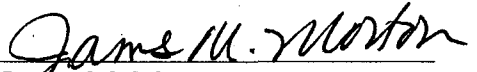
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S.C. SUPREME COURT

December 9, 2009


James M. Morton

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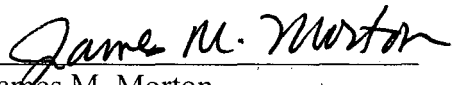
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S.C. SUPREME COURT


James M. Morton

**STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

**APPEAL FROM YORK COUNTY
Court of General Sessions
The Honorable John C. Hayes, III, Circuit Court Judge
Op.No. 4526 (S.C.Ct. App. Filed September 29, 2009)**

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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA,

Respondent,

v.

BILLY WAYNE COPE,

Petitioner.

AMENDED RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S QUESTIONS PRESENTED

1. Given 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-confession 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 Cope and Sanders conspired together to rape and murder Cope's daughter?

RESPONDENT'S STATEMENT OF THE CASE

Billy Wayne Cope was indicted for the murder of his twelve (12) year old daughter (hereafter "Child A"), criminal sexual conduct against Child A and unlawful child neglect of all three of his minor children; Child A, Child B, and Child C. R. 430. R. 81-82; Indictment Numbers: 04-GS-46-2614 to 2618; 02-GS-46-3232 to 3234; 03- GS-46-1843 to 1844; 46-3233 to 34. **Amended Supplemental ROA, p. 30-47.** Cope and James Sanders were subsequently indicted for conspiracy to commit criminal sexual conduct. Sanders was also indicted for the murder of Child A and two counts of criminal sexual conduct against her. A superseding murder indictment was returned against Cope on July 22, 2004. Indictment number: 2004-GS-46-3232. The Honorable John C. Hayes, III, severed the criminal sexual conduct and unlawful conduct charges involving both of Cope's surviving children by order dated August 26, 2004. R. 3699-3700. The state called the remaining charges against Cope and Sanders for trial in the York County Court of General Sessions on September 8th, 2004. R. 894. The trial was held from September 8 through September 22, 2004 before the Honorable Judge John Hayes. The jury convicted Cope and Sanders as charged on September 22, 2004. R. 3675-3677. Judge Hayes sentenced Cope to life imprisonment for murder, 30 years consecutive for one count of criminal sexual conduct, and concurrent terms of 30, 10, and 5 years for the second count of criminal sexual conduct, criminal neglect of a child and conspiracy, respectively. R. 3686-3687. Judge Hayes sentenced Sanders to life for murder, five years for conspiracy, and thirty years for each count of criminal sexual conduct, consecutive.

On April 2, 2009, the Court of Appeals affirmed the convictions for murder, criminal sexual conduct and child neglect and initially reversed the conspiracy conviction, with Judge

Short dissenting. The State and Petitioner both made a petitions for rehearing. On September 29, 2009, the Court of Appeals denied the Petitioner's petition and granted the State's petition. On the same date, the Court entered an opinion affirming all convictions. *State v. Cope*, 385 S.C. 274, 684 S.E.2d 177 (S.C. App. 2009).

ARGUMENT

I. The Court of Appeals reasonably applied the appropriate standard of review in concluding that the trial court properly used its discretion concerning the admission of evidence concerning prior bad acts and statements of his co-defendant, James Sanders.

In his first argument, Cope contends that certiorari should be granted to review the rejection of his claim that he should have been allowed to present evidence concerning other crimes allegedly committed by James Sanders, and an alleged statement made by Sanders after incarceration. The trial court properly denied these efforts concluding the "other bad act" evidence failed to satisfy the requirement of Rule 404(b) to be admissible, that the alleged statement in jail was not relevant or admissible, and that the refusal to sever was appropriate. In denying this claim in the appeal, the Court of Appeals concluded:

Mindful of our standard of review, we find no reversible error in the trial court's exclusion of this evidence. Although there are some similarities between the other crimes and Child's assault, there are also many differences. For instance, no other crime resulted in the death of the victim or involved a child. None of the proffered crimes included the brutality of the attack on Child such as anal penetration and assault with a foreign object. **We therefore hold Cope has not shown a close degree of similarity between the other bad acts and the charged offenses, much less any logical relation between the assault on and murder of Child and the other incidents in the vicinity allegedly involving Sanders and other victims.** Based on these holdings, we affirm the trial court's ruling that Sanders' other crimes are dissimilar to these facts and are therefore inadmissible under Lyle and Rule 404(b), **even if reviewed under a lower standard because proffered by a defendant**, to show either identity or the existence of a common scheme.

State v. Cope, 385 S.C. 285-286, 684 S.E. 2d 1183-184. App.p. 54-55. (Emphasis added).

A. *The Trial Court Properly Excluded Cope's Proffer of Evidence of Other Crimes James Sanders Committed Under Rule 404(b) and State v. Lyle.*

Cope claims that the trial court erred in excluding evidence that co-defendant Sanders committed other crimes subsequent to the November 29, 2001 murder. Cope asserts that this evidence was admissible under SCRE 404(b) to show the existence of a "common scheme or plan" and "identity." The trial judge rejected the showing after a pre-trial hearing on September 8, 2004 based upon the dissimilarity of the crimes. R. 887-890; 9/8/04 Tr. 166-69.

The Trial Court's Order

In denying the admission of the evidence concerning the other bad acts of Sanders, the court determined that the various crimes were too dissimilar to be admitted.¹ At the

The Proffered Evidence

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

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

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

Around midnight, Sarah Hagman Lee was attacked in her residence which is within the same block as George White's residence where a burglary had occurred at 10:30 that same night). Lee answered a knock at her bathroom door while she was in her room watching T.V., thinking it was a roommate. There were a series of knocks without an answer before she went to the door. Sanders pushed his way into her bedroom pushing her back and hitting her head. (This residence is a boarding house that she had recently moved into.) They

outset, Judge Hayes rejected the testimony of expert crime analyst Gregg McCrary who attempted to suggest similarity in the various crimes, concluding that his testimony was flawed. Particularly, Judge Hayes noted that McCrary did not address whether there were additional "similar" crimes in the Rock Hill area. He stated that the asserted similarities were

wrestled their way back through the bathroom and into the kitchen. Once he had her on the ground he kicked her and pushed her, Sanders then got up and went into her bedroom and grabbed her purse which was on her sofa. When he came back into the communal kitchen, which was the only way out of the house, Lee had gotten up and grabbed a baking pan. She then hit Sanders in the head with a pan three times. He dropped her purse and some mace fell out of it. Sanders then got on top of her, but she sprayed Sanders with the mace and he got off of her. As Sanders ran for the door, Lee picked up a screwdriver (which was not hers and she assumed that Sanders brought with him) and tried to stab him as she grabbed Sanders left foot. Lee stabbed at Sanders at three times and noticed blood running down his neck behind his left ear. Sanders then ran out the door with Lee's purse. Although she did not know him previously, she identified him. She stated he had a toboggan on his head than night that she pulled off during the assault and he was not wearing gloves. She did not know how he entered the house and was not aware of any signs of forced entry. Another female resident was across the hallway during the attack, but would not have been able to see the attack. (The record does nor indicate whether she heard the commotion ore not or whether she called the police). R. 753-766 .

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

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

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

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

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

not significant. Judge Hayes stated that the crimes happening "in doors", to strangers, that no forced entry was arguable but not significant where stealth was used, climbing a lattice or waiting outside in a car for a door to open. R. 887-88. He questioned the concept of dual motives.²

2

Gregg McCrary - Crime Analysis Expert.

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

He contended that there were factors to consider about these incidents including date, location, in-door crime, out-door crime, suspect (known or stranger), forced entry, dual motives, sex, robbery, choking or asphyxia, element, and evidence. R. 831; Id. 110. He considered these crimes to have a tight temporal pattern from December 12 to January 12. He contended the location revealed that they were all in Rock Hill within miles of each other, which he contended was a family close geographic pattern. He contended that there was significance in committing crimes in door as opposed to out in the public because a private residence would allow the culprit more control of the premises. He considered a stranger factor to be significant and asserted that stranger based rapes were uncommon as opposed to "known relationship." He contended that in the particular cases there was no sign of what he defined as "forced entry." Concerning dual motives based upon his review of the police reports, there appeared to be a consistent pattern of dual motives of sex and forced sex, sexual assault, robbery and money. He noted that in the Phillips incident she had not reported an interest in robbery or money, but he included it as robbery due to the police report. R. 829-836.

As to this classification, Judge Hayes questioned how McCrary could include robbery as a factor when the victim did not include it in her testimony. R. 836. The witness noted that she had not reported it as such. R. 836-37.

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

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

McCrary discounted the fact that Cope was charged with raping his daughter because the DNA match was to Sanders, "so the actual sexual assault was not done by Cope." R. 840. He opined that "there is sort of a common scheme and pattern that exists in these cases." R. 845.

On cross-examination, he admitted he had not spoken with the victims nor visited the crime scenes. R. 849-50. Importantly, he admitted that he failed to look at other crimes of burglary that occurred in the Rock Hill area during the same time period. R. 851. He also admitted that he did not report on Cope whether it was "known or stranger" and had not

The Court did conclude that Cope had proved by clear and convincing evidence that Sanders was involved in the four proffered incidents. R. 889. However, the trial court felt the evidence failed to rise to the level necessary for admission under Rule 404 to show motive, common scheme or plan. He based this upon the variety of dissimilarities and when attempted to match them up, it cannot be done, even though there are some similarities. He noted that using "identity" to prove a connection to the crime did not count since there was DNA of Sanders in this case, so identity is not necessary to prove Sanders was at this place. He found that the ages of the victims are dissimilar, but the locales are somewhat similar.

reviewed the videotape. He admitted that if the father was the "suspect" it would be different from the others.

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

Concerning K.D. [Victim 1], it was pointed out "he kept looking for money", but in Phillips there was no evidence of robbery. Additionally, the hand was put over Phillips' mouth because she was screaming. As to Hagman (Lee), he was unable to state that there was evidence of a sexual assault on her or that it was other than a fight and robbery. R. 858; 9/8/04 Tr. 137.

As to Child A, he felt the mere fact the victim's pocketbook was out of place was evidence of "robbery." R. 858.

As to age of victim, although Child A was 12 years old, the others were all grown women. R. 858-59.

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

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

Concerning Child A, it was pointed out that there was evidence of sexual mutilation in vaginal and rectal trauma, and evidence about a broom stick being used. However, there was no evidence of sexual mutilation (by object) in any of the other cases, although there was some vagina trauma on K.D. [Victim 1]. He admitted that there was no actual sexual assault on Hagman and others, but they had fiercely resisted. McCrary felt that the two sexually assaulted victims, the 60 year old disabled K.D. [Victim 1] and 12 year old girl were vulnerable. R. 862-63.

However, he then admitted as to Phillips, Lowery, Hagman, there was no commonality of vulnerability by age.

Most importantly, he admitted that one "glaring difference" in the crimes is that Child A was dead and the others were not. R. 863-64.

He stated that he was not going to catalog them, "but I find that they are dissimilar to the extent that he will not let them in under Rule 404. R. 889-90. The Court further stated that the evidence did not need to be addressed under the balancing test of Rule 403 because he found that the evidence did not meet the level of a common scheme. R. 893, l. 1-6. See also, R. 2308-2313 (renewed motion to admit and denial at beginning of defense case).

The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002). Evidence of other crimes, wrongs, or acts is generally not admissible to prove the defendant's guilt for the crime charged. Such evidence is, however, admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent. Rule 404(b), SCRE; State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). To be admissible, the bad act must logically relate to the crime with which the defendant has been charged. If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing. State v. Beck, 342 S.C. 129, 135-36, 536 S.E.2d 679, 682-83 (2000). Even if prior bad act evidence is clear and convincing and falls within an exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. State v. Braxton, 343 S.C. 629, 541 S.E.2d 833 (2001). See State v. Bell, 302 S.C. 18, 27-28, 393 S.E.2d 364, 369 (1990), cert. denied, 498 U.S. 881, 111 S.Ct. 227, 112 L.Ed.2d 182 (1990) (noting that "evidence of other crimes is never admissible unless necessary to establish a material fact or element of the crime charged").

ANALYSIS

There was no Lyle similarity between the other alleged acts of Sanders and the murder of Child A. The instant case involved the middle of the night (between 2 and 4 am. [R. 1115]) sexual mutilation and murder of the twelve year old female victim through abhorrent injuries to both her vaginal and rectal areas by an object. None of these preliminary factors existed in any of the proffered evidence cases against Sanders. There was saliva, identified to Sanders DNA present around her breast of Child A. No sperm was found in the vaginal area. R. 1078 . There was evidence of a struggle in the bed with significant force consistent with holding Child A down while she was alive. R. 1034-35 . There were obvious signs of assault on Child A including bruising about the head and abrasions on the back. It appeared that she had been struck from side to side on her head repeatedly. R. 1048-49 . There was evidence of strangulation on her neck area. R. 1054-57.

The pathologist rejected the claim that a blanket could have accidentally strangle her based upon the autopsy. R. 1056. As to the rectal injuries, they were consistent with a blunt object being inserted up to 8 inches into the rectum. R. 1089; 1104-05. Dr. Maynard stated that this object would have been consistent with a broom handle or a dildo. R. 1106-07. He stated the injury could not have been caused by a penis. R. 110. He also found blows to the abdomen. He opined that Child A was assaulted vaginally, anally and over her entire body with numerous bruises, injuries, and hemorrhages that occurred. The assaults were of a extreme vicious nature to cause the amount of rectal bleeding and were caused by a foreign object with sufficient force to cause deep internal hemorrhages that occurred. R. 1120. Her death was the result of strangulation. R. 1120.

There is no similarity or pattern evident in the Child A assaults that existed in the proffered crimes. No other crime resulted in death. No other crime involved a child. No other

crime involved rectal penetration. No other crime involved strangulation by hand on the neck. No other crime involved similar vaginal penetration and bruising by an object. No other crime involved an sexual assault from 2 to 4 am.

The Petitioner seeks to equate “no forced entry” and “lone wolf” as a theme to his showing of similarity to suggest a common scheme but even in his proffers revealed dissimilarity in the entry in the other Sanders crimes which varied from just appearing through an open patio door, to knocking on a door and gaining entry through subterfuge by an assertion of car trouble. Where there was no evidence that theft occurred in the Child A murder, but it appeared that seeking money was the theme in K.D. [Victim 1] and Lee incidents. While a sexual assault occurred in K.D. [Victim 1], it did not possess the mutilation of the vaginal and rectal areas that occurred to Child A.

Although the crimes occurred in the Rock Hill area, the victims covered the entire range from 12 to 60 years old. Simply put, unlike Hallman and Blanton, there was no signature style in the burglaries. Each possessed different traits on how Sanders gained entry and the manner that he exited the scene. The other crimes also revealed differences on how Sanders would react when confronted from immediate flight to fight.

Since the crimes failed to show any “common scheme or plan” the Court did not abuse his discretion in disallowing the introduction by Cope. His assertions that this deprived him of his right to show that Sanders, by habit, acted alone in committing crime does not entitle him to enter evidence that simply does not satisfy the evidentiary standards of Lyle and Rule 404(b). Absent a sufficient showing, the Court properly denied admissibility. This issue was properly denied. Certiorari must be similarly denied.

II. Certiorari is not warranted when the trial court properly denied the motion to sever his case from Sanders after denying the admission of the evidence of Sanders other crimes.

The record reveals that after the trial court denied the admission of the evidence of Sanders other alleged crimes that his counsel moved to sever his case. R. 891-92. Although denied by the Court, counsel Morton asserted that if the court was concerned about the prejudice of the evidence against Sanders that it could be cured by the severance and then the evidence could be admitted as third party guilt. Judge Hayes then declared that he had not considered the prejudice portion of the evidentiary test because he found that it failed to meet the common scheme test. R. 893-94. Respondents submit this denial of severance was not an abuse of discretion.

In denying the relief, the Court of Appeals concluded:

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

State v. Cope, supra. **App.p. 63.** Respondent submits that certiorari is not warranted where the trial court properly used its discretion in denying the request.

ANALYSIS

First, we reject the argument asserted the joint trial resulted in a "spill-over effect"

from evidence admitted against other co-defendant. Because the State alleged the men conspired and acted in concert to commit the substantive crime charged, all of the State's evidence admitted in the joint trial would have been admissible against Cope if he had been granted separate trials. Accord, State v. Wilson, 315 S.C. 289, 294, 433 S.E.2d 864, 868 (1993) (noting the State is granted great latitude in introducing circumstantial evidence of a conspiracy from its commencement to its conclusion and that substantive crimes committed in furtherance of the conspiracy constitute circumstantial evidence of the conspiracy's existence, object, and scope); State v. Mikell, 257 S.C. 315, 324, 185 S.E.2d 814, 817-18 (1971) (acts and statements of a co-conspirator made in furtherance and during a conspiracy are admissible to prove the existence of a conspiracy).

Second, the trial court did not deny the admission of the other act evidence based upon the “prejudice” to the co-defendant, but because it was inadmissible where Cope failed to show the existence of any common scheme or plan, either among the proffered crimes or Child A death. He attempts to bootstrap that these matters may otherwise be admissible as evidence of “third party guilt” under state law. This argument, though at first blush compelling still does not override the evidentiary inadequacy it suggests.

The Court of Appeals properly evaluated third party guilt issues consistent with the Court’s earlier analysis set out in State v. Gregory, 198 S.C. 98, 104, 16 S.E.2d 532, 534 (1941) as limited by the constitutional analysis set out by the United States Supreme Court in the Holmes v. South Carolina, 547 U.S. 319(2006) opinion. Under the Gregory test (affirmed as appropriate by the U.S. Supreme Court and not challenged therein), the *evidence* offered by accused as to the commission of the crime by another person must be limited to such facts *as are inconsistent* with his own guilt, and to such facts as raise a reasonable

inference or presumption as to his own innocence; evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible.” State v. Gregory, 198 S.C. 98, 104, 16 S.E.2d 532, 534 (1941) (citing 16 C.J. 560).

The problem with the Petitioner’s present argument is that he was not being denied the opportunity to present this particular evidence (or a defense) because of a lack of severance. Even if severed, this particular evidence would not be admissible because it still did not satisfy the Rule 404(b) “common scheme” threshold. The jury in this case was well aware Sanders was involved in Child A’s murder due to the presence of his DNA. The jury was aware of evidence that the Cope house could have been entered without signs of forced entry as Cope presented testimony from a locksmith that the lock could have been picked or a credit card could have opened the door lock without leaving signs of forced entry. The evidence of Cope’s involvement, such as his confessions and the evidence of the lack of forced entry, would still have been admitted in a separate trial. Plainly evidence of Sanders guilt was and would be forthcoming by the admission of his DNA evidence.

It was the evidentiary insufficiency that precluded the particular other act evidence from coming in. The Court did not err in denying the severance. [The same decision on severance would have resulted had Holmes already been decided.] Contrary to the assertions of the Petitioner, there is no constitutional mandate that in a separate trial a lower standard of similarity of offenses would be required under Rule 404(b) when evidence is sought to be used by a defendant rather than the state. Rule 404(b), a rule of exclusion in South Carolina does not express that it is a rule for either the state or defense, or only for the state. However, it is only one addressing that evidence of other crimes are not admissible to prove the

character of a person in order to show action in conformity therewith. To the extent his attempt is only to show that he acts alone in his crime, i.e. "in conformity therewith" he can gain no benefit from a separate trial or otherwise. He was not denied the opportunity to present a complete defense under Holmes v. S.C., 547 U.S. 319 (2006). The trial judge did not abuse his discretion in denying the severance motions.

III. The Trial Court Did Not Abuse its Discretion In Excluding Upon defendant James Sanders Objection Testimony From James Hill Concerning Sanders' Admission To Assaulting A "Little Girl In Rock Hill" Where There Was No Testimony As To Time, Place or Other Circumstances To Connect The Case To The Child A Murder.

James Hill, a convicted burglar serving an 18 year sentence from 2003, was confined with James Sanders in the segregation unit of Perry Correctional facility in Pelzer, South Carolina in 2002. 9/21/04 Tr. 222, ll. 13-20. In camera, he testified at a hearing that he overheard Sanders talking to another inmate. According to Hill's testimony, 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 he made the comment that he was going to get away with what he did to that little girl in Rock Hill, and he went on to describe explicitly what he had done and then in . . . getting away.

R. 3429 . Hill stated that Sanders made "remarks about oral and anal sodomy" and "smothering the child," specifically quoting Sanders as stating that he (Sanders) "f____d her. F____d her good." Hill further testified that Sanders "alluded to the fact that he had got in through a window in the house and that he had left through the same window and proceeded to go to another individual's house." R. 3429, 3431. Hill also stated that he met Cope four or five months after that when they were housed together in the Life Skills Christian Block and overheard a discussion about his case and proceeded to tell him what he had just testified

about. R. 3430-31. After this proffer, Sanders' counsel objected to Hill's testimony concerning Sanders' admissions as irrelevant "because there has been no identifying characteristics." He noted that his client had been charged with many allegations and that there was nothing that made it relevant to this case. R. 3432-33. 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. 3433; 9/21/04 Tr. 229, ll. 5-7.

In denying relief, the Court of Appeals found:

We again look to our standard of review and determine the trial court did not abuse its discretion in excluding Hill's testimony. See State v. Alexander, 303 S.C. 377, 380, 401 S.E.2d 146, 148 (1991) (reiterating the standard of review of a trial judge's ruling on questions concerning the relevancy of evidence and looking for guidance to other jurisdictions that have addressed the particular issue concerning relevancy); State v. Larsen, 91 Idaho 42, 415 P.2d 685, 692 (1966) (noting the potential of abuse from ruling "that a bare, out-of-court confession is ... admissible" and holding "that third-party confessions, made out of court, are admissible only when there is other substantial evidence which tends to show clearly that the declarant is in fact the person guilty of the crime for which the accused is on trial"); People v. Cruz, 162 Ill.2d 314, 205 Ill.Dec. 345, 643 N.E.2d 636, 650 (1994) (reciting the rule that "[a]n extrajudicial declaration not under oath, by the declarant, that he, and not the defendant on trial, committed the crime is inadmissible as hearsay, though the declaration is against the declarant's penal interest," but allowing an exception "where there are sufficient indicia of trustworthiness of such extrajudicial statements").

