

No. 13-8427

IN THE
Supreme Court of the United States

BILLY WAYNE COPE,
Petitioner,

v.

STATE OF SOUTH CAROLINA,
Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of South Carolina

**BRIEF OF AMICUS CURIAE
THE NATIONAL INNOCENCE NETWORK
IN SUPPORT OF PETITIONER**

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INTEREST OF *AMICUS CURIAE*¹

The Innocence Network, Inc. (the “Network”) is an affiliation of organizations that provides pro bono legal and investigative services to convicted individuals seeking to prove their innocence. The Network currently has 65 member organizations representing hundreds of prisoners with innocence claims in all 50 states and the District of Columbia, as well as in countries around the world. The work and dedication of the Network’s member organizations has led to the exoneration of many wrongfully convicted prisoners, with 31 being exonerated in 2013 alone.² The Network’s efforts have to date exonerated over 200 innocent persons, and the Network has served as counsel in the majority of these cases. The Network also works to redress the causes of wrongful convictions. As false confessions often play a key role in wrongful convictions, the Network has a strong interest in ensuring that courts do not misapply evidentiary rules in such a way as to insulate such confessions from rebuttal.

¹ Pursuant to Rule 37.6, *amicus* certifies that no counsel for a party authored this brief in whole or in part. No person or entity other than *amicus* and its counsel made any monetary contribution to the preparation or submission of this brief.

² 2013 Innocence Network Exoneration Report, *available at* <http://www.innocencenetwork.org/resources/innocence-collateral/network-exoneration-reports/innocence-network-exoneration-report-2013/view>.

SUMMARY OF ARGUMENT

The Innocence Network submits this brief in support of Petitioner to provide the Court with information on the excessive biasing effect of false confessions and to urge the Court to accept this case to address the circumstances under which courts may constitutionally exclude compelling exculpatory evidence offered to counter confession evidence. As discussed below, confession evidence is not inevitably reliable, yet even a manifestly unreliable confession can have a potent, undue biasing effect on prosecutors, witnesses, and jurors alike. Indeed, as the cases discussed below demonstrate, confession evidence can be so potent that it can even lead some jurors to ignore DNA-based proof or other compelling evidence that a confessing suspect is actually innocent. The risk of unreliable confession evidence trumping clearly exculpatory evidence such as DNA testing is especially grave where, as here, the defendant's confession takes the form of a detailed narrative and the prosecution offers some sort of explanatory theory (no matter how far-fetched or unsupported by evidence) designed to reconcile the confession with the seemingly exculpatory DNA evidence.

This biasing "confession effect" is not merely an academic theory. It has been borne out to devastating effect in actual cases. Despite the introduction at trial of exonerating DNA evidence, a jury may be swayed by the power of a false confession into ignoring exculpatory DNA evidence where the prosecution presents some (even wildly

speculative) theory to reconcile the defendants' confessions with the DNA exclusions. This risk is particularly acute when the jury is not permitted to consider evidence that powerfully undermines the government's explanatory theory.

This "confession effect" is plainly illustrated by Mr. Cope's case. Several factors increased the risk that the outsized persuasive power of confession evidence would blind the jury to the compelling DNA-based proof of Mr. Cope's innocence. Notable among these factors were that the various confessions in this case were detailed narratives (albeit ones that were inconsistent with the facts in many ways) rather than simple admissions of guilt, and that the prosecution offered up an awkward theory of joint participation in an effort to reconcile the confessions with the exonerating DNA evidence. Remarkably, though, Mr. Cope was precluded from introducing exculpatory evidence to debunk the prosecution's joint participation theory, leaving the jury without knowledge of the essential facts providing a basis to accept or reject the state's theory.

This case therefore illustrates the devastating consequences of the pernicious "confession effect" and the need to protect defendants' constitutional rights to present evidence to counter that effect. This case shows how even defendants with compelling DNA proof of innocence can be rendered defenseless where courts exclude evidence of third-party guilt that undercuts the prosecution's efforts to reconcile a defendant's confession with exonerating DNA

evidence. In short, the exclusion of such crucial evidence can work a grave constitutional violation and injustice by crippling an innocent defendant's ability to empower the jury to reject the prosecution's explanatory theory. Because this case typifies how the "confession effect" manifests itself, this case provides the Court with the opportunity to clarify when such exculpatory evidence can be constitutionally excluded.

ARGUMENT

I. The Court Should Address The Exclusion Of Exculpatory Evidence Offered To Counter Confession Evidence, Given That Confession Evidence Is Not Inevitably Reliable And Yet Has A Strong Biasing Effect.