State v. Cope, supra. App.p. 55-56.

The trial judge did not abuse his discretion in this matter. His basis for sustaining defense counsel Greeley's motion for exclusion was that the evidence was deficient because there was no testimony as to *time, place or other circumstances*. It is evident that the alleged comments in 2002 do not necessarily relate to the Cope case because it neglects to identify the "little girl" only that he had raped a little girl in Rock Hill. He does not state when the

rape occurred or that he was even charged with the crime at the time. Simply put, the evidence that he raped a little girl in Rock Hill and left through a window that he entered is insufficient.

Third party guilt evidence, after Holmes v. S.C., require that the *evidence* offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible.” State v. Gregory, 198 S.C. 98, 104, 16 S.E.2d 532, 534 (1941). The trial court, in its discretion, concluded that this comment related by Hill merely casts a conjectural inference upon Sanders because of its lack of a connection to this incident, particularly where Sanders was the subject of other criminal allegations.

Alternately, assuming the evidence was admissible under Holmes and Gregory, the exclusion of the evidence was harmless error. It cannot be ignored that Sanders was convicted by this jury of both murder and criminal sexual conduct, as well as the conspiracy. Chapman v. California, 386 U.S. 18, 24 (1967). There was a plethora of evidence that Cope was involved in the death of his daughter. As noted - though challenged - his personal statements of guilt and re-enactment of the murder and assault with an object support the harmless error assessment. Although not a predicate to the admissibility of the Hill statement under Holmes, in a harmless error analysis, the proffer conflicts with and is contradicted by the other evidence at trial where the alleged comment by Sanders that he “f---- her” was inconsistent with the lack of semen *in her body* and the claimed alleged entry and exit from the Cope home suggested by the comment as being through the window was inconsistent

with the physical makeup of the Cope home (where the windows were secured in some fashion by either screens, plastic or being nailed down and where the windows were dirty, sooty and with spider webs that would have been obvious if anyone had climbed in or out). In fact, the evidence revealed that there was no sign of wiping smudging or anything to suggest that anything had entered through any window. See, R. 988-89, 1236-38.

Although the Hill-Sanders statement did not indicate any involvement by another person in Sanders' acts, that fact alone does not undermine the powerful evidence which suggests the lack of harmful error by its exclusion, if believed. Further, the fact that Hill admitted that when Sanders told him, "I didn't think nothing of it" and later that Hill later befriended Cope at prison and revealed it to him, makes his credibility in serious question which further limits the probative impact by the lack of presentation of this evidence in a harmless error test. Certiorari must be denied.

IV. The trial judge did not abuse his discretion in limiting the expert testimony of social psychologist, Dr. Saul Kassin, concerning false confessions by disallowing two anecdotal examples, where the expert was able to describe to the jury the concept of "coerced internalized false confessions." The excluded evidence was inadmissible hearsay concerning the Peter Reilly and Gary Gauger cases and any probative value was substantially outweighed by its prejudicial effect.

The trial court and court of appeals properly found no reversible error in the limited exclusion of two claimed anecdotal examples by Dr. Saul Kassin, a social psychologist, involving the confessions of Peter Reilly and Gary Gauger as specific examples of "coerced internalized false confessions." The trial court properly used its discretion in excluding these anecdotal interpretations of the confessions in the Gauger and Reilly cases. In denying relief, the Court of Appeals addressed this issue as follows:

Dr. Kassin proffered testimony about Peter Reilly, who falsely confessed to murdering and sexually assaulting his mother, and Gary Gauger, who falsely

confessed to murdering his parents. In both of these cases, the defendants denied involvement, were administered polygraphs and told they failed, believed they must have somehow committed the crimes, and confessed. The trial court refused to allow Dr. Kassin to testify regarding specific cases of false confession unless they were “on all fours” with this case and ultimately refused to allow the testimony. The trial court in this case conscientiously considered the proffered anecdotal evidence before excluding this testimony. The theories underlying the study of coerced internalized false confessions were exhaustively presented to the jury. Dr. Kassin explained the techniques used by interrogators that can lead to false confessions and informed the jury that there were “innumerable actual cases” of coerced internalized false confessions. Therefore, we find the exclusion of the testimony regarding the specific details of the Reilly and Gauger cases does not constitute reversible error.

State v. Cope, supra., at 289-290. **App.p. 58-59.** Certiorari should be denied. The trial court’s decision to exclude expert testimony will not be reversed on appeal absent an abuse of discretion. State v. Price, 368 S.C. 494, 629 S.E.2d 363 (2006); State v. Myers, 359 S.C. 40, 596 S.E.2d 488 (2004).

1. The testimony concerning the Peter Reilly case and the Gary Gauger case were inadmissible hearsay evidence.

Cope necessarily contends the anecdotal evidence set out in the proffer about the Peter Reilly case and Gary Gauger case are being sought to be admitted for “the truth of the matters asserted.” Since Dr. Kassin asserts that those particular confessions were false, seeks to testify about the particular circumstances surrounding the taking of those statements, and renders a conclusion of “innocence,” his anecdotal testimony is plainly inadmissible as “hearsay” under SCRE, Rule 801. He has shown the existence of no exception to hearsay which would allow its admission.

2. The Hearsay Anecdotal Evidence is not Admissible Under Rule 702.

Respondents, *assuming arguendo* that false confession expert opinion evidence is admissible, assert that providing the specific examples of the Reilly and Gauger case

presentation does not make the summaries admissible under the expert opinion rule merely because he has relied upon them in giving his opinion. An expert witness may not be used as a conduit for the introduction of hearsay testimony for the truth of the matters asserted. See, Engebretsen v. Fairchild Aircraft Corp., F.3d 721 (6th Cir. 1994). Compare, Hundley v. Rite-Aid of S.C., 339 S.C. 285, 529 S.E.2d 45 (2000)(an expert may testify as to matters of hearsay for purpose of giving his opinion value, in the discretion of the court).

3. The Trial Judge Did Not Abuse His Discretion in Limiting the Testimony.

The admission of the expert opinion is a matter within the discretion of the court. Here, he used SCRE Rule 403 to balance the admission of the hearsay summaries of the two (2) collateral cases to avoid the jury confusion and misdirection caused by this evidence. First, as revealed by the laborious summary of Dr. Kassin's testimony set forth in the *Final Brief of Respondents*, pages 33-53, the hallmark of false confessions and particularly "coerced internalized false confessions" were exhaustively revealed to the jury. The factors in coerced internalized confessions about the utilization of the Reid technique and factors of vulnerability, length of interrogation, fatigue, and the alleged presentation of the (disputed) false result of the polygraph were revealed within his opinion. Additionally, the mitigation of "vivid details" and inconsistent evidence was also revealed. It also cannot be argued the jury was unaware of the existence of DNA exonerations and similar non-specific anecdotal factors in rendering an assessment of this opinion.

The trial court did not abuse its discretion where the testimony about Reilly and Gauger were not relevant under Rule 401. In light of Kassin's limitations by his own recognition of an inability to determine true or false confessions, a series of anecdotal cases involving different people and different sets of facts could not be relevant. Cf. State v.

Green, 351 S.C. 184, 198, 569 S.E.2d 318, 325 (2002).

Further, the Petitioner misreads State v. Myers, 359 S.C. 40, 596 S.E.2d 488 (2004) to suggest that “similar” anecdotal cases are admissible. To the contrary, Myers specifically stated “although the Connecticut case was similar, the trial court did not abuse its discretion in excluding the information.” Like the situation in Myers, Dr. Kassin did testify about specific cases, but did not use names or where the false confessions were given. It was an additional alternative holding in Myers by the brief description of the Connecticut case which led to the “cumulative” harmless error conclusion. Accord, State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007).

Under the Rule 403 analysis, it is clear the evidence was properly excluded because the probative value of the anecdotal references was substantially outweighed by the prejudicial effect. State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991). As noted before Judge Hayes, this information would have diverted the jury’s attention away from determining the admissibility and reliability of Cope’s statements and focus on whether the statements by Reilly and Gauger were false and whether Reilly and Gauger were actually innocent, in addition as to what techniques were used in those statements. It would have been incumbent upon the State to litigate those confessions and guilt and may have opened the door to the introduction of other similar crime confessions which were “true.” These factors would further divert the jury’s attention from its proper function. The judge did not abuse his discretion.

The Petitioner further argued that the anecdotal evidence should have been admitted because they were “all fours” with the Cope situation. Although potentially similar under the Myers definition, they were not on all focus because of the unique circumstances of the

crime where he killed his daughter and confessed and unknown corroborating evidence was developed through the interrogations, such as have slept five (5) hours prior to his "confession", said he used broom to assault her, but was unaware about foreign object use, and was enraged. Nevertheless, similarity in the cases is not the touchstone of admissibility. Whereas the trial court, consistent with Myers reasonably limited the prejudicial effect of specific anecdotal testimony, the court did not abuse its discretion.

4. The Exclusion Did Not Prejudice Cope.

Even if the anecdotal cases were admissible, the exclusion did not prejudice Cope. In its conclusion, the Court of Appeals concluded that there was no reversible error. Although there may be special power to confessions, the jury was made aware of the existence of the phenomena of false confessions and the common traits of Cope's statement in the opinion of Dr. Kassir. Contrary to the assertions, the jury did not need to know that particularly Reilly or Geiger or others had falsely confessed to killing a mother or parent, to assess how Cope could have confessed to killing his daughter if it was false. The tools of similarity were presented. The jurors were adequately given "case studies" to enable them to assess how a person could be influenced to confess falsely based upon his research. Prejudice by excluding the particular examples has not been shown. Certiorari is not warranted.

- V. The Court of Appeals correctly concluded that the trial court properly denied the motion for a directed verdict related to the criminal conspiracy between Cope and Sanders the purpose of committing *the crime of criminal Sexual Conduct upon Child A* where substantial circumstantial evidence existed that there was an agreement.**

In its final opinion, the Court of Appeals rejected the claim regarding the failure to grant a motion for a directed verdict concerning the criminal conspiracy charge. The

indictment for criminal conspiracy charged that Cope “ on or about November 29, 2001, willfully and unlawfully unite, combine, conspire, confederate, agree and/or have tacit understanding with James Edward Sanders for **the purpose of committing the crime of criminal Sexual Conduct upon Child A**, the victim being twelve years of age at the time in violation of 16-17-410.” Indictment 2004-GS-46-0200. **Amended Supplemental ROA, p. 43.** He contends that since there was no direct evidence of any connection between Sanders and Cope, the trial court erred by determining the basis for the charge was inference upon inference to develop the conspiracy. Contrary to the claims of Cope there was sufficient evidence to connect Cope and Sanders to the sexual assault upon the body. In assessing this issue, the Court of Appeals concluded:

We recognize that in the present case there was no direct evidence of an agreement between Cope and Sanders. The State's evidence of a conspiracy was entirely circumstantial, including: (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; (3) the deduction from the forensic evidence that Sanders was present in a secure private home after the residents had retired for the night; (4) testimony that the house was full of debris and passage inside, particularly at night, would have been difficult for someone not familiar with the residence; (5) statements by Cope revealing knowledge about the factors of the assault and injuries to Child consistent with forensic evidence; (6) evidence that Cope delayed calling the police after he claimed to have fatally strangled and choked Child; and (7) evidence that Cope staged the scene to make Child's death appear to have been an accident.

Nevertheless, in the present case, the DNA evidence on Child's body, along with Cope's admissions about his interactions with Child shortly before she died, place Cope and Sanders together at the time of the assault on Child and her resulting death. Likewise, the testimony regarding lack of forced entry and the cluttered condition of the home constitute evidence that Sanders, who had no known connection with Cope's family, received assistance to navigate his way to Child's bedroom. Finally, Cope's staging of the crime scene after Child died is evidence that a cover-up had begun before Cope called the police to his home on the pretext that Child had accidentally

strangled herself, notwithstanding compelling forensic evidence that Sanders was present and actively participating during the same time period in which her death was determined to have occurred. Although each of these factors alone may have supported only a mere suspicion of a conspiracy between Cope and Sanders, it is our view that when considered together, they yield the requisite level of proof of “acts, declarations, or specific conduct” by the alleged conspirators to withstand a directed verdict motion on this charge. See *State v. Hernandez*, 382 S.C. 620, 625, 677 S.E.2d 603, 605 (2009) (reversing a conviction for trafficking and noting “the State failed to present any evidence such as acts, declarations, or specific conduct to support [an] inference” that the petitioners had knowledge that drugs were being transported).

State v. Cope, supra, 383 S.C. at 295-296, 684 S.E.2d at 188. **App.p. 65-66.**

ANALYSIS

There is substantial circumstantial evidence to support the existence of a conspiracy to commit criminal sexual conduct upon Child A on November 29, 2001. “In reviewing the denial of a motion for a directed verdict, the evidence must be viewed in the light most favorable to the State, and if there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find that the case was properly submitted to the jury.” *State v. Kelsey*, 331 S.C. at 62, 502 S.E.2d at 69 (1998).

The connection was made in the evidence that Sanders and Cope were both involved in the sexual acts by the admissions (Cope) and the evidence (Sanders). The evidence also supports the fact that Cope admits getting up at 3 am, a time when the assaults and death are determined to have occurred. The knowledge of particular injuries from the deadly assaults by Cope and the actual DNA connection with Sanders saliva put them together with Child A. The non-forced entry, circumstantially proven by the earlier chain locked door being unlocked from the inside shows that Cope opened the door for Sanders and led him to his

daughter. Cope's admissions of having sexual conduct with Child A previously while she was asleep since the beginning of October, is further evidence that Cope was not acting as a guardian for his daughter but rather saw her as a tool for his sexual gratification.

Certain salient factors point to the existence of an agreement and conspiracy between her father and James Sanders to commit the sexual acts which ultimately lead to her death.

There is substantial circumstantial evidence to support the existence of the conspiracy.

1. Cope tells Child B that morning that her sister Child A had been dead for four hours, revealing before any law enforcement involvement his knowledge of the time of death. This four hour time frame is later repeated to law enforcement. It was consistent with the pathologist findings. R. 2083; 9/15/04 Tr.p. 48.
2. Child A has a bite mark on her breast with saliva. The mark reveals an injury contemporaneous to other injuries near the time of death between 2 and 4.
3. Cope gives statement that he got up at 3 a.m. and checked on the girls, consistent with the range of the time of death. R. 1448-49, 1472-73, 1771-72; 9/13/04 Tr.p. 67-68, 91-92. 9/14/04 Tr.p. 49-50, 76-77. Video, Exhibit 7. **(On file with Court).**
4. Sanders DNA is consistent with the saliva located on the breast of Child A at the time of the assault and death. R. 2242; 9/15/04 Tr.p. 207.
5. The windows into Child A room were not disturbed. R. 1566-69; 9/13/04 Tr.p. 187-188. The windows and doors around the house reveal no forced entry by the lack of signs of damage or tampering to doors or disturbance of dust, dirt spider webs to the sealed windows and screens. R. 988-990, 1531, 1538-1580; 9/8/04 Tr.p. 267-269, R. 1237; 9/13/04 Tr.p. 150, 157- 99.
6. Child B specifically recalls Child A locking the front door by latching the chain on the front door the evening of the incident. Child B locked the back door. R. 2079; 9/15/04 Tr.p. 44. The door requires a chain to be unlatched from the inside for entry. State Exhibit 41 E (photograph of door and chain). Child B recalls that the door was already unlocked when the ambulance and police arrived shortly after they awoke that morning and learned her sister had died. R. 2084; 9/15/04 Tr.p. 49.
7. Cope's statements reveal knowledge about factors of the assault and injuries to Child A consistent with forensic evidence . Further, Cope stated that they would not find semen at the crime scene and then later subsequently revealed the presence of a rag he used to masturbate. R. 1806, 1810; 9/14/04 Tr.p. 84, 88.
8. Cope admitted staging the scene to make it appear to be an accident by placing the blanket around his daughter's neck, a historical factor in Cope relationship with his daughter that he had warned her about, something that

Sanders would have been unaware of to suggest an accident. R. 1803; 9/14/04 Tr.p. 81. Video, State Exhibit 7. The scene was also staged by the cleanup of the area and body where she was clothed after the rectal assault and the area was cleaned of feces or traces of the assault, and the door were placed together to make it appear to be an accident, something that a sole intruder would have no reason to do, yet Cope would have reason to do should one of his daughters or another arrive at the scene before he wakes up to shed guilt away from himself. R. 1332, 1803-04; 9/10/04 Tr.p. 62, 9/14/04 Tr.p. 81-84.

9. The house was full of clutter and debris to make passage difficult once inside and particularly if dark. R. 1582-94; 9/13/04 Tr.p. 201-213. (testimony describing photographs of inside house); Video State Exhibit 7. Child B testified that lights were shut off by her that night. R. 2079-80; 9/15/04 Tr.p. 44-45.
10. The locked entry by the door was the only manner that Sanders could have entered the house. Cope had to assist Sanders entry for the assault by opening the door and showing his way through the clutter to Child A's room.
11. The closet in Child A's room was too small and cluttered for anyone to hide in. R. 2076; 9/15/04 Tr.p. 41 (Child B testifies that Child A's closet was messy and had bags of clothes and stuff in it and that she could not get into closet). She also stated that she was in the room with Child A for 20 minutes after her father had gone to bed. R. 2078; 9/15/04 Tr.p. 43.

Simply put, the evidence provided by the body of Child A placed Cope and Sanders together at that time of the assault and death. Since the crime scene was staged subsequently to the death, it is evident that a cover-up had begun before the police had arrived at the scene while Cope was initially claiming an accidental death by being strangled by her bed clothing, even though Sanders was present and involved . It is equally powerful circumstantial evidence that locking of the doors required it to be unlocked and opened for someone to be let in. Here, the act of sexual conduct on Child A, due to the unique timing of the bruise and saliva could not have occurred without the aid and acquiescence of Cope. His complaint is without merit and must be dismissed. The trial court was correct in allowing this jury to decide whether the state had proved beyond a reasonable doubt its existence, albeit by circumstantial evidence

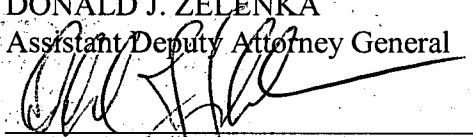
CONCLUSION

For all the foregoing reasons, certiorari must be denied.

Respectfully submitted,

DONALD J. ZELENKA
Assistant Deputy Attorney General

By:


DONALD J. ZELENKA
ATTORNEYS FOR RESPONDENT

April 13, 2010.

CERTIFICATE OF SERVICE

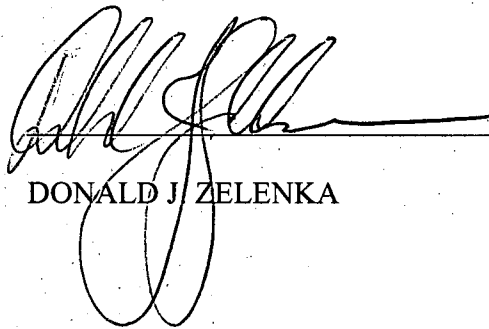
I, **Donald J. Zelenka**, hereby certify that I have served the *Amended Return* in the foregoing action by depositing copies in the United States mail, postage prepaid, to the following:

James M. Morton, Esquire
Michael B. Smith, Esq.
Morton & Gettys, LLC
P.O. Box 707
Rock Hill, SC 29731

David I. Bruck, Esquire
Virginia Capital Case Clearinghouse
Washington & Lee School of Law
Lexington, VA 24450

Steven A. Drizin, Esquire
Center for Wrongful Convictions
Northwestern University School of Law
357 East Chicago Avenue
Chicago, IL 60611-3069

This 12th day of April, 2010.



DONALD J. ZELENKA

BLUME WEYBLE & NORRIS, LLC

ATTORNEYS AT LAW

JOHN H. BLUME
KEIR M. WEYBLE
TERESA L. NORRIS
DAVID I. BRUCK *OF COUNSEL*

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FAX: (803) 765-1143

May 12, 2010

Honorable Daniel E. Shearouse
Clerk
South Carolina Supreme Court
P.O. Box 11330
Columbia, S.C. 29211

RECEIVED

MAY 12 2010

S.C. SUPREME COURT

Re: *State v. Billy Wayne Cope*

Dear Mr. Shearouse,

After further research, counsel for the petitioner Billy Wayne Cope have determined that no further filing will be necessary. I therefore write to withdraw my May 10, 2010 extension request regarding a possible Reply to the State's Amended Return, and to request that the case be submitted to the Court without further delay.

I apologize if my prior extension request has caused any inconvenience, and thank you for your understanding and assistance.

Sincerely,

David I. Bruck
(8)

David I. Bruck

cc: Assistant Deputy Attorney General Donald J. Zelenka
James M. Morton
Steven Drizin
Honorable Kenneth A. Richstad

The Supreme Court of South Carolina

The State,

Respondent,

v.

Billy Wayne Cope,

Petitioner.

The Honorable John C. Hayes, III
York County

Trial Court Case No. 2002-GS-46-03232
2002-GS-46-03233
2002-GS-46-03234
2004-GS-46-00200

ORDER

For good cause having been shown, the time for serving and filing the Reply to the Amended Return to Petition for a Writ of Certiorari in the above entitled matter is hereby extended until May 18, 2010.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY



CLERK

Columbia, South Carolina

May 12, 2010

cc: David I. Bruck, Esquire
James M. Morton, Esquire
Michael B. Smith, Esquire
Steven A. Drizin, Esquire
Assistant Deputy Attorney General Donald J. Zelenka

BLUME WEYBLE & NORRIS, LLC

ATTORNEYS AT LAW

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May 10, 2010

RECEIVED

MAY 11 2010

S.C. SUPREME COURT

Honorable Daniel E. Shearouse
Clerk
South Carolina Supreme Court
P.O. Box 11330
Columbia, S.C. 29211

Re: *State v. Billy Wayne Cope*

Dear Mr. Shearouse,

The petitioner's reply to the State's Amended Return to the Petition for Writ of Certiorari in this post-conviction case is presently due for filing today. I am writing to request a one-week extension of time in which to file the Reply on behalf of the petitioner in this case.

Thank you in advance for your kind assistance in this matter.

Sincerely,

David I. Bruck
(s)

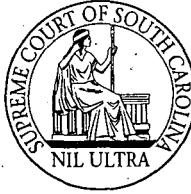
David I. Bruck

cc: Donald J. Zelenka

James M. Morton

Steven Drizin

Honorable Kenneth A. Richstad



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

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April 29, 2010

Assistant Deputy Attorney General Donald J. Zelenka
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

Re: The State v. Cope, Billy Wayne

Dear Counsel:

The following Order has been endorsed on your Motion to Strike Portion of Petition for Writ of Certiorari in the above entitled case on appeal.

"Motion denied.

s/ Jean H. Toal C.J.
For the Court

April 29, 2010."

By copy of this letter we are advising opposing counsel any reply to the amended return to Petition for Writ of Certiorari should be served and filed within ten (10) days of the date of this letter.

Very truly yours,

CHIEF DEPUTY CLERK

BFS/dmh

Assistant Deputy Attorney General Donald J. Zelenka

Page Two

April 29, 2010

cc: David I. Bruck, Esquire
James M. Morton, Esquire
Michael B. Smith, Esquire
Steven A. Drizin, Esquire

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM YORK COUNTY
Court of General Sessions

John C. Hayes, III, Circuit Court Judge

RECEIVED

APR 26 2010

S.C. SUPREME COURT

Case Nos. 2004-GS-46-2614
2004-GS-3232, 2004-GS-46-200, 2004-GS-46-3233,
2004-GS-46-3234

State of South Carolina.....The State,

v.

Billy Wayne Cope.....Petitioner.

**RETURN TO STATE'S MOTION TO STRIKE PORTION OF
PETITION FOR WRIT OF CERTIORARI**

Petitioner Billy Wayne Cope files this return to the State's Motion to Strike Portion of Petition for Writ of Certiorari. The State moves that Question 5 in Petitioner's Petition for Writ of Certiorari should be struck for lack of compliance with SCACR Rule 242(d)(2), which states that "[o]nly those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari." The State asserts that because Petitioner did not seek rehearing of the Court of Appeals' decision *on rehearing* concerning the sufficiency of the evidence of conspiracy, he has not complied with Rule 242(d)(2). For the reasons that follow, Petitioner submits that the Court should deny the motion because it is both untimely and meritless.

I.

First, The State provides no explanation for its failure to raise this alleged procedural defense in its return to the petition for writ of certiorari. By order dated March 24, 2010, the Court granted Petitioner's motion to strike the State's initial return, and required the State to file within 20 days an amended return that complied with the South Carolina Appellate Court Rules. Neither the original nor the amended return identified any procedural obstacle to consideration of each of Petitioner's claims. Two days later, the time for filing its amended return having expired, the State has attempted, in effect, to supplement its amended return, without obtaining or even requesting leave of the Court, by means of a "Motion to Strike."

Permitting such tactics would defeat the purpose of time limits. Having briefed its position within the time allowed, any party could continue to raise new procedural arguments at will, simply by styling them as "motions" rather than petitions or returns. Especially given that Petitioner has already waited more than more than five years for his first opportunity to have this Court address his claim that he is the victim of a miscarriage of justice, the Court should not indulge such a practice. For this reason alone, The State's latest motion should be dismissed.

II.

In any event, the State's new argument is meritless. The relevant portions of Rule 242, SCACR, read as follows:

(c) A decision of the Court of Appeals is not final for the purpose of review by the Supreme Court until the petition for rehearing or reinstatement has been acted on by the Court of Appeals. A petition for writ of certiorari shall be served . . . within thirty (30) days after the petition for rehearing or reinstatement is finally decided by the Court of Appeals.

(d)(1) The petition for writ of certiorari shall contain . . . [c]ertification by counsel for petitioner that a petition for rehearing or reinstatement was made and finally ruled on by the Court of Appeals.

(d)(2) Only those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court

None of these provisions contemplates the filing of more than one rehearing petition with respect to any given point, nor implies—much less states—that the rehearing petition on any point must have been filed by the party seeking certiorari. Rule 242(d)(2) simply requires that each issue be “raised in the Court of Appeals and in the petition for rehearing.”

Rule 242(c)-(d) was complied with here. Petitioner originally presented the issue contained in Question 5 as grounds for reversal in the Court of Appeals. In its initial decision in this matter, the Court of Appeals—with one judge dissenting—agreed with Petitioner that insufficient evidence of a conspiracy had been presented at trial, and reversed the conviction on that charge. The State and the Petitioner both filed petitions for rehearing in the Court of Appeals. Petitioner did not raise the sufficiency of the conspiracy evidence in his petition for rehearing because he had prevailed on that issue. The State, however, did raise the issue in its petition for rehearing, and the Court of Appeals again examined it. On rehearing, that court reversed its earlier decision and reinstated the Petitioner’s conviction on the conspiracy charge. State v. Cope, 385 S.C. 274, 294–96, 684 S.E.2d 177, 187–88. Thus, it is clear that the issue now contained in Petitioner’s Question 5 was raised both in the Court of Appeals and in “the petition for rehearing.” The Court of Appeals has twice considered the issue, as the rule requires. No rule required Petitioner to demand a *third* review of the very same sufficiency-of-the-evidence claim before seeking certiorari here. Under the plain language of Rule 242(d)(2),

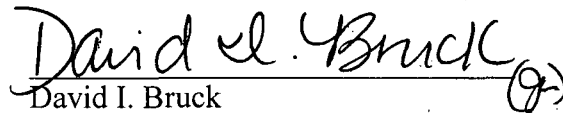
Question 5 is appropriately before this Court.

While the text of the Rule itself suffices to dispose of the State's motion, consideration of the purpose of Rule 242(d)(2) further supports the conclusion that the State's motion should be denied. By requiring that all issues presented to the Supreme Court first be raised in the Court of Appeals and in the petition for rehearing, Rule 242(d)(2) ensures that all issues are fully developed and decided by the lower court before being reviewed in this Court. This goal is achieved regardless of which party raises the issue in the Court of Appeals or the petition for rehearing; it matters only that the issue has been presented to that court once on appeal, and once more in a petition for rehearing. Such a procedure allows for full consideration of each issue by the Court of Appeals before review by the Supreme Court. The rule does not envision a hall of mirrors in which rehearing must be sought following rehearing, in order to argue for a *third* time issues that the Court of Appeals has already considered twice. In this case, Respondent's Question 5 was considered and decided on appeal, and again on rehearing, in the Court of Appeals. Accordingly, the Petitioner has complied with both the language and the purpose of Rule 242(d)(2).

The State cites no authority for its contention that the Petitioner must be the party to raise an issue in the petition for rehearing in order to comply with Rule 242. Moreover, the cases that the State does cite involved issues that were never raised in the Court of Appeals or in any petition for rehearing. Because those issues had not been considered and decided by the Court of Appeals, this Court declined to review them on certiorari. The present case is entirely different, because Petitioner's sufficiency claim has already been decided twice by the Court of Appeals. Given that the Court of Appeals has examined and decided this precise issue on two separate

occasions, including on a petition for rehearing, the Court should deny the State's untimely motion, and should grant his petition for writ of certiorari to review all five issues presented therein.

Respectfully submitted,

A handwritten signature in cursive script that reads "David I. Bruck". To the right of the signature is a small, handwritten circled "G".

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ATTORNEYS FOR PETITIONER

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

John C. Hayes, III, Circuit Court Judge

Case No. 2004-GS-46-2614
2004-GS-3232, 2004-GS-46-200,
2004-GS-46-3233, 2004-GS-46-3234

BILLY WAYNE COPE,.....Petitioner,

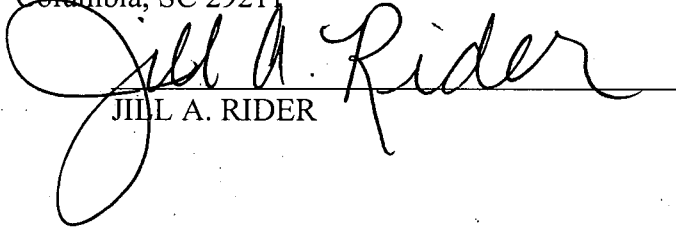
v.

STATE OF SOUTH CAROLINA, ... Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the Petitioner's Return to State's Motion to Strike Portion or Petition for Writ of Certiorari in the above-referenced case has been served upon counsel for the Respondent by mailing one (1) copy properly addressed with postage prepaid this 26th day of April, 2010 to:

Donald J. Zelenka
Assistant Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211


JILL A. RIDER

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM YORK COUNTY
Court of General Sessions
The Honorable John C. Hayes, III, Circuit Court Judge
Op.No. 4526 (S.C.Ct. App. Filed September 29, 2009)

STATE OF SOUTH CAROLINA,

Respondent,

RECEIVED

APR 20 2010

v.

BILLY WAYNE COPE,

Petitioner.

S.C. SUPREME COURT

MOTION TO STRIKE PORTION OF PETITION FOR WRIT OF CERTIORARI

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The Respondent, above-named, files this motion to strike a portion of the Petition for Writ of Certiorari for failing to comply with SCACR Rule 242(d)(2), specifically Question 5 and argument at pages 21-23. In Rule 242(d)(2), it plainly states that "[O]nly those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari." In his petition for writ of certiorari from the Court of Appeals, he raises the following question presented, among others:

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 Cope and Sanders conspired together to rape and murder Cope's daughter?

Petition for Writ of Certiorari, p. iii. The Petitioner made argument on this issue in his Petition at pages 21-23. [Respondent has addressed the merits of this issue in its

Amended Return to the Petition for Writ of Certiorari, pages 20-24].

1. SCACR Rule 242(d)(2) Was Not Complied With To Give This Court Authority To Address Question 5 from the September 29, 2009 Opinion.

Respondent submits that Petitioner Billy Wayne Cope **never** filed a petition for rehearing addressing this issue as decided by the South Carolina Court of Appeals in its September 29, 2009 substituted opinion. In its first, but withdrawn opinion, the Court of Appeals initially concluded that the motion for a directed verdict on the conspiracy charge should be have been granted and the conviction vacated. The State made a petition for rehearing on that issue [App.p. 25-42] which was granted on September 29, 2009. App.p. 44.¹ On September 29, 2009, the Court of Appeals issues issued a new opinion which revised its earlier opinion as a result of granting of the State's petition for rehearing on the issue. In that opinion, the Court of Appeals - the subject of the challenge in Question 5 - concluded that there was sufficient evidence and applied the particular standard of review. It is this September 29, 2009 conclusion that the petitioner is challenging in his question presented and argument in Question 5 of his petition for the first time - a conclusion which Cope never sought to petition for rehearing within the Court of Appeals after the September 29, 2009 decision, although he was entitled to do so and required under Rule 242.

Since the Petitioner failed to satisfy the condition precedent of Rule 242(d)(2)

¹

Cope made a petition for rehearing on April 16, 2009 from the April 2, 2009 opinion. App. 14-23.

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#3

with respect to Question 5, it should be struck.² The requirement of filing a petition for rehearing from a ruling of the Court of Appeals is a requirement. Doe ex rel Roe v. Orangeburg School District No. 2, 335 S.C. 556, 561 n.8, 518 S.E.2d 259, 261 n.8 (1999) (specific issue not raised in petition for rehearing to the Court of Appeals was not preserved for review before the Supreme Court) As stated in the treatise on South Carolina appellate practice, there are two prerequisites to preserving an issue for consideration by the Supreme Court on writ of certiorari (1) the issue must have been raised in the initial arguments to the Court of Appeals, and (2) the issue must have been raised in the petition for rehearing before the Court of Appeals. Hon. Jean Hoefer Toal, et al, *Appellate Practice in South Carolina* 77 (2nd Ed. 2002). See also Sloan v. Dep't of Transp., 365 S.C. 299, 618 S.E.2d 876 (2005); State v. Johnson, 334 SC. 78, 512 S.E.2d 795 (1999)(Court of Appeals did not address issue and petitioner did not raise issue in petition for rehearing); Anonymous v. State Bd. of Med. Exam'rs, 329 S.C. 371, 496 S.E.2d 17 (1998) (issue not ruled on by Court of Appeals and upon which rehearing is not sought is not preserved for this Court's review); Norton v. Opening Break of Aiken, Inc., 319 S.C. 469, 462 S.E.2d 861 (1995)(only those questions raised in the Court of Appeals and in a petition for rehearing shall be included in a petition for a writ of certiorari); Bonaparte v. Bonaparte, 317 S.C. 256, 452 S.E.2d 836 (1995)(where the Court of Appeals does not address a particular issue, petitioner cannot argue the merits of the issue

2

This same SCACR Rule 242(d)(2) procedural defect exists in the certiorari petition in the co-defendant's appeal, although Mr. Sanders in his certiorari petition never made any petition for rehearing after either order in the Court of Appeals. See, *James Edward Sanders v. State of S.C., Petition for Writ of Certiorari*, filed March 24, 2010.

in a petition for a writ of certiorari because the issue is not preserved for review; petitioner must instead argue that the Court of Appeals erred in failing to address the issue if, of course, that was raised in a petition for rehearing); Camp v. Springs Mortgage Corp., 310 S.C. 514, 426 S.E.2d 304 (1993)(where the Court of Appeals does not address a particular issue and appellant fails to petition for rehearing for the Court of Appeals to consider it, the Supreme Court will decline to address it).

2. The Petitioner Never Raised the Same Or Similar Claims In Any Petition Pursuant To SCACR Rule 221.

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#4.
The Petitioner may assert that because the State raised a question in its petition for rehearing from the April 2, 2009 opinion that the State's petition should satisfy the conditions of Rule 242.³ This must be considered incorrect because the Order at issue was the September 29, 2009 order which completely changed its result on the conspiracy case. At no time did the Petitioner ever comply with SCACR Rule 221 and "state with particularity the points supposed to have been overlooked or misapprehended by the court" in its September 29, 2009 decision concerning the directed verdict issue.

Certainly, the State's earlier petition did not address it because the September 29, 2009 decision was contrary to the decision that the State was addressing at the time.⁴

3

The Respondent do not contend that Rule 242 required re-doing another petition for rehearing as it related to questions one through four since there was no change in the judgment on those questions from the April 2, 2009 opinion to the September 29, 2009 and the same claim had essentially been raised in the initial petition for rehearing by Cope's counsel which was denied by the Court of Appeals.

4

In the Petition for Writ of Certiorari, the certificate of counsel merely states: "counsel for petitioner certify that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on September 29, 2009. *State v. Cope, Petition for Writ of Certiorari*, p. ii .

Further, the earlier petition for rehearing by Cope did not address the requirements of Rule 221 concerning the Court of Appeals' judgment related to the conspiracy count because at that time the judgment related to that count was that it would be vacated and his rehearing petition relied upon that factor in seeking to have the other grounds reheard.

CONCLUSION

For all the foregoing reasons, the portion of the petition for writ of certiorari related to question 5 should be struck.

Respectfully submitted,
HENRY D. McMASTER
Attorney General

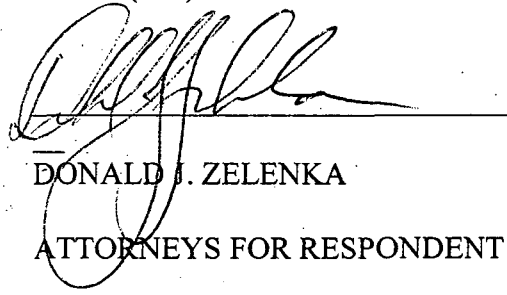
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By:


DONALD J. ZELENKA

ATTORNEYS FOR RESPONDENT

April 15, 2010.

CERTIFICATE OF SERVICE

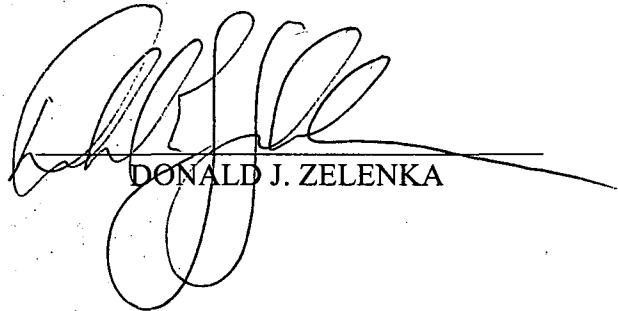
I, **Donald J. Zelenka**, hereby certify that I have served the in the foregoing
action by depositing copies in the United States mail, postage prepaid, to the following:

James M. Morton, Esquire	Michael B. Smith, Esquire
Morton & Gettys, LLC	Morton & Gettys, LLC
P.O. Box 707	P.O. Box 707
Rock Hill, SC 29731	Rock Hill, SC 29731

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This 15th day of April, 2010.



DONALD J. ZELENKA



HENRY McMASTER
ATTORNEY GENERAL

April 15, 2010

RECEIVED

APR 20 2010

S.C. SUPREME COURT

Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
P. O. Box 11330
Columbia, SC 29211

Re: The State v. Billy Wayne Cope

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of a *Motion to Strike Portion of Petition for Writ of Certiorari* in the above-referenced matter for filing. By copy of this letter, I am serving opposing counsel with same.

Sincerely,

Donald J. Zelenka
Assistant Deputy Attorney General

DJZ/lbb
Enclosure

cc: James M. Morton, Esquire
Michael B. Smith, Esquire
David I. Bruck, Esquire
Steven A. Drizin, Esquire
Alison R. Flaum, Esquire
Kevin S. Brackett, Solicitor



HENRY McMASTER
ATTORNEY GENERAL

RECEIVED

APR 15 2010

April 13, 2010

S.C. SUPREME COURT

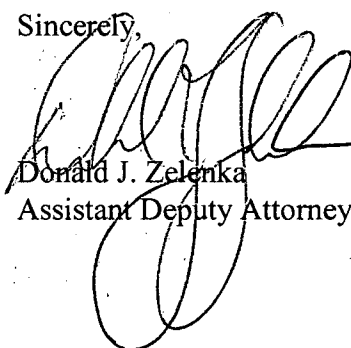
Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
P. O. Box 11330
Columbia, SC 29211

Re: The State v. Billy Wayne Cope

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the *Amended Return to Petition for Writ of Certiorari* in the above-referenced matter for filing. By copy of this letter, I am serving opposing counsel with same.

Sincerely,


Donald J. Zelenka
Assistant Deputy Attorney General

DJZ/lbb
Enclosure

cc: David I. Bruck, Esquire
James M. Morton, Esquire
Michael B. Smith, Esquire
Steven A. Drizin, Esquire
Kevin S. Brackett, Solicitor
Sandi Wofford, Victims Assistance

RECEIVED

FEB 11 2010

S.C. SUPREME COURT

**STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

**APPEAL FROM YORK COUNTY
Court of General Sessions
The Honorable John C. Hayes, III, Circuit Court Judge**

Op.No. 4526 (S.C.Ct. App. Filed September 29, 2009)

STATE OF SOUTH CAROLINA,

Respondent,

v.

BILLY WAYNE COPE,

Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S QUESTIONS PRESENTED

1. Given 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-confession 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 Cope and Sanders conspired together to rape and murder Cope's daughter?

RESPONDENT'S STATEMENT OF THE CASE

On November 29, 2001, between 2 and 4 am, twelve year Child A, a 160 pound girl, was forcefully sexually assaulted by an object in her vagina and her rectum, severely beaten and strangled to death. Certain salient factors point to the existence of an agreement and conspiracy between her father and James Sanders to commit the sexual acts which ultimately lead to her death. There is substantial circumstantial evidence to support the existence of the conspiracy.

1. Cope tells Child B that morning that her sister Child A had been dead for four hours, revealing before any law enforcement involvement his knowledge of the time of death. This four hour time frame is later repeated to law enforcement. It was consistent with the pathologist findings. R. 2083; 9/15/04 Tr.p. 48.
2. Child A has a bite mark on her breast with saliva. The mark reveals an injury contemporaneous to other injuries near the time of death between 2 and 4.
3. Cope gives statement that he got up at 3 a.m. and checked on the girls, consistent with the range of the time of death. R. 1448-49, 1472-73, 1771-72; 9/13/04 Tr.p. 67-68, 91-92. 9/14/04 Tr.p. 49-50, 76-77. Video, Exhibit 7. **(On file with Court).**
4. Sanders DNA is consistent with the saliva located on the breast of Child A at the time of the assault and death. R. 2242; 9/15/04 Tr.p. 207.
5. The windows into Child A room were not disturbed. R. 1566-69; 9/13/04 Tr.p. 187-188. The windows and doors around the house reveal no forced entry by the lack of signs of damage or tampering to doors or disturbance of dust, dirt spider webs to the sealed windows and screens. R. 988-990, 1531, 1538-1580; 9/8/04 Tr.p. 267-269, R. 1237; 9/13/04 Tr.p. 150, 157- 99.
6. Child B specifically recalls Child A locking the front door by latching the chain on the front door the evening of the incident. Child B locked the back door. R. 2079; 9/15/04 Tr.p. 44. The door requires a chain to be unlatched from the inside for entry. State Exhibit 41 E (photograph of door and chain). Child B recalls that the door was already unlocked when the ambulance and police arrived shortly after they awoke that morning and learned her sister had died. R. 2084; 9/15/04 Tr.p. 49.
7. Cope's statements reveal knowledge about factors of the assault and injuries to Child A consistent with forensic evidence . Further, Cope stated that they would not find semen at the crime scene and then later subsequently revealed the presence of a rag he used to masturbate. R. 1806, 1810; 9/14/04 Tr.p. 84, 88.
8. Cope admitted staging the scene to make it appear to be an accident by placing the blanket around his daughter's neck, a historical factor in Cope relationship with his daughter that he had warned her about, something that Sanders would have been unaware of to suggest an accident. R. 1803; 9/14/04 Tr.p. 81. Video, State Exhibit 7. The scene was also staged by the cleanup of the area and body where she was clothed after the rectal assault and the area was cleaned of feces or traces of the assault, and the door were placed together to make it appear to be an accident, something that a sole intruder would have no reason to do, yet Cope would have reason to do should one of his daughters or another arrive at the scene before he wakes up to shed guilt away from himself. R. 1332, 1803-04; 9/10/04 Tr.p. 62, 9/14/04 Tr.p. 81-84.
9. The house was full of clutter and debris to make passage difficult once inside and particularly if dark. R. 1582-94; 9/13/04 Tr.p. 201-213. (testimony describing photographs of inside house); Video State Exhibit 7. Child B testified that lights were shut off by her that night. R. 2079-80; 9/15/04 Tr.p. 44-45.
10. The locked entry by the door was the only manner that Sanders could have entered the house. Cope had to assist Sanders entry for the assault by opening the door and showing his way through the clutter to Child A's room.
11. The closet in Child A's room was too small and cluttered for anyone to hide in. R. 2076; 9/15/04 Tr.p. 41 (Child B testifies that Child A's closet was messy and had bags of clothes and stuff in it and that she could not get into closet). She also stated that she was in the room with Child A for 20 minutes after her father had gone to bed. R. 2078; 9/15/04 Tr.p. 43.