It is by now well documented that, contrary to what many jurors assume, confession evidence is not inevitably reliable. False confessions happen, and with disconcerting regularity. As this Court has noted, interrogation pressures "can induce a frighteningly high percentage of people to confess to crimes they never committed."³ Indeed, there have been more than a hundred exonerations that involved proven false confessions.⁴ Notably, false confessions have been present in one-fourth of all

³ *Corley v. United States*, 556 U.S. 303, 320-321 (2009).

⁴ Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 906-07 (2004) (study of 125 proven false confession exonerations from the post-*Miranda* era).

Innocence Project post-conviction DNA exonerations.⁵

It has been shown that convictions based on police-induced false confessions occur primarily in “more serious cases, especially homicides.”⁶ In one study of 125 DNA exonerations in cases involving false confessions, the “overwhelming majority,” eighty-one percent, occurred in murder cases.⁷

One partial explanation for why so many wrongful convictions involve false confessions is the “confession effect”: confessions can carry such persuasive power that juries are unable to reliably identify their falsity even in the face of DNA or other powerful proof of innocence, and even when there are compelling indications that the confession was coerced or otherwise unworthy of belief.

There are several key reasons why some jurors conclude that confessions trump even the most exculpatory DNA evidence: (1) the concept of false confessions is counter-intuitive, meaning jurors and other actors in the criminal justice system often do not believe that they would ever falsely confess and

⁵ Drizin & Leo, *supra* note 4, at 905 (citing Innocence Project percentage as of March 2004); Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 88 n.124 (2008).

⁶ Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051, 1065 (2010).

⁷ Drizin & Leo, *supra* note 4, at 946-47; *see also* Garrett, *supra* note 6, at 1065 (noting that in a second study of 40 cases of proven false confessions, seventy percent of the exonerations involving a false confession occurred in murder cases).

thus cannot fathom why anyone else would; (2) false confessions are often highly detailed, giving them an appearance of reliability that is often undeserved because the details were either generally known or were intentionally or inadvertently fed to the suspects by their interrogators through a process known as contamination; and (3) once a confession is believed, confirmation bias reinforces the perception that a given confession is true.

A. The Literature On The Biasing Effect Of False Confessions.

This Court has recognized the “mounting empirical evidence that the[] pressures [of custodial police interrogation] can induce a frighteningly high percentage of people to confess to crimes they never committed.”⁸ Indeed, in recent years, DNA and other evidence has proven that many confessions in murder cases are demonstrably false.⁹ At the same time, confession evidence is exceedingly persuasive to jurors.¹⁰ Although the frequency of false

⁸ *Corley*, 556 U.S. at 320-21 (citation omitted).

⁹ *See, e.g.*, *Garrett*, *supra* note 6, at 1060-61, 1065.

¹⁰ Saul M. Kassin, *Why Confessions Trump Innocence*, 67 AM. PSYCHOL. 431, 433-34 (2012); Gisli H. Gudjonsson, “*Convicting the Innocent*”: *False Confessions and Correcting Injustices*, 46 New Eng. L. Rev. 689, 690 (2012) (noting that even when retracted, false confessions still “constitute very powerful factors that typically result in a conviction”); Saul Kassin and Katherine Neumann, *On the Power of Confession Evidence: An Experimental Test of the “Fundamental Difference” Hypothesis*, 21 LAW & HUM. BEHAV. 469, 469, 481 (1997) (finding that “confession evidence has a greater impact on jurors—and is

confessions should lead all of the participants in the criminal justice system to recognize that the probative power of confession evidence can be greatly exaggerated, confession evidence has retained its power to blind. In fact, confession evidence retains such persuasive power that in a battle between the “queen of proofs” (confessions)¹¹ and the gold standard of evidence (DNA),¹² confession evidence may still prevail, especially when prosecutors offer any explanation (no matter how contorted) for why the confession may still be true despite DNA evidence exposing its falsehood.¹³

Confessions have more impact on jury verdicts than do many other powerful forms of evidence, as

seen as having a greater impact *by* jurors—than other potent types of evidence”); *see also Bruton v. United States*, 391 U.S. 123, 139 (1968) (recognizing that a “defendant’s own confession is probably the most probative and damaging evidence that can be admitted against him”).

¹¹ PETER BROOKS, *TROUBLING CONFESSIONS: SPEAKING GUILT IN LAW AND LITERATURE*, at 4 (2000).