Simply put, the evidence provided by the body of Child A placed Cope and Sanders together at that time of the assault and death. Since the crime scene was staged subsequently to the death, it is evident that a cover-up had begun before the police had arrived at the scene while Cope was initially claiming an accidental death by being strangled by her bed clothing , even though Sanders was present and involved . It is equally powerful circumstantial evidence that locking of the doors required it to be unlocked and opened for someone to be let in.

The Petitioner, Billy Wayne Cope, was charged in arrest warrants on November 30, 2001 with the November 29, 2001 murder of his twelve (12) year old daughter (hereafter "Child A"), criminal sexual conduct against Child A and unlawful child neglect of all three of his minor children; Child A, Child B, and Child C. R. 430; 8/25/04 Tr. 73, lines 21-24. The Court of General Sessions for York County indicted Cope for murder, criminal sexual conduct (three counts) and unlawful neglect of minor children (three counts). R. 81-82; 8/23/04 Tr. 30, lines 11-25; Tr. 31, lines 1-6; Indictment Numbers: 04-GS-46-2614 to 2618; 02-GS-46-3232 to 3234; 03- GS-46-1843 to 1844; 46-3233 to 34. **Amended Supplemental ROA, p. 30-47.**

Subsequent indictments were returned charging Cope and James Sanders with conspiracy to commit criminal sexual conduct. Sanders was also indicted for the murder of Child A and two counts of criminal sexual conduct against her. Indictment Numbers: 2004-GS-46-199 to 200; GS-46-196; GS-46-197-198. A superseding murder indictment was returned against Cope on July 22, 2004. Indictment number: 2004-GS-46-3232. The Honorable John C. Hayes, III, severed the criminal sexual conduct and unlawful conduct charges involving both of Cope's surviving children by order dated August 26, 2004. R. 3699-3700

The state called the remaining charges against Cope and Sanders for trial in the York County Court of General Sessions on September 8th, 2004. R. 894; 9/8/04 Tr. 173, lines 9-20. Cope was represented at trial by A. Philip Baity, James Morton, David Wood and Michael Smith of the York County Bar. Sanders was represented by Leland Greeley of the York County Bar. The prosecution was represented by Solicitor Thomas Pope, Deputy Solicitor Kevin Brackett and Assistant Solicitor Willy Thompson of the Sixteenth Judicial Circuit Solicitor's Office. The trial was held from September 8 through September 22, 2004 before the Honorable Judge John Hayes.

The jury convicted Cope and Sanders as charged on September 22, 2004. R. 3675-3677; 9/22/04 Tr. 194, line 23, to 196, line 1. Judge Hayes sentenced Cope to life imprisonment for murder, 30 years consecutive for one count of criminal sexual conduct, and concurrent terms of 30, 10, and 5 years for the second count of

criminal sexual conduct, criminal neglect of a child and conspiracy, respectively. R. 3686-3687; 9/22/04 Tr. 205, line 18, to 206, line 1. Judge Hayes sentenced Sanders to life for murder, five years for conspiracy, and thirty years for each count of criminal sexual conduct, consecutive.

Cope made a motion for a new trial. R. 3695-3698. Following denial of Cope's motion for a new trial, Cope timely served and filed a notice of appeal on September 30, 2004. Sanders filed a notice of appeal on September 30, 2004. This appeal follows.

The relevant facts will be set out within the argument. Particularly, Respondents do not endorse the Petitioner's version of the "facts" set out in their Petition and earlier brief inasmuch as they have been disputed by evidence or expressly rejected by the jury. At most it is a version of their theory.

The state's version of the facts are much simpler. Between 2 and 4 a.m. on November 29, 2001, Child A, a 160 pound 12 year old girl, was brutally assaulted in her vaginal and rectal area, suffered severe beating to body from her head to her abdomen, and strangled to death in her bedroom. This act was accomplished by the combined effort of her father, Billy W. Cope and James Sanders. The facts are more fully set out in the opinion of the Court of Appeals which is incorporated herein by reference. **App.p. 48-51.**

The Petitioner made a appeal raising six issues. The Petitioner was represented in the appeal by current counsel. On April 2, 2009, the Court of Appeals affirmed the convictions for murder, criminal sexual conduct and child neglect and initially reversed the conspiracy conviction, with Judge Short dissenting. The State and Petitioner both made a petitions for rehearing. On September 29, 2009, the Court of Appeals denied the Petitioner's petition and granted the State's petition. On the same date, the Court entered an opinion affirming all convictions. *State v. Cope*, 385 S.C. 274, 684 S.E.2d 177 (S.C. App. 2009).

ARGUMENT

I. The Court of Appeals reasonably applied the appropriate standard of review in concluding that the trial court properly used its discretion concerning the admission of evidence concerning prior bad acts and statements of his co-defendant, James Sanders.

In his first argument, Cope contends that certiorari should be granted to review the rejection of his claim that he should have been allowed to present evidence concerning other crimes allegedly committed by James Sanders, and an alleged statement made by Sanders after incarceration. The trial court properly denied these efforts concluding the "other bad act" evidence failed to satisfy the requirement of Rule 404(b) to be admissible, that the alleged statement in jail was not relevant or admissible, and that the refusal to sever was appropriate. In denying this claim in the appeal, the Court of Appeals concluded:

Mindful of our standard of review, we find no reversible error in the trial court's exclusion of this evidence. Although there are some similarities between the other crimes and Child's assault, there are also many differences. For instance, no other crime resulted in the death of the victim or involved a child. None of the proffered crimes included the brutality of the attack on Child such as anal penetration and assault with a foreign object. **We therefore hold Cope has not shown a close degree of similarity between the other bad acts and the charged offenses, much less any logical relation between the assault on and murder of Child and the other incidents in the vicinity allegedly involving Sanders and other victims.** Based on these holdings, we affirm the trial court's ruling that Sanders' other crimes are dissimilar to these facts and are therefore inadmissible under Lyle and Rule 404(b), **even if reviewed under a lower standard because proffered by a defendant**, to show either identity or the existence of a common scheme.

State v. Cope, 385 S.C. 285-286, 684 S.E. 2d 1183-184. App.p. 54-55. (Emphasis added).¹

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

Cope claims that the trial court erred in excluding evidence that co-defendant Sanders committed other crimes subsequent to the November 29, 2001 murder. Cope asserts that this evidence was admissible under SCRE 404(b) to show the existence of a "common scheme or plan" and "identity." The trial judge rejected the showing after a pre-trial hearing on September 8, 2004 based upon the dissimilarity of the crimes. R. 887-890; 9/8/04 Tr. 166-69.

The Trial Court's Order

In denying the admission of the evidence concerning the other bad acts of Sanders, the court determined that the various crimes were too dissimilar to be admitted.² At the outset, he rejected the testimony of expert

¹The Court of Appeals noted that some state apply a lower standard when the evidence is offered by a defendant rather than the government. As it found, some jurisdictions lower the standard of similarity necessary for admission of evidence of "other crimes" when, as here, a defendant is attempting to introduce the evidence. See *State v. Garfole*, 76 N.J. 445, 388 A.2d 587, 591 (1978) (stating "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"); see also *United States v. Stevens*, 935 F.2d 1380, 1403 (3d Cir.1991) (applying a lower standard and quoting Garfole); *United States v. Cohen*, 888 F.2d 770, 776 (11th Cir.1989) (finding standard for admission relaxed when the evidence is offered by a defendant). This is sometimes called the "Reverse 404(b) Rule." Jessica Broderick, *Comment and Casenote, Reverse 404(b) Evidence: Exploring Standards When Defendants Want to Introduce Other Bad Acts of Third Parties*, 79 U.Colo.L.Rev. 587, 587 (2008). Even with a lower standard of similarity, the defendant must still show the other crimes are of a similar nature. See *Rivera v. State*, 561 So.2d 536, 539-40 (Fla.1990) (recognizing lower standard of admissibility but finding other crimes dissimilar enough to determine trial court did not abuse discretion in excluding evidence).

²**The Proffered Evidence**

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

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

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

Around midnight, Sarah Hagman Lee was attacked in her residence which is within the same block as George White's residence where a burglary had occurred at 10:30 that same night). Lee answered a knock at her bathroom door while she was in her room watching T.V., thinking it was a roommate. There were a series of knocks without an answer before she went to the door.

crime analyst Gregg McCrary who attempted to equate the various crimes, concluding that his testimony was flawed. Particularly, Judge Hayes noted that McCrary did not address whether there were other similar crimes in the Rock Hill area. He stated that the asserted similarities were not significant. He stated that the crimes happening "in doors", to strangers, that no forced entry was arguable but not significant where stealth was used, climbing a lattice or waiting outside in a car for a door to open. R. 887-88; 9/8/04 Tr.p. 166-167. He questioned the concept of dual motives.³

Sanders pushed his way into her bedroom pushing her back and hitting her head. (This residence is a boarding house that she had recently moved into.) They wrestled their way back through the bathroom and into the kitchen. Once he had her on the ground he kicked her and pushed her. Sanders then got up and went into her bedroom and grabbed her purse which was on her sofa. When he came back into the communal kitchen, which was the only way out of the house, Lee had gotten up and grabbed a baking pan. She then hit Sanders in the head with a pan three times. He dropped her purse and some mace fell out of it. Sanders then got on top of her, but she sprayed Sanders with the mace and he got off of her. As Sanders ran for the door, Lee picked up a screwdriver (which was not hers and she assumed that Sanders brought with him) and tried to stab him as she grabbed Sanders left foot. Lee stabbed at Sanders at three times and noticed blood running down his neck behind his left ear. Sanders then ran out the door with Lee's purse. Although she did not know him previously, she identified him. She stated he had a toboggan on his head that night that she pulled off during the assault and he was not wearing gloves. She did not know how he entered the house and was not aware of any signs of forced entry. Another female resident was across the hallway during the attack, but would not have been able to see the attack. (The record does not indicate whether she heard the commotion or not or whether she called the police). R. 753-766; 9/8/04 Tr. 31-44.

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

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

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

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

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

³ *Gregg McCrary - Crime Analysis Expert.*

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

He contended that there were factors to consider about these incidents including date, location, in-door crime, out-door crime, suspect (known or stranger), forced entry, dual motives, sex, robbery, choking or asphyxia, element, and evidence. R. 831; Id. 110. He considered these crimes to have a tight temporal pattern from December 12 to January 12. He contended the location revealed that they were all in Rock Hill within miles of each other, which he contended was a family close geographic pattern. He contended that there was significance in committing crimes in door as opposed to out in the public because a private residence would allow the culprit more control of the premises. He considered a stranger factor to be significant and asserted that stranger based rapes were uncommon as opposed to "known relationship." He contended that in the particular cases there was no sign of what he defined as "forced entry." Concerning dual motives based upon his review of the police reports, there appeared to be a consistent pattern of dual motives of sex and forced sex, sexual assault, robbery and money. He noted that in the Phillips incident she had not reported an interest in robbery or money, but he included it as robbery due to the police report. R. 829-836; 9/8/04 Tr. 108-115.

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

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

McCrary felt the Child A murder possessed similar characteristics because it was 17 days before the K.D. [Victim 1]

The Court did conclude that Cope had proved by clear and convincing evidence that Sanders was involved in the four incidents. R. 889; 9/8/04 Tr.p. 168. However, the trial court felt the evidence failed to rise to the level necessary for admission under Rule 404 to show motive, common scheme or plan. He noted that there were a variety of dissimilarities and when attempted to match up, they cannot be done, even though there are some similarities. He noted that using identity to prove a connection to the crime did not count since there was DNA so identity is not necessary to prove Sanders was at this place. He found that the ages of the victims are dissimilar, but the locales are somewhat similar. He stated that he was not going to catalog them, "but I find that they are dissimilar to the extent that he will not let them in under Rule 404. R. 889-90; 9/8/04 Tr.p.168-169. The Court further stated that the evidence did not need to be addressed under the balancing test of Rule 403 because he found that the evidence did not meet the level of a common scheme. R. 893; 9/8/04 Tr.p. 172, l. 1-6. See also, R. 2308-2313; 9/16/04 Tr.p. 25-30 - renewed motion to admit and denial at beginning of defense case.

Standard of Review

The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002). Evidence of other crimes, wrongs, or

assault, was an in-door crime, had no forced entry and contended sex and robbery existed because of her pocketbook being on the bed. In addition, he found the presence of asphyxia or choking present. He opined a statistical base about the relationship rapes and that stranger rapes are rare.

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

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

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

Concerning K.D. [Victim 1], it was pointed out "he kept looking for money", but in Phillips there was no evidence of robbery. Additionally, the hand was put over Phillips' mouth because she was screaming. As to Hagman (Lee), he was unable to state that there was evidence of a sexual assault on her or that it was other than a fight and robbery. R. 858; 9/8/04 Tr. 137.

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

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

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

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

Concerning Child A, it was pointed out that there was evidence of sexual mutilation in vaginal and rectal trauma, and evidence about a broom stick being used. However, there was no evidence of sexual mutilation (by object) in any of the other cases, although there was some vagina trauma on K.D. [Victim 1]. He admitted that there was no actual sexual assault on Hagman and others, but they had fiercely resisted. McCrary felt that the two sexually assaulted victims, the 60 year old disabled K.D. [Victim 1] and 12 year old girl were vulnerable. R. 862-63; 9/8/04 Tr. 141-42.

However, he then admitted as to Phillips, Lowery, Hagman, there was no commonality of vulnerability by age.

Most importantly, he admitted that one "glaring difference" in the crimes is that Child A was dead and the others were not. R. 863-64; 9/8/04 Tr. 142-43.

acts is generally not admissible to prove the defendant's guilt for the crime charged. Such evidence is, however, admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent. Rule 404(b), SCRE; State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). To be admissible, the bad act must logically relate to the crime with which the defendant has been charged. If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing. State v. Beck, 342 S.C. 129, 135-36, 536 S.E.2d 679, 682-83 (2000). Even if prior bad act evidence is clear and convincing and falls within an exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. State v. Braxton, 343 S.C. 629, 541 S.E.2d 833 (2001).

When this exception is invoked, it is important to recognize that a close degree of similarity between the prior bad acts and the crime charged, by itself, does not satisfy Lyle. Indeed, the mere presence of similarity only serves to enhance the potential for prejudice. State v. Gore, 283 S.C. 118, 121, 322 S.E.2d 12, 13 (1984). The foundation for admissibility transcends mere similarity, for the admission of such evidence under the common scheme or plan exception requires a connection between the extraneous crimes and the crime charged so that proof of the former tends to prove the latter. See State v. Timmons, 327 S.C. 48, 52, 488 S.E.2d 323, 325 (1997) ("A common scheme or plan concerns more than the commission of two similar crimes; some connection between the crimes is necessary."); State v. Hough, 325 S.C. 88, 95, 480 S.E.2d 77, 80 (1997) ("The common scheme or plan [exception] concerns more than the commission of two similar crimes; some connection between the crimes is necessary."); State v. Bell, 302 S.C. 18, 27-28, 393 S.E.2d 364, 369 (1990), cert. denied, 498 U.S. 881, 111 S.Ct. 227, 112 L.Ed.2d 182 (1990) (noting that "evidence of other crimes is never admissible unless necessary to establish a material fact or element of the crime charged"); State v. Johnson, 293 S.C. 321, 324, 360 S.E.2d 317, 319 (1987) ("Evidence of other crimes is never admissible unless necessary to establish a material fact or element of the crime charged."); State v. Stokes, 279 S.C. 191, 193, 304 S.E.2d 814, 815 (1983) ("The 'common scheme or plan' exception requires more than mere commission of two similar crimes by the same person. There must be some connection between the crimes. If there is any doubt as to the connection between the acts, the evidence should not be admitted." State v. Wallace, 364 S.C. 130, 611 S.E.2d 332 (Ct.App.2005) (finding the trial court erred in admitting evidence of alleged prior bad acts merely because the prior acts were similar to the crime charged; holding instead that the trial court should look beyond mere close similarity to consider the connection between extraneous bad act and the crime charged). Lyle and 404 (b) have set forth a rule of exclusion not inclusion. Lyle, 125 S.C. at 416-17, 118 S.E. at 807.

ANALYSIS

As correctly determined by the trial judge and Court of Appeals, there was no Lyle similarity between the other alleged acts of Sanders and the murder of Child A.⁴ The instant case concerned the middle of the night (between 2 and 4 am. [R. 1115; 9/9/04 Tr.p. 103]) sexual mutilation and murder of the twelve year old female victim through abhorrent injuries to both her vaginal and rectal areas by an object. None of these preliminary factors existed in any of the proffered evidence cases against Sanders. There was saliva, identified to Sanders DNA present around her breast of Child A. No sperm was found in the vaginal area. R. 1078; 9/9/04 Tr.p. 66. There was evidence of a struggle in the bed with significant force consistent with holding Child A down while she was alive. R. 1034-35; 9/9/04 Tr. p 22-23. There were obvious signs of assault on Child A including bruising about the head and abrasions on the back. It appeared that she had been struck from side to side on her head repeatedly. R. 1048-49; 9/9/04 Tr.p. 36-37. There was evidence of strangulation on her neck area. R. 1054-57; 9/9/04 Tr.p. 42-45.

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

There is no similarity or pattern evident in the Child A assaults that existed in the proffered crimes. No crime resulted in death. No crime involved a child. No crime involved rectal penetration. No crime involved strangulation by hand on the neck. No crime involved similar vaginal penetration and bruising by an object. No crime involved an sexual assault from 2 to 4 am.

⁴During the pretrial hearing on August 25, 2001, in response to a motion to sever Cope's other charges, Deputy Solicitor Thompson made a statement why then state was not proceeding on Sanders' other charges at the same time because the crimes were too dissimilar to be tried together. R. 884-86; 8/25/04 Tr.p. 163, l. 14 - p. 165, l. 5. In that proceeding, he described traits of dissimilarity in the different crimes.

The Petitioner seeks to equate “no forced entry” and “lone wolf” as a theme to his showing of similarity to suggest a common scheme but even in his proffers revealed dissimilarity in the entry in the other Sanders crimes which varied from just appearing through an open patio door, to knocking on a door and gaining entry through subterfuge by an assertion of car trouble. Where there was no evidence that theft occurred in the Child A murder, but it appeared that seeking money was the theme in K.D. [Victim 1] and Lee incidents. While a sexual assault occurred in K.D. [Victim 1], it did not possess the mutilation of the vaginal and rectal areas that occurred to Child A.

Although the crimes occurred in the Rock Hill area, the victims covered the entire range from 12 to 60 years old. Simply put, unlike Hallman and Blanton, there was no signature style in the burglaries. Each possessed different traits on how Sanders gained entry and the manner that he exited the scene. The other crimes also revealed differences on how Sanders would react when confronted from immediate flight to fight.

Since the crimes failed to show any “common scheme or plan” the Court did not abuse his discretion in disallowing the introduction by Cope. His assertions that this deprived him of his right to show that Sanders, by habit, acted alone in committing crime does not entitle him to enter evidence that simply does not satisfy the evidentiary standards of Lyle and Rule 404(b). Absent a sufficient showing, the Court properly denied admissibility.⁵ This issue was properly denied. Certiorari must be similarly denied.

II. Certiorari is not warranted when the trial court properly denied the motion to sever his case from Sanders after denying the admission of the evidence of Sanders other crimes.

The record reveals that after the trial court denied the admission of the evidence of Sanders other alleged crimes that his counsel moved to sever his case. R. 891-92; 9/8/04 Tr.p. 170-171. Although denied by the Court, counsel Morton asserted that if the court was concerned about the prejudice of the evidence against Sanders that it could be cured by the severance and then the evidence could be admitted as third party guilt. Judge Hayes then declared that he had not considered the prejudice portion of the evidentiary test because he found that it failed to meet the common scheme test. R. 893-94; 9/8/04, Tr.p. 172-173. Respondents submit this denial of severance was not an abuse of discretion.

⁵ As determined by the judge, Sander’s identity at the Child A scene was not necessary to be proved by the assistance of other act evidence due to the DNA findings. At issue was the common scheme concept and essentially whether Sanders, in fact, had a “common scheme.” The Petitioner, as noted, failed to prove that a “common scheme or plan” but only show that he had committed other crimes by clear and convincing evidence.

In denying the relief, the Court of Appeals concluded:

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

State v. Cope, supra. **App.p. 63.** Respondent submits that certiorari is not warranted where the trial court properly used its discretion in denying the request.

Standard of Review

Motions for severance are addressed to the discretion of the trial court. *State v. Nichols*, 325 S.C. 111, 122, 481 S.E.2d 118, 124 (1997). "A severance should be granted only when there is a serious risk that a joint trial would compromise a specific trial right of a co-defendant or prevent the jury from making a reliable judgment about a co-defendant's guilt." *Hughes v. State*, 346 S.C. 554, 559, 552 S.E.2d 315, 317 (2001) (emphasis removed). An appellate court should not reverse a conviction achieved at a joint trial in the absence of a reasonable probability that the defendant would have obtained a more favorable result at a separate trial." *Id.* See also *State v. Dennis*, 337 S.C. 275, 281-82, 523 S.E.2d 173, 176 (1999); *State v. Kelsey*, 331 S.C. 50, 73, 502 S.E.2d 63, 75 (1998).

First, we reject the argument asserted the joint trial resulted in a "spill-over effect" from evidence admitted against other co-defendant. Because the State alleged the men conspired and acted in concert to commit the substantive crime charged, all of the State's evidence admitted in the joint trial would have been admissible against Cope if he had been granted separate trials. Accord, *State v. Wilson*, 315 S.C. 289, 294, 433 S.E.2d 864, 868 (1993) (noting the State is granted great latitude in introducing circumstantial evidence of a conspiracy from its commencement to its conclusion and that substantive crimes committed in furtherance of the conspiracy constitute circumstantial evidence of the conspiracy's existence, object, and scope); *State v. Mikell*, 257 S.C. 315, 324, 185 S.E.2d 814, 817-18 (1971) (acts and statements of a co-conspirator made in furtherance and during a conspiracy are admissible to prove the existence of a conspiracy).

Second, the trial court did not deny the admission of the other act evidence based upon the "prejudice" to the co-defendant, but because it was inadmissible because he failed to show the existence of any common

scheme or plan, either among the proffered crimes or Child A death. He attempts to bootstrap that these matters may otherwise be admissible as evidence of third party guilt under state law. This argument, though at first blush compelling still does not override the evidentiary inadequacy it suggests.

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

The problem with the Petitioner's present argument is that he was not being denied the opportunity to present this particular evidence because of a lack of severance. Even if severed, this particular evidence would be inadmissible because it still does not satisfy the Rule 404(b) common scheme threshold. The jury in this case was well aware Sanders was involved in Child's murder due to the presence of his DNA. The jury was aware of evidence that the Cope house could have been entered without signs of forced entry as Cope presented testimony from a locksmith that the lock could have been picked or a credit card could have opened the door lock without leaving signs of forced entry. The evidence of Cope's involvement, such as his confessions and the evidence of the lack of forced entry, would still have been admitted in a separate trial. Plainly evidence of Sanders guilt was and would be forthcoming by the admission of his DNA evidence.

It was the evidentiary insufficiency that precluded the particular other act evidence from coming in. The Court did not err in denying the severance. [The same decision on severance would have resulted had Holmes already been decided.] Contrary to the assertions of the Petitioner, there is no constitutional mandate that in a separate trial a lower standard of similarity of offenses would be required under Rule 404(b) when evidence is sought to be used by a defendant rather than the state. Rule 404(b), a rule of exclusion in South Carolina does not express that it is a rule for either the state or defense, or only for the state. However, it is only one addressing that evidence of other crimes are not admissible to prove the character of a person in order to show action in conformity therewith. To the extent his attempt is only to show that he acts alone in his crime, i.e "in

conformity therewith” he can gain no benefit from a separate trial or otherwise.

The trial judge did not abuse his discretion in denying the severance motions. His argument must be denied.

III. The Trial Court Did Not Abuse its Discretion In Excluding Upon defendant James Sanders Objection Testimony From James Hill Concerning Sanders’ Admission To Assaulting A “Little Girl In Rock Hill” Where There Was No Testimony As To Time, Place or Other Circumstances To Connect The Case To The Child A Murder.

James Hill, a convicted burglar serving an 18 year sentence from 2003, was confined with James Sanders in the segregation unit of Perry Correctional facility in Pelzer, South Carolina in 2002. 9/21/04 Tr. 222, ll. 13-20. In camera, he testified at a hearing that he overheard Sanders talking to another inmate. According to Hill’s testimony, 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 he made the comment that he was going to get away with what he did to that little girl in Rock Hill, and he went on to describe explicitly what he had done and then in . . . getting away.

R. 3429; 9/21/04 Tr. 225, ll. 8-17. Hill stated that Sanders made “remarks about oral and anal sodomy” and “smothering the child,” specifically quoting Sanders as stating that he (Sanders) “f ____ d her. F ____ d her good.” Hill further testified that Sanders “alluded to the fact that he had got in through a window in the house and that he had left through the same window and proceeded to go to another individual’s house.” R. 3429; *Id.*, Tr. 225, l.19 - p. 226, l. 4; R. 3431; Tr. 227, ll. 13-16. Hill also stated that he met Cope four or five months after that when they were housed together in the Life Skills Christian Block and overheard a discussion about his case and proceeded to tell him what he had just testified about. R. 3430-31; 9/21/06 Tr.p. 226-227.

After this proffer, Sanders’ counsel objected to Hill’s testimony concerning Sanders’ admissions as irrelevant “because there has been no identifying characteristics.” He noted that his client had been charged with many allegations and that there was nothing that made it relevant to this case. R. 3432-33; 9/21/04 Tr. 228, l. 21- p. 229, l. 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. 3433; 9/21/04 Tr. 229,

II. 5-7.⁶

In denying relief, the Court of Appeals found:

We again look to our standard of review and determine the trial court did not abuse its discretion in excluding Hill's testimony. See State v. Alexander, 303 S.C. 377, 380, 401 S.E.2d 146, 148 (1991) (reiterating the standard of review of a trial judge's ruling on questions concerning the relevancy of evidence and looking for guidance to other jurisdictions that have addressed the particular issue concerning relevancy); State v. Larsen, 91 Idaho 42, 415 P.2d 685, 692 (1966) (noting the potential of abuse from ruling "that a bare, out-of-court confession is ... admissible" and holding "that third-party confessions, made out of court, are admissible only when there is other substantial evidence which tends to show clearly that the declarant is in fact the person guilty of the crime for which the accused is on trial"); People v. Cruz, 162 Ill.2d 314, 205 Ill.Dec. 345, 643 N.E.2d 636, 650 (1994) (reciting the rule that "[a]n extrajudicial declaration not under oath, by the declarant, that he, and not the defendant on trial, committed the crime is inadmissible as hearsay, though the declaration is against the declarant's penal interest," but allowing an exception "where there are sufficient indicia of trustworthiness of such extrajudicial statements").

State v. Cope, supra. App.p. 55-56.

The trial judge did not abuse his discretion in this matter. His basis for sustaining defense counsel Greeley's motion for exclusion was that the evidence was deficient because there was no testimony as to *time, place or other circumstances*. It is evident that the alleged comments in 2002 do not necessarily relate to the Cope case because it neglects to identify the "little girl" only that he had raped a little girl in Rock Hill. He does not state when the rape occurred or that he was even charged with the crime at the time. Simply put, the evidence that he raped a little girl in Rock Hill and left through a window that he entered is insufficient.

Concerning third party evidence, after Holmes, it requires under the Gregory test, the *evidence* offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible." State v. Gregory, 198 S.C. 98, 104, 16 S.E.2d 532, 534 (1941). The trial court, in its discretion concluded that this comment related by Hill merely casts a conjectural inference upon Sanders because of its lack of a connection to this incident, particularly where

⁶ In his brief, he asserts that the statement by Sanders should have been admitted under SCRE Rule 804(b)(3) as a "statement against penal interest." Initial Brief of Appellant, p. 53-54. However, he never asserted at trial this basis for admission and it is not preserved for appeal. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) ("A party may not argue one ground at trial and an alternate ground on appeal.").

Sanders was the subject of other criminal allegations.⁷

Alternately, assuming the evidence was admissible under Holmes and Gregory, the exclusion of the evidence was harmless error. It cannot be ignored that Sanders was convicted by this jury of both murder and criminal sexual conduct, as well as the conspiracy. An examination of the record in this case reveals that any error in excluding Petitioner's third-party-guilt evidence, if it was error at all, was "harmless beyond a reasonable doubt." Chapman v. California, 386 U.S. 18, 24 (1967). As the Court stated in Rose v. Clark, 478 U.S. 570, 579 (1986), a judgment of conviction should be affirmed "[w]here the reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt." Even if this Court should find that there was error in the exclusion of the evidence, any error in the exclusion is harmless beyond a reasonable doubt.

Here there was a plethora of evidence that Cope was involved in the death of his daughter. As noted - though challenged - his statements of guilt and re-enactment of the murder and assault with an object support the harmless error assessment. Although not a predicate to the admissibility of the Hill statement under Holmes, on a harmless error analysis, the proffer conflicts and is contradicted by the evidence at trial where the information that he "f--- her" was inconsistent with the lack of semen *in her body* and the alleged entry and exit from the Cope home suggested by the comment as being through the window was inconsistent with the physical makeup of the Cope home where the windows were secured in some fashion by either screens, plastic or being nailed down and where the windows were dirty, sooty and with spider webs that would have been obvious if anyone had climbed in or out. In fact, the evidence revealed that there was no sign of wiping smudging or anything to suggest that anything had entered through any window. See, R. 988-89, 1236-38; 9/8/04 Tr.p. 267-268. 9/9/04 Tr.p. 224-226.

Although the statement did not indicate any involvement by another person in Sanders acts, that fact alone does not undermine the powerful evidence which suggests the lack of harmful error by its exclusion, if believed. Further, the fact that Hill admitted that when Sanders told him, "I didn't think nothing of it" and later befriended Cope at prison and revealed it to him, makes his credibility in serious question further limits the

⁷ It must be clear that we are not stating that the exclusion of the evidence was proper because of the strong evidence of Cope's guilt or forensic evidence inconsistent with the proffer. Under Holmes, that threshold analysis on admissibility would be error. Instead we are asserting that the evidence itself failed to satisfy the relevance requirement based upon the defects noted by the judge on whether the comment even applied to this case where Sanders, as alleged by Cope, was a serial criminal.

probative impact by the lack of presentation of this evidence in a harmless error test. Certiorari must be denied.

IV. The trial judge did not abuse his discretion in limiting the expert testimony of social psychologist, Dr. Saul Kassin, concerning false confessions by disallowing two anecdotal examples, where the expert was able to describe to the jury the concept of “coerced internalized false confessions.” The excluded evidence was inadmissible hearsay concerning the Peter Reilly and Gary Gauger cases and any probative value was substantially outweighed by its prejudicial effect.

The Petitioner complains that the trial judge abused his discretion by prohibiting Dr. Saul Kassin, a social psychologist, to include in his opinion testimony concerning the factors involved in the phenomena “false confessions” to include two (2) anecdotal cases involving the confessions of Peter Reilly and Gary Gauger as specific examples of “coerced internalized false confessions.” He contends that the failure to admit these examples, which were “similar,” was an abuse of discretion because “it prevented him from offering a plausible explanation to the jury not only why he was influenced to confess to a murder he did not commit but why he confessed to perhaps the most heinous crime imaginable.” Contrary to the assertion within the brief, although expressly precluded from presenting his interpretation of the anecdotal examples of Gauger and Reilly, the defense was not “prevented” from offering a plausible explanation as to why he was influenced to confess to the murder by the expert witness. Contrary to the assertions in the brief, the exclusion of these two anecdotal “real life” examples, did not leave Cope “powerless” to respond to the State’s claim concerning the confession.

Initial Brief of Appellant, p. 23. In denying relief, the Court of Appeals addressed this issue as follows:

Dr. Kassin proffered testimony about Peter Reilly, who falsely confessed to murdering and sexually assaulting his mother, and Gary Gauger, who falsely confessed to murdering his parents. In both of these cases, the defendants denied involvement, were administered polygraphs and told they failed, believed they must have somehow committed the crimes, and confessed. The trial court refused to allow Dr. Kassin to testify regarding specific cases of false confession unless they were “on all fours” with this case and ultimately refused to allow the testimony. The trial court in this case conscientiously considered the proffered anecdotal evidence before excluding this testimony. The theories underlying the study of coerced internalized false confessions were exhaustively presented to the jury. Dr. Kassin explained the techniques used by interrogators that can lead to false confessions and informed the jury that there were “innumerable actual cases” of coerced internalized false confessions. Therefore, we find the exclusion of the testimony regarding the specific details of the Reilly and Gauger cases does not constitute reversible error.

State v. Cope, supra., at 289-290. App.p. 58-59.

Assuming arguendo that the trial judge, over the State’s objection, properly admitted the expert testimony on false confessions, the excluded anecdotal examples were inadmissible. First, even if relevant, any probative value of the hearsay examples may have been greatly outweighed by its prejudicial impact because (1) the excluded testimony about Reilly and Gauger would have averted the jury’s attention from its focus on both the voluntariness and credibility of Cope’s confessions; (2) the introduction of Gauger and Reilly’s

confessions would have opened the door to collateral evidence for the jury to determine whether either the Gauger or Reilly confessions were actually “false”, and; most importantly (3) Dr. Kassin was able to testify about the factors concerning “false confessions”, including general examples of “coerced internalized false confessions” without the specific examples. The trial court properly used its discretion in excluding these anecdotal interpretations of the confessions in the Gauger and Reilly cases.

STANDARD OF REVIEW

Rule 702, SCRE, allows the testimony of an expert witness qualified by knowledge, experience, skill, training, or education to assist the jury to understand the evidence or determine an issue. Even if evidence is admissible under Rule 702, however, it may be excluded under Rule 403, SCRE, if it’s probative value is outweighed by its prejudicial effect. State v. McHoney, 344 S.C. 85, 96, 544 S.E.2d 30, 35 (2001).

The trial court’s decision to exclude expert testimony will not be reversed on appeal absent an abuse of discretion. State v. Price, 368 S.C. 494, 629 S.E.2d 363 (2006); State v. Myers, 359 S.C. 40, 596 S.E.2d 488 (2004). An abuse of discretion occurs when the trial court’s ruling is based on an error of law or on a factual conclusion that is without evidentiary support. State v. Price, *supra*.

To warrant reversal based upon the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice. State v. Douglas, 367 S.C. 498, 507, 626 S.E.2d 59 (S.C. App. 2006). To show prejudice, there must be a reasonable probability that the jury’s verdict was influenced by the challenged evidence or lack thereof. Douglas, *supra*.

The admission of expert testimony should be analyzed pursuant to Rules 702 and 402, SCRE and the factors outlined in State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979).

1. The testimony concerning the Peter Reilly case and the Gary Gauger case were inadmissible hearsay evidence.

It cannot be disputed that the Petitioner contends the evidence set out in the proffer about the Peter Reilly case and Gary Gauger case are being sought to be admitted for “the truth of the matters asserted.”⁸ Since Dr. Kassin asserts that those particular confessions were false, and seeks to testify about the particular circumstances surrounding the taking of those statements, and renders a conclusion of “innocence” suggested therein, his anecdotal testimony is plainly inadmissible as hearsay under SCRE, Rule 801. He has shown the

⁸Respondents incorporate by reference its summary of the evidence and procedural history related to Dr. Kassin set out in the *Final Brief of Respondent*, p. 33-53.

existence of no exception to hearsay which would allow its admission. Further, inherent in his testimony, is the fact that Dr. Kassin was not the interrogator in either case. Since he did not have “personal knowledge” of those matters related to Geiger and Reilly, his testimony would be inadmissible under SCRE Rule 602.

2. The Hearsay Anecdotal Evidence is not Admissible Under Rule 702.

Respondents, assuming arguendo that false confession expert opinion evidence is admissible, assert that providing the specific examples of the Reilly and Gauger case presentation does not make the summaries admissible under the expert opinion rule merely because he has relied upon them in giving his opinion. An expert witness may not be used as a conduit for the introduction of hearsay testimony for the truth of the matters asserted. See, Engbretsen v. Fairchild Aircraft Corp., F.3d 721 (6th Cir. 1994). See Peterson v. National R.R. Passenger Corp., 365 S.C. 391, 618 S.E.2d 903 (2005). Also, State v. King, 904 A.2d 808 (N.J. 2006) (same). Respondents are not contending that Dr. Kassin could not use the information for his opinion, only that his use does not make the inadmissible then admissible. Compare, Hundley v. Rite-Aid of S.C., 339 S.C. 285, 529 S.E.2d 45 (2000)(an expert may testify as to matters of hearsay for purpose of giving his opinion value, in the discretion of the court).

3. The Trial Judge Did Not Abuse His Discretion in Limiting the Testimony.

The admission of the expert opinion is a matter within the discretion of the court. Here, he used SCRE Rule 403 to balance the admission of the hearsay summaries of the two (2) collateral cases to avoid the jury confusion and misdirection caused by this evidence.

First, as revealed by the laborious summary of Dr. Kassin’s testimony set forth in the Final Brief of Respondents, pages 33-53, the hallmark of false confessions and particularly “coerced internalized false confessions” were exhaustively revealed to the jury. Where Dr. Kassin was not limited in generally describing his case studies without reference to particular case names, the tools of his expert opinion were sufficiently presented to the jury. In fact, the record reveals that these tools were specifically applied to Cope’s situation where the jury was left to resolve the situation.

Contrary to the claim of Petitioner, the limitation did not “prevent him from a plausible explanation” for why he had confessed allegedly falsely. The factors in coerced internalized confessions about the utilization of the Reid technique and factors of vulnerability, length of interrogation, fatigue, and the alleged presentation of the (disputed) false result of the polygraph were revealed within his opinion. Additionally, the mitigation of “vivid details” and inconsistent evidence was also revealed. It also cannot be argued the jury was unaware of

abuse its discretion.

4. Alternately, False Confession Expert Testimony is Not Admissible Under Rule 702 and State v. Jones.

Here, we would submit that the testimony essentially went to the credibility of a witness - the defendant, Billy Cope - and was not a proper subject for an expert witness because it should be left to the province of the jury. See, Paul G. Cassell, Balanced Approaches to the False Confession Problem: A Brief Comment on Ofshe, Leo and Alschuler, 74 Denver U.L. Review 1123 (1997); Nadia Soree, When the Innocent Speak: False Confessions, Constitutional Safeguards, and the Role of Expert Testimony, 32 Am.J.Crim.L. 191 (2005) (summary of jurisdictions positions on admission).⁹ As such, it should not have been admissible. State v. Myers, State v. Pittman.

5. The Exclusion Did Not Prejudice Cope.

Even if the anecdotal cases were admissible, the exclusion did not prejudice Cope. In its conclusion, the Court of Appeals concluded that there was no reversible error. Although there may be special power to confessions, the jury was made aware of the existence of the phenomena of false confessions and the common traits of Cope's statement in the opinion of Dr. Kassir. Contrary to the assertions, the jury did not need to know that particularly Reilly or Geiger or others had falsely confessed to killing a mother or parent, to assess how Cope could have confessed to killing his daughter if it was false. The tools of similarity were presented. The jurors were adequately given "case studies" to enable them to assess how a person could be influenced to confess falsely based upon his research. Prejudice by excluding the particular examples has not been shown. Certiorari is not warranted.

V. The Court of Appeals correctly concluded that the trial court properly denied the motion for a directed verdict related to the criminal conspiracy between Cope and Sanders the purpose of committing *the crime of criminal Sexual Conduct upon Child A* where substantial circumstantial evidence existed that there was an agreement.

⁹ As an alternative ground, Respondents would submit the lower court erred in the admission of false confession expert testimony. Although this Court has held social science testimony is not required to fully meet the full rigors of expert scientific testimony of State v. Jones, supra and Rule 702 in State v. Douglas, supra, Respondents submit that such testimony fails to satisfy those requirements. See State v. Free, 798 A.2d 83 (N.J. 2002)(Kassin testimony rejected under Frye standard); People v. Kogut, 806 N.Y.S.2d 366 (S.Ct. Nass. Co. 2005)(similar testimony limited where interrogation technique evidence excluded U.S. v. Adams, 271 F.3d 1236 (10th Cir. 2001)(not admissible); State v. Tellier, 526 A.2d 941 (Me. 1987) (same); State v. Ritt, 599 N.W.2d 802 (Minn. 1999); State v. Davis, 32 S.W.3d 603, 608 (Mo. Ct.App. 2000). Respondents note that similar testimony, though, has been deemed admissible in U.S. v. Hall, 974 F.Supp. 1198 (C.D. Ill. 1997); Miller v. State, 770 N.E.2d 763 (Ind. 2002); Boyer v. State, 825 So.2d 418 (Fla. 1st DCA 2002).

In its final opinion, the Court of Appeals rejected the claim regarding the failure to grant a motion for a directed verdict concerning the criminal conspiracy charge. The indictment for criminal conspiracy charged that Cope “on or about November 29, 2001, willfully and unlawfully unite, combine, conspire, confederate, agree and/or have tacit understanding with James Edward Sanders for **the purpose of committing the crime of criminal Sexual Conduct upon Child A**, the victim being twelve years of age at the time in violation of 16-17-410.” Indictment 2004-GS-46-0200. **Amended Supplemental ROA, p. 43.** He contends that since there was no direct evidence of any connection between Sanders and Cope, the trial court erred by determining the basis for the charge was inference upon inference to develop the conspiracy. Contrary to the claims of Cope there was sufficient evidence to connect Cope and Sanders to the sexual assault upon the body. In assessing this issue, the Court of Appeals concluded:

We recognize that in the present case there was no direct evidence of an agreement between Cope and Sanders. The State's evidence of a conspiracy was entirely circumstantial, including: (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; (3) the deduction from the forensic evidence that Sanders was present in a secure private home after the residents had retired for the night; (4) testimony that the house was full of debris and passage inside, particularly at night, would have been difficult for someone not familiar with the residence; (5) statements by Cope revealing knowledge about the factors of the assault and injuries to Child consistent with forensic evidence; (6) evidence that Cope delayed calling the police after he claimed to have fatally strangled and choked Child; and (7) evidence that Cope staged the scene to make Child's death appear to have been an accident.