¹² Joseph L. Peterson & Anna S. Leggett, *The Evolution of Forensic Science: Progress Amid the Pitfalls*, 36 *STETSON L. REV.* 621, 654 (2007).

¹³ *See, e.g., Tice v. Johnson*, No. 3:08CV69, 2009 U.S. Dist. LEXIS 83931, at *2 (E.D. Va. Sept. 14, 2009); *People v. Rivera*, 962 N.E.2d 53, 62-63 (Ill. App. 2012); *see also* Garrett, *supra* note 6, at 1054-56, 1057, 1084-85 (discussing the cases of Jeffrey Deskovic, Ryan Mathews, and Travis Hayes, whose false confessions and exonerating DNA evidence were both presented at trial, and the juries credited the confessions over the DNA evidence).

jurors do not adequately discount confession evidence—even when it is retracted and shown to be the result of coercion.¹⁴ For example, a study of proven false confessions elicited between 1971 through 2002 showed that roughly four out of five now exonerated confessors who went to trial despite exonerating evidence that raised doubts about the validity of their confessions were convicted.¹⁵ As the study’s authors, Steven Drizin and Richard Leo, conclude, “in the overwhelming majority of cases that go to trial, confessions (even if they are demonstrably false) almost always seal the defendant’s fate . . . commonly . . . by leading a judge or jury to wrongfully convict the factually innocent defendant.”¹⁶

The reasons why confessions trump innocence are simple: the counter-intuitive nature of false confessions makes confession evidence particularly convincing, the level of detail in many false confessions gives the confession the ring of truth, and confirmation bias then creates tunnel vision that

¹⁴ Kassin, *supra* note 10, at 433-34; *see also* Drizin & Leo, *supra* note 4, at 961, 962 (“[C]onfession evidence substantially biases the trier of fact’s evaluation of the case in favor of the prosecution and conviction—exercising [a] profound and context-resistant impact on jurors.”); Gudjonsson, *supra* note 10, at 690; Richard A. Leo & Richard J. Ofshe, *Criminal Law: The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429, 429-30 (1998).

¹⁵ Drizin & Leo, *supra* note 4, at 960-61.

¹⁶ *Id.* at 961.

reinforces the perception that a given confession must have been true.¹⁷ The first factor, the apparent illogic of false confessions, provides confession evidence with instant apparent credibility to judges and juries alike. As Saul Kassin explains, “[m]ost people reasonably believe that they would never confess to a crime they did not commit, so they evaluate others accordingly, do not understand the influence of police interrogation practices, and have only a rudimentary understanding of the dispositional and situational factors that would lead someone innocent to confess.”¹⁸

The confidence in confession evidence is particularly strong where, as occurs in many false confessions, the confession contains vivid details of what the suspect allegedly did.¹⁹ Indeed, detailed “narrative confessions can be so powerful as to overwhelm contradictory forensic evidence,” including exculpatory DNA evidence.²⁰ But the level of detail in a suspect’s confession is not always an accurate barometer of its reliability. As researcher

¹⁷ Kassin, *supra* note 10, at 433-35, 437, 440 (noting that the phenomenon of false confessions does not comport with a layperson’s common sense and that confessions trigger “confirmation processes” that bias the interpretation of other evidence); *see also* Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 292-95 (2006).

¹⁸ Kassin, *supra* note 10, at 434.

¹⁹ *Id.* at 436.

²⁰ *Id.*

Brandon Garrett explains, the details in false confessions are often the product of police contamination—the inadvertent leaking of crime facts to the suspect through the use of leading questions, showing crime scene photos to suspects, taking them to visit crime scenes and other such interrogation tactics. Confession contamination leads some innocent suspects to “offer[] surprisingly rich, detailed, and accurate information” about the crime and cloaks their confessions in an aura of reliability that is undeserved.²¹

This unwarranted confidence in confession evidence can often be powerful enough to overcome exonerating DNA evidence as long as the prosecution offers some semblance of an explanatory theory—even a far-fetched one—to reconcile the contradiction between a confession and exculpatory DNA evidence. For example, as evidenced in one study, where the prosecution presents an explanatory theory that appears to reconcile a defendant’s confession with exonerating DNA evidence, nearly half of all adult factfinders were prepared to convict the defendant despite powerfully exonerating DNA evidence.²² Because judges and jurors “simply fail to appropriately discount false confession evidence[,] . . . false confession evidence is highly, if not inherently,

²¹ Garrett, *supra* note 6, at 1054; Gudjonsson, *supra* note 10, at 690-91.