Nevertheless, in the present case, the DNA evidence on Child's body, along with Cope's admissions about his interactions with Child shortly before she died, place Cope and Sanders together at the time of the assault on Child and her resulting death. Likewise, the testimony regarding lack of forced entry and the cluttered condition of the home constitute evidence that Sanders, who had no known connection with Cope's family, received assistance to navigate his way to Child's bedroom. Finally, Cope's staging of the crime scene after Child died is evidence that a cover-up had begun before Cope called the police to his home on the pretext that Child had accidentally strangled herself, notwithstanding compelling forensic evidence that Sanders was present and actively participating during the same time period in which her death was determined to have occurred. Although each of these factors alone may have supported only a mere suspicion of a conspiracy between Cope and Sanders, it is our view that when considered together, they yield the requisite level of proof of “acts, declarations, or specific conduct” by the alleged conspirators to withstand a directed verdict motion on this charge. See *State v. Hernandez*, 382 S.C. 620, 625, 677 S.E.2d 603, 605 (2009) (reversing a conviction for trafficking and noting “the State failed to present any evidence such as acts, declarations, or specific conduct to support [an] inference” that the petitioners had knowledge that drugs were being transported).

State v. Cope, supra, 383 S.C. at 295-296, 684 S.E.2d at 188. **App.p. 65-66.**

How This Issue Was Raised at Trial

At the conclusion of the State's case, defense counsel Morton, on behalf of Cope, made a motion for

a directed verdict of acquittal on the conspiracy charge. R. 2295-97; 9/16/04 Tr.p. 12, l. 24 - p. 14, l. 16. He asserted that the State's case to link Cope and Sanders was that there was no forced entry and because Sanders' DNA was found on Child A's leg. R. 2296; 9/16/04 Tr.p. 13, ll. 1-7. Counsel Morton contended that for a conspiracy there had to be an agreement which may be implied, but cannot be based upon speculation. He noted that there were various ways to enter the house, as shown by Sanders' other entries. He stated that the mere combination of the fact of no evidence of forced entry, of Sanders DNA on the victim's leg, and of Cope being home is not evidence of an agreement. R. 2296; 9/16/04 Tr.p. 13, ll. 3-11. Counsel noted that he asked Cabiness about any evidence from family, friends, phone records, emails, or computers about any indication that Cope and Sanders knew each other. R. 2296; 9/16/04 Tr.p. 13, l. 20 - p. 14, l. 2. He contended that this failure to show a meeting of the minds to commit criminal sexual conduct was shown by the failure to prove any connection between Cope and Sanders other than the fact that Cope was home and Sanders' DNA was found on his daughter's body. R. 2297; 9/16/04 Tr.p. 14, ll. 8-16.

Judge Hayes denied the motion without argument from the State. R. 2297; 9/16/04 Tr.p. 14, ll. 17-20. Judge Hayes found "some direct evidence and substantial circumstantial evidence." R. 2298; 9/16/04 Tr.p. 15, ll. 2-4. In addition to the evidence cited by Morton, Judge Hayes emphasized the testimony of one young girl [Child B] that Child A had chained the door and circumstantial evidence that someone took the chain from where Child A had it and removed the chain over the night. Further, Judge Hayes noted that Cope was home that night and Sanders was in the home that night. He concluded there was direct and substantial circumstantial evidence. R. 2298; 9/16/04 Tr.p. 15, ll. 11-23.

On behalf of James Sanders, counsel Greeley made a similar direct verdict motion. He stated that while the DNA evidence may be direct evidence that Sanders and the victim were in contact with each other. However, he contended that the fact the alleged semen was found on her pants and saliva on her breast were locations of mobility. He stated that there was no circumstantial evidence which placed Sanders inside the house unless the assumption is made that the contact occurred inside the house. R. 2299; 9/16/04 Tr. 16.

As to the conspiracy charge, counsel Greeley asserted there was no evidence of the two men having any contact, any association, or even knowing each other. R. 2300; 9/16/04 Tr. 17. He contended that in the light most favorable to the State shows statements of what one defendant says he did and how he carried it out, but never mentioned Sanders in regard to the crime. He asserted that semen and saliva merely raises a suspicion of Sanders involvement. R. 2301; 9/16/04 Tr. 18. Judge Hayes denied the motions as to Sanders. R. 2307-08;

A. STANDARD OF REVIEW FOR DIRECTED VERDICT

"In reviewing the denial of a motion for a directed verdict, the evidence must be viewed in the light most favorable to the State, and if there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find that the case was properly submitted to the jury." State v. Kelsey, 331 S.C. at 62, 502 S.E.2d at 69 (1998). "In ruling on a motion for a directed verdict, the trial court is concerned with the existence of evidence, not its weight." *Id.* In addressing the standard of review where the State relies exclusively on circumstantial evidence and a motion for directed verdict is made, our supreme court has stated:

[T]he circuit court is concerned with the existence or nonexistence of evidence, not with its weight. The circuit court should not refuse to grant the directed verdict motion when the evidence merely raises a suspicion that the accused is guilty. "Suspicion" implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof. However, a trial judge is not required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis.

State v. Cherry, 361 S.C. 588, 594, 606 S.E.2d 475, 478 (2004) (emphasis in original).

Criminal conspiracy is statutorily defined as "a combination between two or more persons for the purpose of accomplishing an unlawful object or a lawful object by unlawful means." S.C.Code Ann. § 16-17-410 (2003); accord State v. Gordon, 356 S.C. 143, 588 S.E.2d 105 (2003). The gravamen of the offense of conspiracy is the agreement, or combination. State v. Dasher, 278 S.C. 454, 298 S.E.2d 215 (1982); see also State v. Buckmon, 347 S.C. 316, 323, 555 S.E.2d 402, 405 (2001) ("The essence of a conspiracy is the agreement."). "A formal or express agreement need not be established. Horne at 381, 478 S.E.2d at 293. "A tacit, mutual understanding, resulting in the willful and intentional adoption of a common design by two or more persons is sufficient, provided the common purpose is to do an unlawful act either as a means or an end." *Id.* (citation omitted). See State v. Gunn, 313 S.C. 124, 437 S.E.2d 75 (1993) (holding it is not enough for the offense of conspiracy that a group of people separately intend to distribute drugs in a single area, nor that their activities occasionally or sporadically place them in contact with each other).

In State v. Miller, 223 S.C. 128, 74 S.E.2d 582 (1953), the Court notes: "Often proof of conspiracy is necessarily by circumstantial evidence alone." *Id.* at 133, 74 S.E.2d at 585. Professor McAninch observes, "The agreement might be difficult to establish by direct evidence if none of the co-conspirators will talk. Consequently, the cases in this jurisdiction, as well as others, which hold that the agreement can be established by circumstantial evidence are legion." McAninch & Fairey, *Criminal Law In South Carolina* (2d Ed.), p. 476.

See, State v. Oliver, 275 S.C. 79, 267 S.E.2d 529 (1980) (sufficiency of circumstantial evidence to convict on conspiracy); State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998) (sufficiency of evidence for a criminal conspiracy); State v. Childs, 299 S.C. 471, 385 S.E.2d 839 (1989).

Conclusion

As stated above, there is substantial circumstantial evidence to support the existence of a conspiracy to commit criminal sexual conduct upon Child A on November 29, 2001. Contrary to the assertions of Cope, the connection was made in the evidence that Sanders and Cope were both involved in the sexual acts by the admissions (Cope) and the evidence (Sanders). The evidence also supports the fact that Cope admits getting up at 3 am, a time when the assaults and death are determined to have occurred. The knowledge of particular injuries from the deadly assaults by Cope and the actual DNA connection with Sanders saliva put them together with Child A. The non-forced entry, circumstantially proven by the earlier chain locked door being unlocked from the inside shows that Cope opened the door for Sanders and led him to his daughter. Cope's admissions of having sexual conduct with Child A previously while she was asleep since the beginning of October, is further evidence that Cope was not acting as a guardian for his daughter but rather saw her as a tool for his sexual gratification.

This case is far different from the cases cited by Cope involving several individuals who happen to be involved in similar crimes at the same time like Mouzon and Amaker. Here, the act of sexual conduct on Child A, due to the unique timing of the bruise and saliva could not have occurred without the aid and acquiescence of Cope. His complaint is without merit and must be dismissed. The trial court was correct in allowing this jury to decide whether the state had proved beyond a reasonable doubt its existence, albeit by circumstantial evidence.¹⁰

¹⁰ At the outset of the case in the opening argument, the state laid the foundation for its case on conspiracy. Child A was brutally penetrated in her vagina and rectum during the hours between 2 and 4 AM. At 6 a.m., law enforcement receives a 911 call where Cope, devoid of emotion states that his daughter is dead - "cold as a cucumber." R. 948; 9/8/04 Tr.p. 227, State Exhibit 15. At that time Cope claims he last saw his daughter alive at two o'clock and then changes it to one o'clock. R. 949; 9/9/04 Tr.p. 228, l. 7-8. He contended at that time she must have strangled upon a piece of the blanket. He had even claimed he had previously warned her about this fact. Id. *A 12 year old female who weighs over 160 pounds was alleged to have wrapped herself in a blanket and choked resulting in her accidental death.* R. 956, 970, 980, 998-99, 1161, 1201, 1284, 1292; 9/8/04 Tr.p. 235, 249, 259, 277-278, 9/9/04 Tr.p. 149, 189, 9/10/04 Tr.p. 13, 21. He initially declared that she had been dead for four hours, albeit claiming inconsistently to being asleep until before 6 a.m., which was consistent with the later determined actual time of death. R. 956, 963, 1159; 9/8/04 Tr.p. 235, 242, 9/9/04 Tr.p. 147.

Once police and EMS arrive, Cope begins to make a series of inconsistent statements about her state of undress at the time he found her that morning, from being naked when he found her (R. 959, 1159; 9/8/04 Tr.p. 238, l. 1-17, 9/9/04 Tr.p. 147), to being clothed and straightening her clothes, where evidence revealed that her clothes had been put on her by someone else. The inconsistent statements and obvious staging of the crime scene became a theme to the trial. The was odd behavior when the police found her clothed with the blanket around her neck when they arrived on the scene. R. 988; 9/9/04 Tr.p. 267. Further, while at the hospital during the collection process, Cope told Detective Burris that he knew there would be an autopsy and if his skin was found underneath his daughter's fingernails, it was because she had scratched his back that night. R. 1205; 9/8/04 Tr.p. 193.

Cope also initially told the police that the house was secure with the windows closed and there were no signs of any break-

in. R. 1285; 9/10/04 Tr.p. 14. [This was supported by law enforcement testimony. R. 1237-38; 9/9/04 Tr.p. 225-226].

The variety of statements about the event and Cope's demeanor did not make sense that morning. Compare, State Exhibit 15 (911 Call) **(On file with Court)**, with R. 963, 969-70, 971, 994-98; 9/8/01 Tr.p. 242, 248-249, 250, 274-275, 277. Cope even inquired whether he would be in trouble with the law because his daughter was found dead in the house. R. 981, 990; 9/8/04 Tr.p. 260, 269.

The pathologist, Dr. Maynard came to the scene and the possibility of a sexual assault was evident to him leading to a later autopsy. R. 1120; 9/9/04 Tr.p. 108. The autopsy reveals brutal rape and injury where her rectal cavity is bruised by an object like either a dildo or a broomstick being jammed in up to 8 inches. R. 1116-17; 9/9/04 Tr.p. 104-105. He opines that this could not be done with a penis. [Oddly, Cope claims in the video re-enactment to have tossed out his dildo after the incident, but later a dildo is found in his room [R. 1614; 9/13/04 Tr.p. 233] and Cope is also unable to identify or locate a broomstick that he says he used in the inculpatory confession]. According to Dr. Maynard, her vaginal area had significant injuries which were done by an object by more force than a normal sexual act. R. 1080; 9/9/68. No sperm was found in the vaginal area. R. 1090; 9/9/04 Tr.p. 69. Child A also suffered from severe head injuries and brain swelling and there is a bite upon her breast. R. 1058; 9/9/04 Tr.p. 46. [The saliva around the bite mark is later determined to be consistent with Sanders]. Dr. Maynard also opined that her cause of death by strangulation could not have been caused by a blanket. R. 1057; 9/9/04 Tr.p. 45. Importantly to the staging concept, her body appeared to have been cleaned up after the assault. R. 1116-17; 9/9/04, Tr.p. 104, 105. He noted that it was uncommon that fecal material would not be in the soiled pants and that fecal material would usually be brought out and left around the anal opening in similar assaults. R. 1117; 9/9/04 Tr.p. 105. He further stated that when he was at scene he examined the bedding and did not see the presence of any fecal matter. Id. Importantly he noted all the injuries to Child A occurred within a short time prior to her death. As to her abdominal injuries, he noted that they could have been caused by a 300 pound man kneeling on the abdomen or back with sufficient force even if the victim was lying in the bed. R. 1119; 9/9/04 Tr.p. 107.

In his series of early exculpatory statements, Cope continued his assertion of accident and that he had slept until 6 am. R. 1208, 1221; 9/9/04 Tr.p. 196, 209. His room is within close proximity of the victim's room, yet he contended that he would not be able to hear matter based upon his sleep machine noise. R. 1210-11, 1215; 9/9/04 Tr.p. 198-199, 203. Although initially stating he slept through the night, he later asserts at some time that he got up at sometime and went to the bathroom and checked on the girls. The pathologist ultimately determined that death occurred between 2 and 4 am.

Next day, he agrees to take a polygraph test. Before the test, he gives an exculpatory statement continuing to assert getting up at 3 a.m., but denied checking on Child A. R. 1448-49; 9/13/04 Tr.p. 67-68. After the test, he is advised of the result that he failed. R. 1461; 9/13/04 Tr.p. 80. Cope then begins on an evolving series of inculpatory statements. R. 1469, 1472-76; 9/13/04 Tr.p. 88, 91-95. At that point the admits killing Child A and that he jammed a broom inside her rectum and vagina after he had gotten up in the middle of the night with an erection, went to her room, masturbated over her and got enraged after she woke up and saw him doing it and slammed her head into a video game as he straddled his 300 pound body over her, hit her with his fist and described using his hands to choke her. Id. He stated that she was already dead when he used the broom on her. Oddly, he volunteered that he deleted his internet files from his computer after the incident. R. 1478; 9/13/04 Tr.p. 97. See also, R. 1770-72; 9/14/04 Tr.p. 49-48-50 (Herring statement - 11/30/01 @ 2 P.M.).

Days later, Cope changed his story to suggest that he woke up and acted act beating and smothering his daughter and ultimately penetrating her with a broom vaginally and rectally because he was upset with an old girlfriend who had aborted his child. R. 1798-99; 9/14/04 Tr.p. 76-77 (Cabiness statement - 12/3/01 @ 9:45 am). This leads to the crime scene video re-enactment where Cope acts out his recollection of the event with revealing force and corrections as he went through the scene and physically demonstrated his violence toward his daughter. Video - State Exhibit 7. Subsequently, he gives another statement which provide new corroborative evidence including a towel rag that he masturbated into that was located at the scene. R. 1808-09; 9/14/04 Tr.p. 87-88.

At 4:55 PM on December 3, 2001, Cope gives his final statement to Cabiness. In that statement, he abandoned his "dream concept" and asserted that he woke up about 3 a.m. and went into Child A's room, used a dildo on her and masturbated, cleaned it off the floor with a towel. While using the dildo while she was on her stomach, she woke up and he tried to keep her from seeing him and he jumped on top of her and started hit her in the head and strangled her until she went limp. R. 1816-1820; 9/14/04 Tr.p. 94-98 (Dec. 3, 2001 Cabiness Statement @ 4:55). He described using the blanket to "make it look like she had strangled herself." After he jumped off the bed, he wiped off the dildo with the towel and put it between the mattress, arranged the doors to Child A room so that they would lock together so his other daughters would not wake up in the morning and see her. Id. [Evidence was also presented about disputed writings made by him to Amy Simmons where he stated that "I killed [Child A]." R. 1956, 1958; 9/14/04 Tr.p. 233, 235.]

State Exhibit 9. (On file with Court).

Subsequently, the DNA from the saliva upon Child A's breast and the semen on her pants comes back connected to James Sanders. R. 2240-42; 9/15/04 Tr.p. 205 - 207. [Cope's DNA was found on the towel he stated in his statement he used when he masturbated. R. 2241; 9/15/04 Tr.p. 206.] Cope had not mentioned anyone else being involved in either the assault or death of Child A in any inculpatory statement.

Sanders lived only about one block away from Cope, but the record contained no prior evidence of any existing relationship between them. However, the bruising and injuries on Child A's breast where the saliva was found occurred around the time of her death so that there is now a temporal connection with Child A and Sanders being inside the house together at the time she died. Now there is the combination of this evidence linking both Sanders and Cope to the crime that resulted in the criminal sexual conduct of Child A and ultimately her death by place and time.

The state's theory then becomes that based upon the circumstantial evidence the only logical explanation is that Cope served up his daughter that fateful night for his and Sanders own perverse pleasures and did it together. This is more than inference upon inference, it is the only logical conclusion from the evidence.

Supportive of this concept was the fact that the house itself showed no signs any entry through windows and that the doors were locked before the children went to bed. Further as revealed in the video, the home was in complete chaotic clutter and that anyone entering, particularly in the night hours with lights on or off, would need a guide to get to any room through the clutter and junk on the floor.

Furthermore, the crime scene staged. Why would an unknown intruder wrap a particular item around the victim's neck to make it appear accidental for a 160 pound person, when that item was consistent with what Cope indicated that he had warned her about. How would Sanders know this and why would an unknown intruder even care to do this where the violence would be inevitably revealed. Why would Cope ever want to cover up how Sanders solitary involvement in the case and clean up the scene where there was no evidence of feces from the rectal penetration, remove the object used (broom or dildo). The evidence leads to the logical conclusion

CONCLUSION

For all the foregoing reasons, certiorari must be denied.

Respectfully submitted,

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By:


DONALD J. ZELENKA

ATTORNEYS FOR RESPONDENT

February 8, 2010.

that Sanders was let in from the previously locked door by Cope while his wife was working the night shift. This evidence leads to the logical conclusion that they were together in the event of sexual conduct. This circumstantial evidence leads to a showing of the existence of a conspiracy to commit sexual conduct on his daughter.

CERTIFICATE OF SERVICE

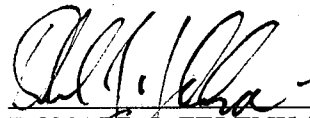
I, **Donald J. Zelenka**, hereby certify that I have served the *Return to Petition for Writ of Certiorari* in the foregoing action by depositing copies in the United States mail, postage prepaid, to the following:

David I. Bruck, Esquire
Virginia Capital Case Clearinghouse
Washington and Lee School of Law
Lewis Hall, Room 220
Lexington, VA 24450

James M. Morton, Esquire
Michael B. Smith, Esquire
Morton & Gettys, LLC
P. O. Box 707
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Steven A. Drizin, Esquire
Center on Wrongful Convictions
Bluhm Legal Clinic
Northwestern University School of Law
357 E. Chicago Avenue
Chicago, IL 60611

This 8th day of February, 2010.



DONALD J. ZELENKA
Assistant Deputy Attorney General

The Supreme Court of South Carolina

The State,

Respondent,

v.

Billy Wayne Cope,

Petitioner.

The Honorable John C. Hayes, III
York County
Trial Court Case Nos. 2002-GS-46-03232
2002-GS-46-03233
2002-GS-46-03234
2004-GS-46-00200

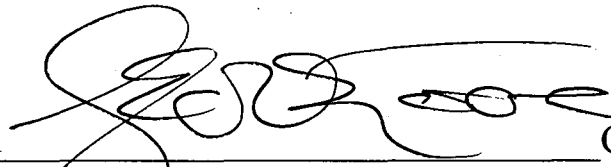
ORDER

Petitioner moves to strike the State's return and to expedite this matter. The State has filed a return opposing the motion.

The motion to strike is granted. The State shall serve and file an amended return that fully complies with Rules 242 and 267, SCACR, within twenty (20) days of the date of this order. If the State believes that it is necessary to file a return exceeding the page limitation contained in Rule 242(f), SCACR, it should serve and file a motion requesting permission to

exceed that page limit. The motion to expedite is denied.

IT IS SO ORDERED.


C.J.

FOR THE COURT

Columbia, South Carolina

March 24, 2010

cc: David I. Bruck, Esquire
James M. Morton, Esquire
Michael B. Smith, Esquire
Steven A. Drizin, Esquire
Assistant Deputy Attorney General Donald J. Zelenka



HENRY McMASTER
ATTORNEY GENERAL

RECEIVED

February 26, 2010

FEB 26 2010

S.C. SUPREME COURT

Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
P. O. Box 11330
Columbia, SC 29211

Re: The State v. Billy Wayne Cope

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the *Return to Motion to Strike State's Return to Petition for Writ of Certiorari and for Expedited Disposition of the Petition* in the above-referenced matter for filing. By copy of this letter, I am serving opposing counsel with same.

Sincerely,

Donald J. Zelenka
Assistant Deputy Attorney General

DJZ/lbb
Enclosure

cc: James M. Morton, Esquire
David I. Bruck, Esquire
Steven A. Drizin, Esquire
Michael B. Smith, Esquire
Sandi Wofford, Victims Assistance

**STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

RECEIVED

FEB 26 2010

APPEAL FROM YORK COUNTY

S.C. SUPREME COURT

Court of General Sessions

The Honorable John C. Hayes, III, Circuit Court Judge

Op.No. 4526 (S.C.Ct. App. Filed September 29, 2009)

STATE OF SOUTH CAROLINA,

Respondent,

v.