²² Kassin, *supra* note 10, at 436.

prejudicial to the fate of any innocent defendant in the American criminal justice system.”²³

Once an individual believes confession evidence to be true, confirmation bias then kicks in, which further strengthens a decision-maker’s faith in the veracity of the confession. Such confirmation bias can have a dramatic impact on the police investigation phase and then infiltrate every stage of the proceedings that follow, from the gathering of evidence to the disposition of appeals.²⁴

With regard to the police investigation phase, as Kassin explains, “[o]nce a suspect confesses, police often close the investigation, deem the case solved, and overlook exculpatory information—even if the confession is internally inconsistent, contradicted by external evidence, or the product of coercive interrogation.”²⁵ This trust in the integrity of confessions “may extend to prosecutors as well, some of whom express skepticism about false confessions and . . . refuse to admit the possibility of their falsity even after DNA testing has unequivocally excluded the confessor.”²⁶

The power of confession evidence can also taint both expert and lay witness testimony, leading to

²³ Drizin & Leo, *supra* note 4, at 962.

²⁴ See Kassin, *supra* note 10, at 437-440; see also Findley & Scott, *supra* note 16, at 295 (noting that “tunnel vision infects all phases of criminal proceedings”).

²⁵ Kassin, *supra* note 10, at 433.

²⁶ *Id.*

false corroboration of the confession. For example, polygraph and fingerprint examiners are more likely to find markers of guilt in polygraph results and inculpatory fingerprint evidence when the examiner has been told that the suspect has confessed.²⁷ In addition, a majority of eyewitnesses who previously implicated one individual will confidently change their identification testimony after being told that another suspect confessed.²⁸ It is therefore not surprising that, in a study of documented cases of wrongful conviction, 63% of wrongful convictions that involved false confessions also involved improper forensic science, 29% involved mistaken eyewitness identifications, and 19% involved untruthful informants.²⁹ Thus, as Kassir explains, false “confessions can spawn other incriminating evidence, creating an illusion of corroboration.”³⁰

Preliminary studies also suggest that confirmation bias can surreptitiously sneak into the adversarial process, leading to higher instances of ineffective lawyering by defense attorneys and of prosecutorial misconduct.³¹ These findings, in sum,

²⁷ *Id.* at 437.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 438.

³¹ *Id.* at 438-39 (in a 2012 archival analysis of the first 273 DNA exoneration cases from the Innocence Project files, finding that false confession cases were more likely to involve bad defense lawyering than nonconfession cases (9.09% versus 3.38%) and

paint a picture of a system alarmingly unaware of its own gaping blind spots.

B. Bias In Action: The Norfolk Four.

This biasing “confession effect,” moreover, is not merely an academic theory; indeed, it has been borne out to devastating effect in actual cases.³² The case of the Norfolk Four illustrates the point.

On July 8, 1997, a young Navy wife named Michelle Bosko was found murdered in her apartment bedroom in Norfolk, Virginia.³³ Bosko had been raped, manually strangled, and stabbed in the chest several times with a kitchen knife.³⁴ One of Bosko’s friends directed police to Danial Williams, a Navy sailor who lived across the hall from Bosko and her husband.³⁵ After nine hours of denying involvement in Bosko’s murder, Williams confessed to the rape and murder of Bosko.³⁶

more likely to involve government misconduct (21.21% versus 15.46%)).

³² *See supra*, note 13.

³³ *Tice*, 2009 U.S. Dist. LEXIS 83931, at *2.

³⁴ *Id.*

³⁵ *Case Timeline: a history of key events surrounding the Norfolk Four case, from 1990 to present*, PBS, <http://www.pbs.org/wgbh/pages/frontline/the-confessions/timeline-of-the-case/> (last visited Feb. 23, 2014).

³⁶ Jeffrey Toobin, *The Wrong Guys*, *The New Yorker* (Aug. 24, 2009), http://www.newyorker.com/talk/2009/08/24/090824ta_talk_toobin; Alan Berlow, *What Happened in Norfolk*, *The New*

As it turned out, though, that confidence that the crime had been accurately solved was soon destroyed: six months after Williams's confession, testing conclusively revealed that Williams's DNA did not match the blood and semen found at the crime scene.³⁷

In search of the source of the DNA evidence, police detectives questioned, and subsequently arrested, Williams's roommate, Joseph Dick.³⁸ Dick denied involvement in the crime and told detectives that he had been fulfilling his assignment on board his naval ship at the time of the crime.³⁹ Dick eventually confessed to raping and killing Bosko with Williams.⁴⁰ As with Williams, though, later DNA testing excluded Dick as the source of the blood and semen found at the crime scene.⁴¹

Following the DNA results, detectives questioned Dick again, eliciting from him that Eric Wilson, a third sailor who was a friend of Williams's, had also participated in the rape-murder.⁴² After hours of

York Times (Aug. 19, 2007), http://www.nytimes.com/2007/08/19/magazine/19Norfolk-t.html?pagewanted=all&_r=0.