BILLY WAYNE COPE,

Petitioner.

**RETURN TO MOTION TO STRIKE STATE'S RETURN TO
PETITION FOR WRIT OF CERTIORARI AND FOR EXPEDITED
DISPOSITION OF THE PETITION**

The Respondent State of South Carolina makes a Return to the Petitioner's

Motion undated and served by mail on February 22, 2010. On that date, below-signed counsel was requested to do an expedited response and provided a copy of the motion by the Clerk's Office. The mailed version was received February 24, 2010. This response follows:

RESPONSE TO MOTION TO STRIKE

Respondents would respectfully request this Court to accept that Respondent's Return as is. In the alternative, Respondent's would request the Court to accept a substituted filing of a thirty-five (35) page Return which is entirely with 1 ½ inch margin on the left hand side and in 12 point Times New Roman Font, including footnotes.

[Applying the requirement of civility, Respondents are not similarly moving to strike the Petition for Writ of Certiorari for not strictly complying with the SCACR Rule 267].¹

A.

On February 8, 2010, Respondent filed a twenty-five (25) page Return within the page limits required under SCACR Rule 242(f). The Return was due on that date based upon a first extension received on January 8, 2010 for the petition which had been received on December 9, 2009.

B.

Prior to that, on January 27, 2010, below-signed counsel had received an e-mail from opposing counsel David Bruck with a copy going to all co-counsel, including James Morton among others. [Copy Attached As Exhibit One]. The e-mail - attached to this response - which speaks for itself - it strongly suggested that opposing counsel could not consent to a second extension, if one was requested. *[It should be noted that counsel Bruck had earlier opposed in the Court of Appeals the Respondent's request for an extension of time to file its Initial Brief on Respondent in the Court of Appeals on November 14, 2006].*

Respondent's counsel found this email was extraordinary and its timing was interesting, particularly as Cope's counsel had requested two extensions to file the certiorari petition, without any objection from the State, that Mr. Bruck's co-counsel James Morton was to begin a death penalty PCR evidentiary hearing in *Kenneth Simmons v. State* with

1

Respondent also are not moving to strike the Petition for Writ of Certiorari signed by counsel James Morton on December 10, 2009. Like Respondent's Return, it did not comply with the one and one-half inch margin requirement. Like Respondent's Return, the footnotes, at least on pages 1, 3, 4, 7, and 19 are in smaller than a 12- point font.

below-signed counsel on Monday February 1, 2010 in Orangeburg that had been recently re-assigned to counsel Zelenka to avoid a continuance in the evidentiary hearing due to the re-assignment of Melody Brown to Washington D.C., and counsel Morton was aware that below-signed counsel also had a death penalty argument set for February 4, 2010 before this Court in *State v. Finklea* - which was to necessitate a recess in the hearing that week.² In fact, on February 1, 2010, below-signed counsel mentioned the email from Mr. Bruck to Mr. Morton during the Simmons hearing. He stated to Mr. Zelenka - "I think I can help you out on that if you need it."

C.

6
§ 3.
However, despite requests of staff and co-workers based upon his illness, below-signed counsel, in an act of civility, decided to complete the Return by February 8, 2010 in light of Mr. Bruck's request rather than seek an extension to cooperate with his request to get the matter before the Court.

D.

As the Return was being completed on February 8, 2010, it was appearing to take greater than the 25 page limit set out in SCACR Rule 242(f), below-signed counsel thought that any extension request or motion to exceed page limits would be seen by opposing counsel Bruck as an affront to his request in his email and thought that the better practice

2

Unfortunately, below-signed counsel on January 30, 2010, contracted a severe bronchial and pulmonary illness which necessitated him being placed under the care of a pulmonary physician beginning February 3. This Court can probably take judicial notice of it as a result of below-signed counsel's argument on February 4. I would submit that the illness was obvious to Mr. Bruck's co-counsel, James Morton throughout the Simmons hearing. The medical treatment, which did not require hospitalization, is ongoing.

would be to cut the Return to the 25 page limit. These decisions were ultimately being made after normal business hours, noting that counsel had earlier requested staff to provide sufficient postage for a fifty (50) page return on the pre-addressed envelopes.

At one point of time, the Return was sixty (60) pages. It was revised by deletions to be thirty-one (31) pages in the format that counsel normally files briefs and returns in this Court which was to one-inch margins, which is the default in the computer counsel uses to prepare pleadings. *[Upon review of the personal briefs previously filed in over thirty years of appellate practice in this Court, below-signed counsel has routinely used one inch margins in matters he typed as the default, rather than one and one-half inch margins. Unfortunately, counsel, despite this prior appellate experience, including supervisory experience, had neither recognized nor intentionally required the one and one-half (1 1/2) inch requirement in the appellate court rules, including in all the previous pleadings filed in this litigation without objection by opposing counsel].* Respondent's counsel has more recently further adopted the practice shared by many to use 10-point font in footnotes as required in the United States Supreme Court.³

3

In his motion to strike, Cope's counsel complains on page 2 that the footnotes were sometimes in 11 point font and other times in a smaller 10 point font. As stated, Respondent's intent was to have all footnotes in 10 point font throughout, which is consistent with the practice in matters filed in the United States Supreme Court. See U.S. Supreme Court Rule 33.1(b). (10 point font required for footnotes). It was not intended to be in disrespect of the Rules of this Court. Further, although Cope's counsel may legitimately question the style, the lengthy footnotes summarizing the facts within the case was an attempt to emphasize the body of the argument, rather than having the Court initially to focus on the factual background before getting to the argument. The placement of the footnotes was done prior to the recognition of the length of the Return. Although counsel was trying to fit the arguments within the Court's page limits, the use of the footnotes was not done for the purpose counsel suggests when it was done.

Below-signed counsel then chose to make the Return fit the page limitations to comply with the page request after the cuts were completed. In using the “make it fit ” function of Wordperfect while counsel was aware that the margins were being extended, fonts affected, but I did not recognize that it also shrunk the double spacing of the lines. However, it appears that was done also. ⁴

E.

MS
#5
In his motion, he suggests that the petition for writ of certiorari should be granted because the State failed to address his claims within the space provided. This arbitrary suggestion that this is an “implicit concession” is extraordinary, particularly in light of their own deficiency in their certiorari petition. **There was no concession in this matter.** Instead it was an attempt to effectively make the state’s argument against certiorari within the page limitations set out in the Rules, without seeking to potentially delay the matter after one extension, as a courtesy to opposing counsel’s request rather than extending the time for the matter to be filed by requesting a motion for allow additional pages or an extension of time. Simply put, Respondent responded to the matter in less time than Petitioner made his Petition, albeit also in violation of Rules.⁵

As stated, Respondents would request, to the extent necessary, that the motion to

4

It appears that the line spacing was adjusted by the program to 1.7 rather than 2.0. Also the font was reduced in the body to 11.5 rather than 12.

5

Respondents would note that below-signed counsel and opposing counsel are not the only counsel who file pleadings, briefs and motions without strictly complying with the font and margin requirements set out in this Court Rules. Counsel is not aware of any pleading being struck by either the Court of Appeals or this Court.

strike be denied and that the Return - not previously rejected since February 8, 2010, be accepted for filing "as is." Alternately, should the Court deem it necessary, Respondents can upon request file, without substantive changes, a thirty-five (35) page double spaced document with 1 ½ inch margin on left and margin similar to Petitioner's on the right and 12 point font in its entirety, including footnotes immediately upon the Court's request.

RESPONSE TO MOTION TO EXPEDITE

M
#10-
As evidenced in both the Court of Appeals opinion and the Return, Billy Wayne Cope confessed to murder of the child victim in this case. While the Petitioner made non-frivolous arguments in the Court of Appeals, each was rejected in decision of the Court. While counsel, as a zealous advocate, passionately seeks relief on behalf of his client, Respondents cannot consent or urge this Court to prioritize this case over those cases of the other zealous counsel who passionately argue on their clients behalf. Simply put, we leave it to this Court's sound discretion on whether to grant preference in his docket on when to consider the merits of the certiorari petition. However, we stand by our assertion that certiorari is not warranted under SCACR Rule 242 (b).

A review of his petition does not reveal that there are any "novel questions of law", there was no dissent in the opinion of the Court of Appeals, it is not in conflict with a prior decision of the Supreme Court and neither is a substantial constitutional claim directly involved nor is a federal question included that conflicts with a United States Supreme Court decision. As such, certiorari is not mandated.

CONCLUSION

WHEREFORE HAVING MADE RETURN, Respondents request the motions be

denied. For all the prior reasons, certiorari must be denied.

Respectfully submitted,

HENRY D. McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

KEVIN S. BRACKETT
Solicitor, Sixteenth Judicial Circuit
1675 - 1A York Highway
York, South Carolina 29745-7422
(803) 628-3020

February 26, 2010

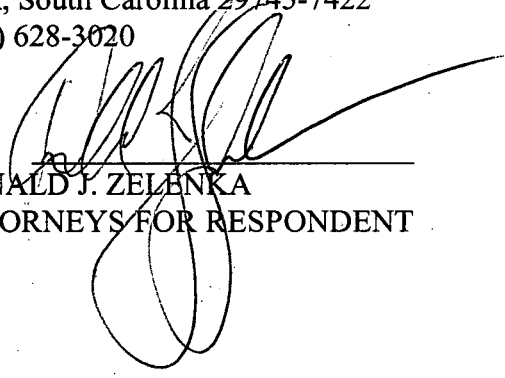
By: 
DONALD J. ZELENKA
ATTORNEYS FOR RESPONDENT

EXHIBIT ONE - January 27, 2010 E-Mail from Counsel David Bruck to Donald Zelenka.

Don Zelenka - Sate v. Billy Wayne Cope

From: "Bruck, David" <BruckD@wlu.edu>
To: "Don Zelenka" <AGDZELENKA@scag.gov>
Date: 1/27/2010 1:42 PM
Subject: Sate v. Billy Wayne Cope
CC: James Morton <James.Morton@mortongettys.com>, Michael Smith <Michael.Smith@mortongettys.com>, "Drizin, Steve" <s-drizin@law.northwestern.edu>, "Rixie Dunn" <Rixie.Dunn@mortongettys.com>

Dear Don:

I hope this finds you well.

I wanted to let you know that this case puts me in an unusual situation as far as extension requests go. I don't expect you to agree that Mr. Cope is likely innocent, but we think he is, and we can probably agree that his case has moved very slowly since he was arrested more than eight years ago.

We did request and receive one 30-day extension and another of 10 days in order to get the cert petition and appendix filed, and I obviously won't begrudge you the same amount of time, but I did want to request that you do everything you can to get the state's response promptly so that the Court can act on this petition without undue delay.

All best,

David

--- Scanned by M+ Guardian Messaging Firewall ---

CERTIFICATE OF SERVICE

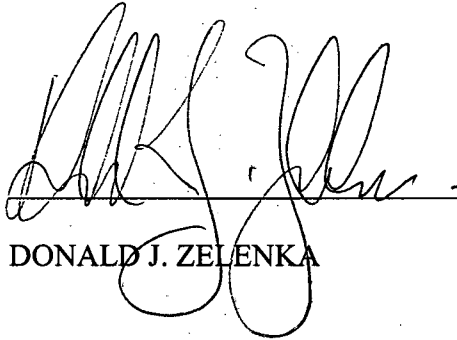
I, **Donald J. Zelenka**, hereby certify that I have served the *Return to Motion to Strike* in the foregoing action by depositing copies in the United States mail, postage prepaid, to the following:

James M. Morton, Esquire	Michael B. Smith, Esquire
Morton & Gettys, LLC	Morton & Gettys, LLC
P.O. Box 707	P.O. Box 707
Rock Hill, SC 29731	Rock Hill, SC 29731

David I. Bruck, Esquire
Virginia Capital Case Clearinghouse
Washington & Lee School of Law
Lexington, VA 24450

Steven A. Drizin, Esquire
Center for Wrongful Convictions
Northwestern University School of Law
357 East Chicago Avenue
Chicago, IL 60611-3069

This 26th day of February, 2010.



DONALD J. ZELENKA

Original

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

FEB 22 2010

APPEAL FROM YORK COUNTY
Court of General Sessions

S.C. SUPREME COURT

John C. Hayes, III, Circuit Court Judge

Opinion 4526 (S.C. Ct. App. filed April 02, 2009, refiled September 29, 2009)

The State.....Respondent,
v.
Billy Wayne Cope.....Petitioner.

**MOTION TO STRIKE STATE'S RETURN TO PETITION
FOR WRIT OF CERTIORARI
AND FOR EXPEDITED DISPOSITION OF THE PETITION**

Petitioner Billy Wayne Cope respectfully moves:

- (1) that the Court strike Respondent's Return to his Petition for a Writ of Certiorari because it fails to comply with Rule 242(f) and Rule 267(c)-(d), SCACR, and
- (2) that the Court grant his petition for writ of certiorari, and order expedited briefing and oral argument on the merits.

The grounds for this motion are as follows.

I.

This case involves a strong DNA-based claim of actual innocence. Petitioner Cope has been incarcerated since November 30, 2001, and his case has already been pending on direct appeal for well over five years. After receiving one 30-day extension, the respondent State of South Carolina filed its return to Cope's petition for certiorari on February 8, 2010. Notwithstanding Rule 267(c), SCACR, which requires that for "[a]ll papers or documents filed with the appellate court . . . [t]ype size shall be standard 12-point or larger and double spaced," respondent has elected to file a return employing 1.5 spacing, with lengthy footnotes (one covering more than an entire page, see n. 10, pp. 23-25) in what appears to be 10-point type.¹ In addition, despite Rule 267's requirement that "[t]ypewritten papers or reproductions must have a blank margin of an inch and a half on the left," the left margins of the Return are all less than one inch wide. These violations of Rule 267 have permitted the state to squeeze into its 25-page Return more than 40 pages of its Court of Appeals brief (32 of them copied

¹ Concise footnotes appear in 11-point font, but where footnotes contain entire pages of verbatim text from respondent's Court of Appeal's brief—including typographical errors—they are printed in a noticeably smaller font. This variation appears to reflect respondent's conscious determination to shoehorn a much lengthier pleading into 25 pages.

verbatim²), along with large blocks of text from the Court of Appeals' opinion on rehearing and a smattering of new material. Cope estimates that the state's Return, had it been formatted in compliance with this Court's rules, would have filled more than 45 pages, and would thus have exceeded by 80 percent the page limitation imposed by Rule 242(f), SCACR.

II.

Cope's petition has set forth, within the constraints imposed by Rules 242 and 267, exceptionally powerful reasons why certiorari should be granted. The state's failure to respond to these arguments within the space limitations governing returns to petitions for writs of certiorari is an implicit concession that full briefing and plenary consideration is warranted. For this reason, Cope submits that the most appropriate remedy for the state's violations of this Court's rules is to strike the state's Return, and to grant the petition for writ of certiorari without further delay.

III.

Cope further requests that after granting certiorari, the Court direct both parties to file their merits briefs without undue delay, and that oral argument be set at the earliest possible opportunity.

Cope has already served some eight-and-a-half years in jail and prison

² Those pages are pp. 2–12, 17, 18, 23, 26, 27, 31, 32, 54–57, 78–87.

for the rape and murder of his own child that was clearly committed by a complete stranger, a serial sex offender named James Sanders who always committed his crimes without accomplices. He submits that he would not have been convicted as Sanders' supposed co-conspirator but for a series of egregious legal and constitutional errors. Both sides have already thoroughly briefed their positions in the Court of Appeals, and there is no reason why either side should now require more than the 30 days specified in Rule 242(i) to file their merits briefs in this Court.

If Cope is in fact innocent, as he has maintained for over eight years, the State cannot restore what it has already taken from him. He should at least not have to wait any longer than necessary for review of the merits of his appeal by this Court.

WHEREFORE, having set forth his grounds, the petitioner Billy Wayne Cope requests that the Court strike the state's Return, grant his petition for certiorari, and expedite briefing and oral argument of his appeal.

Respectfully submitted,

DAVID I. BRUCK
Virginia Capital Case Clearinghouse
Washington & Lee School of Law
Lexington VA 24450
(540) 458-8188

STEVEN A. DRIZIN
Center on Wrongful Convictions
Bluhm Legal Clinic
Northwestern Univ. School of Law
357 E Chicago Ave.
Chicago, IL 60611
(312) 503-6608

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

BY: David L. Bruck
ATTORNEYS FOR PETITIONER

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

John C. Hayes, III, Circuit Court Judge

Case No. 2004-GS-46-2614
2004-GS-3232, 2004-GS-46-200,
2004-GS-46-3233, 2004-GS-46-3234

BILLY WAYNE COPE,.....Petitioner,

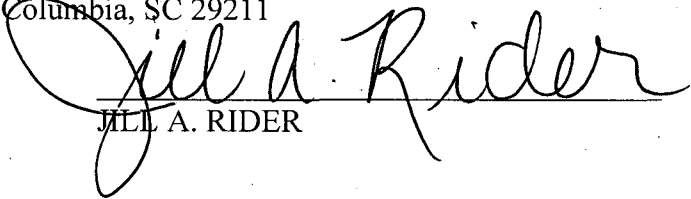
v.

STATE OF SOUTH CAROLINA, ... Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the Petitioner's Motion to Strike State's Return to Petition for Writ of Certiorari and for Expedited Disposition of the Petition in the above-referenced case has been served upon counsel for the Respondent by mailing one (1) copy properly addressed with postage prepaid this 22nd day of February, 2010 to:

Donald J. Zelenka
Assistant Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211


JILL A. RIDER



HENRY McMASTER
ATTORNEY GENERAL

February 8, 2010

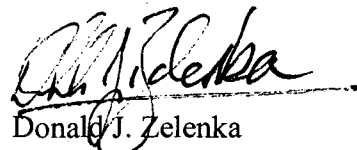
Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
P. O. Box 11330
Columbia, SC 29211

Re: *The State v. Billy Wayne Cope*

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the *Return to Petition for Writ of Certiorari* in the above-referenced case for filing. By copy of this letter, I am serving all interested parties with same.

Sincerely,

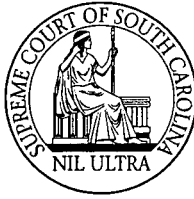


Donald J. Zelenka
Assistant Deputy Attorney General

DJZ/lbb
Enclosure

cc: David I. Bruck, Esquire
James M. Morton, Esquire
Michael B. Smith, Esquire
Steven A. Drizin, Esquire
Kevin S. Brackett, Solicitor
Sandi Wofford, Victims Assistance

RECEIVED
FEB 11 2010
S.C. SUPREME COURT



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

February 10, 2010

James M. Morton, Esquire
Michael B. Smith, Esquire
Morton & Gettys, LLC
P. O. Box 707
Rock Hill, SC 29731

Re: The State v. Cope, Billy Wayne

Dear Counsel:

The following Order has been endorsed on your Motion for Admission *Pro Hac Vice* in the above entitled matter.

“Granted.

Jean H. Toal C.J.
For the Court

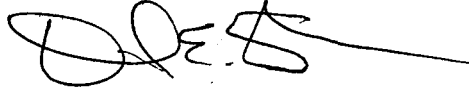
By s/ Daniel E. Shearouse
Clerk

February 10, 2010.”

Please be advised our records will now reflect Steven A. Drizin as additional counsel of record for the petitioner in this matter.

James M. Morton, Esquire
Michael B. Smith, Esquire
Page Two
February 10, 2010

Very truly yours,

A handwritten signature in black ink, appearing to be "DE" followed by a stylized flourish and a long horizontal line extending to the right.

CLERK

DES/dmh

cc: David I. Bruck, Esquire
Steven A. Drizin, Esquire
Assistant Deputy Attorney General Donald J. Zelenka
The Honorable Kevin Scott Brackett
The Honorable Tanya Gee

APPEAL FROM YORK COUNTY
Court of General Sessions

Opinion 4526 (S.C. Ct. App. filed April 02, 2009, and re-filed September 29, 2009)

The State..... Respondent,
versus
Billy Wayne Cope..... Appellant.

Michael B. Smith, attorney for appellant, seeks an order of this court permitting Steven A. Drizin to appear *pro hac vice* in this matter pursuant to Rule 404, SCACR. The basis of the motion is as follows:

1. Michael B. Smith, attorney for appellant, is admitted to practice law in South Carolina.
2. Steven A. Drizin is not admitted to practice law in South Carolina but is admitted and authorized to practice law in the highest court of the State of Illinois.

FEB 08 2010

3. Steven A. Drizin is not a resident of South Carolina, is not regularly employed in South Carolina, and is not regularly engaged in the practice of law or in substantial business or professional activities in South Carolina.

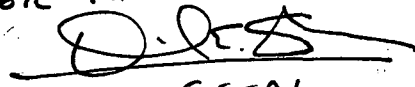
WHEREFORE, based upon the foregoing, Michael B. Smith, attorney for appellant, seeks an order of this court permitting Steven A. Drizin to appear *pro hac vice* in this matter.

Respectfully Submitted,

MORTON & GETTYS, LLC

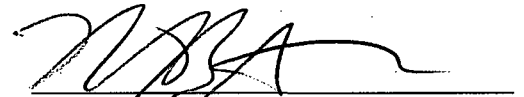
GRANTED.

JEAN H. TOAL C.J.
FOR THE COURT

BT: 

February 05, 2010
Rock Hill, SC

cc: *February 10, 2010*



Michael B. Smith
Attorney for Plaintiff
334 Oakland Avenue
PO Box 707
Rock Hill, SC
office 803.366.3388
fax 803.366.4076

Attorneys for Appellant:

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Virginia Capital Case Clearinghouse
Washington and Lee School of Law
Lewis Hall, Room 220
Lexington, VA 24450
540.458.8188

STEVEN A. DRIZIN
Center on Wrongful Convictions
Bluhm Legal Clinic
NW University School of Law
357 E Chicago Ave
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312.503.6608

JAMES M. MORTON
MICHAEL B. SMITH
Morton & Gettys, LLC
PO Box 707
Rock Hill, SC 29731
803.366.3388

Other Counsel of Record:

DONALD J. ZELENKA
Assistant Deputy Attorney General
PO Box 11549
Columbia, SC 29211
803.734.3601

KEVIN BRACKETT
Solicitor, Sixteenth Judicial Circuit
1675 York, Hwy, Suite 1-A
York, SC 29745
803.628.3020

CERTIFICATE OF SERVICE

I, **Rixie R. Dunn**, hereby certify that I have served Steven Drizin's Application for Admission *Pro Hac Vice* in the foregoing action by depositing copies in the United States mail and/or hand delivery to the following:

Donald J. Zelenka
Assistant Deputy Attorney General
Attorney General's Office
Rembert Dennis Building
1000 Assembly Street, Room 519
Post Office Box 11549
Columbia, South Carolina 29211

The Honorable Kevin S. Brackett
16th Circuit Solicitor's Office
Moss Justice Center
1675-1A York Hwy
York, SC 29745

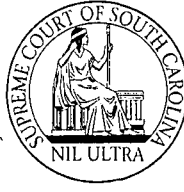
RECEIVED

FEB 8 - 2010

S.C. SUPREME COURT

February 5, 2010


Rixie R. Dunn



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211
TELEPHONE: (803) 734-1080
FAX: (803) 734-0384

February 8, 2010

The Honorable Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
Post Office Box 11330
Columbia, S.C. 29211

RE: State of South Carolina v. Billy Wayne Cope
Case No. 2009-143966

Dear Mr. Shearouse:

I certify that the Office of Bar Admissions has received a verified application requesting Steven A. Drizin be admitted *pro hac vice* in the above matter. The \$250 filing fee for each applicant has been paid.

Yours truly,

Gayle B. Watts
Deputy Clerk for Bar Admissions

GBW/sp

VERIFIED APPLICATION FOR ADMISSION *PRO HAC VICE*
IN THE STATE OF SOUTH CAROLINA

State of South Carolina 2009-143966 South Carolina Supreme Ct
Plaintiff Case No. Court
vs.

Billy Wayne Cope Mailing Address of Court: Supreme Court Building
Defendant 1231 Gervais Street
Columbia, SC 29201

Comes now Steven A. Drizin, applicant herein, and respectfully represents the following:

RECEIVED

1. Applicant resides at:

428 Elder Lane
Street Address
Winnetka Cook IL 60093
City County State Zip
847-446-6778
Telephone
FEB 8 - 2010
SUPREME COURT

2. Applicant is an attorney and a member of the law firm of (or practices law under the name of)

Northwestern University, Bluhm Legal Clinic, with offices at, at
375 E Chicago Avenue

Chicago Cook IL 60611
Street Address City County State Zip Code
312-503-8576
Telephone Fax Number

3. Applicant has been retained personally or as a member of the above named law firm by

Billy Wayne Cope to provide legal representation in connection with the above case now pending before the above named court of the State of South Carolina.

4. Since November of 1986, applicant has been, and presently is, a member in good standing of the bar of the highest court of the District of Columbia or the State of Illinois where applicant regularly practices law. Attached is a certificate of good standing.

5. Applicant has been admitted to practice before the following courts: (List all of the following courts applicant has been admitted to practice before: United States District Courts; United States Circuit Courts of Appeals; the Supreme Court of the United States; and courts of other states or the District of Columbia.)

Court:	Date Admitted:
United States Court of Appeals (7th Cir)	12/3/1998
United States Dist Ct (N.D. Ill.)	12/17/1986
Illinois Supreme Court	11/1986

Applicant is presently a member in good standing of the bars of those courts listed above, except as listed below:
(List any court named in the preceding paragraph that applicant is no longer admitted to practice before.)

I am presently a member in good standing in all courts.

6. Applicant presently is not subject to any suspension or disbarment proceedings, and has not been formally notified of any complaints pending before a disciplinary agency, except as provided below (give particulars, e.g., jurisdiction, court, date):

I am not now nor have I ever been subject to disciplinary proceedings in any state or federal court.

7. Applicant never has had any application for admission *pro hac vice* in this or any other jurisdiction denied or any *pro hac vice* admission revoked, except as provided below (give particulars, e.g., date, court, docket number, judge, circumstances; attach a copy of any order of denial or revocation):

I have not been denied admission pro hac vice in this or any other jurisdiction.

8. Applicant never has had any certificate or privilege to appear and practice before any administrative body suspended or revoked, except as provided below (give particulars, e.g., date, administrative body, date of suspension and reinstatement):

I have never had any certificate or privilege to appear revoked.

9. Local counsel of record associated with applicant in this case is Michael Smith James Morton, of the Morton & Gettys law firm, which has offices at:
334 Oakland Avenue, P. O. Box 707

Street Address	<u>Rock Hill</u>	<u>York</u>	<u>S.C.</u>	<u>29731</u>
City	<u>803-366-3388</u>	<u>County</u>	<u>State</u>	<u>Zip Code</u>
Telephone				

If applicable list all other firms/attorneys you are associated with in this matter

David L. Bruck

10. Applicant has previously filed an application to appear *pro hac vice* in the following South Carolina cases (give case name and status of litigation, date of application, local counsel of record in each case, and state whether application is pending or was granted).

Billy Wayne Cope, Opinion No. 4526, S. C. Ct. Appeals

11. Applicant agrees to comply with the applicable statutes, laws and rules of the State of South Carolina and will familiarize him/herself with and comply with the South Carolina Rules of Professional Conduct. Applicant consents to the jurisdiction of the South Carolina courts and Commission on Lawyer Conduct.

12. Applicant respectfully requests to be admitted to practice in the above named court for this case only.

DATED this 1st day of February, 20 10

Adam Dyer
APPLICANT

VERIFICATION

STATE OF Illinois)

COUNTY OF Cook)

I, Steven A. Drizin, do hereby swear or affirm under penalty of perjury that I am the applicant in the above styled matter; that I have read the foregoing application and know the contents thereof; and that the contents are true of my own knowledge, except as to those matters stated on information and belief, and that as to those matters I believe them to be true.

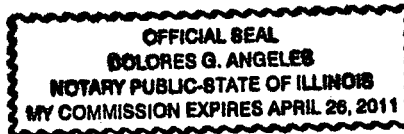
Steven A. Drizin
APPLICANT/AFFIANT

Subscribed and sworn to before me this 1st day of February, 20 10.

Dolores G. Angeles

Notary Public for the State of Illinois

My Commission Expires: April 26, 2011



LOCAL COUNSEL CONSENT

I hereby consent, as local counsel of record, to the association of applicant in this cause pursuant to Rules Governing Admission *Pro Hac Vice* to the South Carolina Bar.

DATED this 4 day of February, 20 10.

MSSA
LOCAL COUNSEL OF RECORD

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of this application upon the South Carolina Supreme Court by mail addressed to: South Carolina Supreme Court Office of Bar Admissions, PO Box 11330, Columbia, SC 29211, accompanied by payment of the \$250 filing fee payable to the South Carolina Supreme Court on this 5 day of February, 20 10.

Steven A. Drizin
APPLICANT/AFFIANT

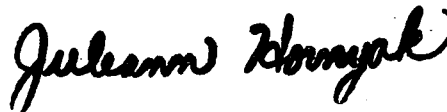
Certificate of Admission To the Bar of Illinois

I, Juleann Hornyak, Clerk of the Supreme Court of Illinois, do hereby certify that

Steven Andrew Drizin

has been duly licensed and admitted to practice as an Attorney and Counselor of Law within this State; has duly taken the required oath to support the CONSTITUTION OF THE UNITED STATES and of the STATE OF ILLINOIS, and also the oath of office prescribed by law, that said name was entered upon the Roll of Attorneys and Counselors in my office on November 6, 1986 and is in good standing, so far as the records of this office disclose.

In Witness Whereof, I have hereunto
placed my hand and affixed the seal
of said Supreme Court, at Springfield,
in said State, this Friday, January 08, 2010.



Clerk

The Supreme Court of South Carolina

The State,

Respondent,

v.

Billy Wayne Cope,

Petitioner.

The Honorable John C. Hayes, III
York County

Trial Court Case No. 2002-GS-46-03232

2002-GS-46-03233

2002-GS-46-03234

2004-GS-46-00200

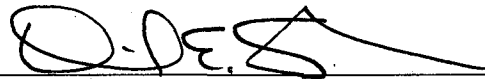
ORDER

For good cause having been shown, the time for serving and filing the Return to Petition for Writ of Certiorari in the above entitled matter is hereby extended until February 8, 2010.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY



CLERK

Columbia, South Carolina

January 11, 2010

cc: David I. Bruck, Esquire
James M. Morton, Esquire
Michael B. Smith, Esquire
Assistant Deputy Attorney General Donald J. Zelenka



HENRY McMASTER
ATTORNEY GENERAL

RECEIVED

JAN - 8 2010

S.C. SUPREME COURT

January 8, 2010

Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: State v. Billy Wayne Cope

Dear Mr. Shearouse:

The return to petition for writ of certiorari in the above-referenced case is due to be filed on the above date. I am requesting an extension of thirty (30) days to file and serve the Return. This is made because below-signed counsel has been unable because of other court commitments to prepare the return.

By copy of this letter I am informing opposing counsel of this request.

Sincerely,

Donald J. Zelenka
Assistant Deputy Attorney General

DJZ/lbb

cc: David I. Bruck, Esquire
James M. Morton, Esquire
Michael B. Smith, Esquire
Steven A. Drizin, Esquire

MORTON & GETTYS
ATTORNEYS AT LAW

JAMES M. MORTON

JOHN P. GETTYS, JR.

MICHAEL B. SMITH †

JOSHUA B. VANN

SHANNON M. LANDO

ELIZABETH S. OWEN

J. RICHARDS MCCRAE, III

Special Counsel:
WILLIAM T. MOODY

Certified Family Court Mediator †

December 10, 2009

RECEIVED

DEC 14 2009

Attention: Filing
South Carolina Supreme Court
Post Office Box 11330
Columbia, SC 29211

S.C. SUPREME COURT

Re: *South Carolina vs. Billy Wayne Cope*
Opinion No.: 4526

Dear Sir/Madame:

Enclosed please find two copies of the Petition for Writ of Certiorari along with labels containing the opposing counsels' names and address for the Appendix. Please return to me stamped copies of the Petition for Writ of Certiorari, I have included a pre-stamped, self addressed envelope. Please call me should you have any questions. Thank you.

Sincerely,



Rixie R. Dunn
Paralegal for
Morton & Gettys, LLC.

ROCK HILL OFFICE

334 Oakland Avenue
PO Box 707

Rock Hill, SC 29731

office 803.366.3388

fax 803.324.3768

INDIAN LAND OFFICE

7580 Charlotte Highway
Highway 521, Suite 700

Fort Mill, SC 29707

office 803.548.5646

fax 803.547.4044

YORK OFFICE

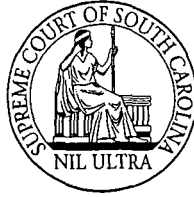
Congress St Executive Ctr
30 North Congress St
Suite 200

York, SC 29745

office 803.684.9604

fax 803.684.4932

enclosures



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

December 10, 2009

David I. Bruck, Esquire
Blume Weyble and Norris, LLC
P. O. Box 11744
Columbia, SC 29211

James M. Morton, Esquire
Michael B. Smith, Esquire
Morton & Gettys, LLC
P. O. Box 707
Rock Hill, SC 29731

Re: The State v. Cope, Billy Wayne
Case Tracking No. 2009-143966

Dear Counsel:

This office has received your Petition for a Writ of Certiorari in the above matter. It has been assigned the Case Tracking Number that appears above. Please use this number on all future correspondence relating to this matter.

I do wish to call the attention of the parties to the attached order relating to the inclusion of personal data identifiers and other sensitive information in documents filed with the Supreme Court of South Carolina and the South Carolina Court of Appeals. Please note that the responsibility for insuring that information is redacted or sealed as required by this order rests with counsel and the parties. This office will not review filings for redaction or to determine if materials should be sealed.

David I. Bruck, Esquire
James M. Morton, Esquire
Michael B. Smith, Esquire
Page Two
December 10, 2009

Very truly yours,

A handwritten signature in black ink, appearing to be a stylized 'D' followed by a horizontal line and a flourish.

CLERK

DES/dmh

Enclosure

cc: Assistant Deputy Attorney General Donald J. Zelenka

BLUME & WEYBLE, LLC

ATTORNEYS AT LAW

JOHN H. BLUME
KEIR M. WEYBLE
SUSAN B. HACKETT
DAVID I. BRUCK *OF COUNSEL*

1247 SUMTER STREET, SECOND FLOOR
COLUMBIA, SOUTH CAROLINA 29201
MAILING ADDRESS:
POST OFFICE BOX 11744
COLUMBIA, SC 29211
PHONE: (803) 765-1044
FAX: (803) 765-1143

November 24, 2009

Honorable Kenneth A. Richstad
Clerk
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: State v. Billy Wayne Cope

Dear Mr. Richstad,

Please find enclosed a copy of Petitioner's Motion for Second Extension of Time that was filed in the South Carolina Supreme Court today in the above referenced case.

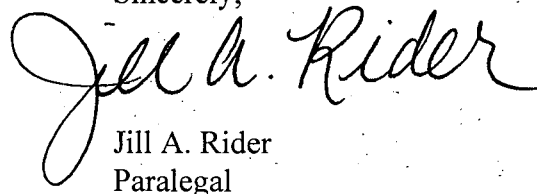
If you have any questions or need further information, please do not hesitate to contact me.

RECEIVED

NOV 30 2009

S.C. SUPREME COURT

Sincerely,


Jill A. Rider
Paralegal

enclosure

cc: Honorable Daniel E. Shearouse

The Supreme Court of South Carolina

The State,

Respondent,

v.

Billy Wayne Cope,

Petitioner.

The Honorable John C. Hayes, III
York County

Trial Court Case No. 2002-GS-46-03232
2002-GS-46-03233
2002-GS-46-03234
2004-GS-46-00200

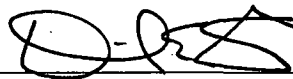
ORDER

Petitioner seeks a second extension of time for an additional ten (10) days to serve and file the Petition for a Writ of Certiorari and Appendix in the above entitled matter. The request for an extension is granted until December 10, 2009.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY



CLERK

Columbia, South Carolina

November 25, 2009

cc: David I. Bruck, Esquire
Assistant Deputy Attorney General Donald J. Zelenka
The Honorable Jeanette Barber

BLUME WEYBLE & NORRIS, LLC

ATTORNEYS AT LAW

JOHN H. BLUME
KEIR M. WEYBLE
TERESA L. NORRIS
DAVID I. BRUCK *OF COUNSEL*

1247 SUMTER STREET, SECOND FLOOR
COLUMBIA, SOUTH CAROLINA 29201
MAILING ADDRESS:
POST OFFICE BOX 11744
COLUMBIA, SC 29211
PHONE: (803) 765-1044
FAX: (803) 765-1143

November 24, 2009

Honorable Daniel E. Shearouse
Clerk
South Carolina Supreme Court
P.O. Box 11330
Columbia, S.C. 29211

RECEIVED

NOV 24 2009

S.C. SUPREME COURT

Via Hand-Delivery

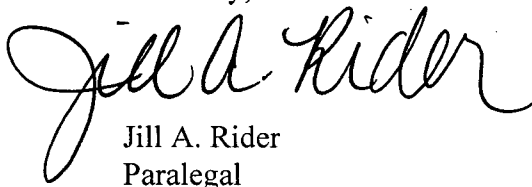
Re: State v. Billy Wayne Cope

Dear Mr. Shearouse:

Please find enclosed for filing, with proof of service, the original six copies of Petitioner's Second Extension of Time in above-referenced case.

If you have any questions or need further information, please do not hesitate to contact me.

Sincerely,


Jill A. Rider
Paralegal

Enclosure

cc: Donald J. Zelenka
James M. Morton

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

John C. Hayes, III, Circuit Court Judge

Case No. 2004-GS-46-2614
2004-GS-3232, 2004-GS-46-200,
2004-GS-46-3233, 2004-GS-46-3234

RECEIVED

NOV 24 2009

S.C. SUPREME COURT

BILLY WAYNE COPE,.....Petitioner,

v.

STATE OF SOUTH CAROLINA, ... Respondent.

MOTION FOR SECOND EXTENSION OF TIME

The undersigned court-appointed counsel for Petitioner, Billy Wayne Cope, requests that this Court grant an extension of time of 10 days to file the Petition for Writ of Certiorari and the Appendix presently due for filing on November 30, 2009. This extension is required primarily to allow for time to assemble and print the Appendix to the petition. Counsel has consulted with counsel for Respondent, Donald J. Zelenka, who consents to this extension.

WHEREFORE, the undersigned counsel requests that this Court grant an extension of time until December 10, 2009 to file the Petition for Writ of Certiorari and the Appendix.

Respectfully submitted,


DAVID I. BRUCK (9)

Blume Weyble & Norris, LLC
P.O. Box 11744
Columbia, S.C. 29211
(803) 765-1044

Counsel for Petitioner

November 24, 2009.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

John C. Hayes, III, Circuit Court Judge

Case No. 2004-GS-46-2614
2004-GS-3232, 2004-GS-46-200,
2004-GS-46-3233, 2004-GS-46-3234

RECEIVED

NOV. 24 2009

S.C. SUPREME COURT

BILLY WAYNE COPE,.....Petitioner,

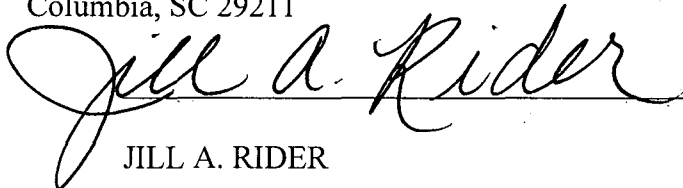
v.

STATE OF SOUTH CAROLINA, ... Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the Petitioner's Extension of Time
in the above-referenced case has been served upon counsel for the Respondent by mailing one (1)
copy properly addressed with postage prepaid this 23rd day of November, 2009 to:

Donald J. Zelenka
Assistant Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211


JILL A. RIDER

Hopkins, Debbie

From: Don Zelenka [AGDZELENKA@scag.gov]
Sent: Tuesday, November 24, 2009 5:00 PM
To: Hopkins, Debbie
Cc: jill@blumelaw.com; james.morton@mortongettys.com; David Bruck
Subject: Fwd: State v. Billy Wayne Cope - 2nd Request for Extension to File Petition for Certiorari
Attachments: Billy Wayne Cope

I have reviewed the attached motion for extension to file a certiorari petition. Please be advised that it correctly states my position on the motion which I gave this morning to one of the petitioner's counsel, Jim Morton of Rock Hill, SC. If further information is needed please advise me.

Sincerely,

Donald J. Zelenka
Assistant Deputy Attorney General
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, South Carolina 29211
803-734-3601
803-734-4035(FAX)
agdzenka@scag.gov

BLUME WEYBLE & NORRIS, LLC

ATTORNEYS AT LAW

JOHN H. BLUME
KEIR M. WEYBLE
TERESA L. NORRIS
DAVID I. BRUCK *OF COUNSEL*

1247 SUMTER STREET, SECOND FLOOR
COLUMBIA, SOUTH CAROLINA 29201
MAILING ADDRESS:
POST OFFICE BOX 11744
COLUMBIA, SC 29211
PHONE: (803) 765-1044
FAX: (803) 765-1143

October 27, 2009

Honorable Daniel E. Shearouse
Clerk
South Carolina Supreme Court
P.O. Box 11330
Columbia, S.C. 29211

RECEIVED
OCT 29 2009
S.C. SUPREME COURT

Re: *State v. Billy Wayne Cope*, Court of Appeals Opinion No. 4526
(Opinion on Rehearing filed September 29, 2009)

Dear Mr. Shearouse,

I am writing to request that the Court grant a 30-day extension of time in which to file the Petition for Writ of Certiorari to the Court of Appeals in the above-captioned case. The petition is presently due for filing on October 29, 2009. This is petitioner's first request for an extension.

If you have any questions or need further information, please do not hesitate to contact me.

Sincerely,

David I. Bruck
(x)

David I. Bruck

cc: Donald J. Zelenka
James M. Morton
Steven Drizin
Honorable Kenneth A. Richstad

The Supreme Court of South Carolina

The State,

Respondent,

v.

Billy Wayne Cope,

Petitioner.

The Honorable John C. Hayes, III
York County

Trial Court Case No. 2002-GS-46-03232
2002-GS-46-03233
2002-GS-46-03234
2004-GS-46-00200

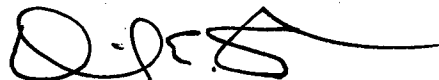
ORDER

For good cause having been shown, the time for serving and filing the
Petition for Writ of Certiorari and Appendix in the above entitled matter is
hereby extended until November 30, 2009.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY



CLERK

Columbia, South Carolina

October 28, 2009

cc: David I. Bruck, Esquire
Assistant Deputy Attorney General Donald J. Zelenka
The Honorable Jeanette Barber

BLUME WEYBLE & NORRIS, LLC

ATTORNEYS AT LAW

JOHN H. BLUME
KEIR M. WEYBLE
TERESA L. NORRIS
DAVID I. BRUCK *OF COUNSEL*

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FAX: (803) 765-1143

October 27, 2009

Honorable Daniel E. Shearouse
Clerk
South Carolina Supreme Court
P.O. Box 11330
Columbia, S.C. 29211

Re: *State v. Billy Wayne Cope*, Court of Appeals Opinion No. 4526
(Opinion on Rehearing filed September 29, 2009)

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If you have any questions or need further information, please do not hesitate to contact me.

Sincerely,

David I. Bruck
(s)

David I. Bruck

cc: Donald J. Zelenka
James M. Morton
Steven Drizin

RECEIVED

OCT 28 2009

S.C. SUPREME COURT