³⁷ *Tice*, 2009 U.S. Dist. LEXIS 83931, at *3.

³⁸ *Id.*; *see also* Berlow, *supra* note 36.

³⁹ *Tice*, 2009 U.S. Dist. LEXIS 83931, at *3; *see also* Berlow, *supra* note 36.

⁴⁰ *Tice*, 2009 U.S. Dist. LEXIS 83931, at *3

⁴¹ *Id.*

⁴² *Id.* at *3-4.

interrogation, Wilson too confessed to rape, but not to murder.⁴³ But, once again, DNA tests excluded Wilson as the source of the blood and semen left at the crime scene by the perpetrator.⁴⁴

Still searching for a DNA match, police detectives questioned Dick again, who told them that a fourth man was involved in the rape-murder.⁴⁵ Dick eventually identified Derek Tice as the additional perpetrator.⁴⁶ As with the other men, Tice initially denied involvement, but ultimately confessed to raping and murdering Bosko after hours of interrogation.⁴⁷ During multiple rounds of questioning, Tice implicated not only Dick, Williams, and Wilson, but also three additional men: Geoffrey Farris, Richard Pauley, and John Danser.⁴⁸ Despite the fact that the DNA evidence did not match the three additional men and that both Pauley and Danser had confirmed alibis, police continued prosecuting the eight men.⁴⁹ Neither Farris, Pauley, nor Danser confessed to raping or murdering Bosko.⁵⁰

⁴³ *Id.* at *4.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at *4-5.

⁴⁹ Berlow, *supra* note 36.

⁵⁰ *Id.*

On February 22, 1999, police were given a copy of a letter written by a man named Omar Ballard.⁵¹ Ballard had written the letter to a friend, threatening her and admitting to killing Bosko.⁵² The letter was written from prison, where Ballard was serving forty years for the rape and brutal beating of a fourteen-year-old girl that took place ten days after Bosko's murder, just a mile away.⁵³ Ballard had also beaten a young women with a base-ball bat in Bosko's apartment complex a few weeks before Bosko's murder.⁵⁴ DNA tests revealed that Ballard was the source of the sperm and blood evidence found at the crime scene.⁵⁵ On March 11, 1999, Ballard confessed to police, stating that he alone killed Bosko.⁵⁶ However, a year later, pursuant to a plea agreement in which Ballard avoided the death penalty, Ballard changed his story, telling police that he, Williams, Dick, Wilson, and Tice committed the crime together.⁵⁷

Based on the parties' alibis and the DNA evidence inculcating Ballard, charges were dropped against

⁵¹ *Tice*, 2009 U.S. Dist. LEXIS 83931, at *6-7.

⁵² *Id.*

⁵³ Berlow, *supra* note 36; *see also Tice*, 2009 U.S. LEXIS 83931, at *6.

⁵⁴ Berlow, *supra* note 36.

⁵⁵ *Tice*, 2009 U.S. Dist. LEXIS 83931, at *7.

⁵⁶ *Id.*

⁵⁷ *Id.* at *8.

Farris, Pauley, and Danser (the three who had never confessed).⁵⁸ Nonetheless, the State proceeded to try Tice and Wilson (both of whom refused to plead guilty) under the theory that all eight men, including Ballard, raped and murdered Bosko.⁵⁹ The court excluded the most powerful evidence that Ballard acted alone—his unsolicited and voluntary admissions in a letter he wrote to a friend while in jail awaiting trial on other rape charges.⁶⁰ In June 1999, the jury convicted Wilson of raping Bosko, but acquitted him of the murder charge.⁶¹ On February 14, 2000, a jury found Tice guilty of raping and murdering Bosko.⁶² The Virginia Court of Appeals later overturned Tice’s conviction and remanded for a new trial on May 21, 2002, finding that the jury was improperly instructed and that the trial court had erred in refusing to allow questions concerning the Ballard confession letter.⁶³ A second jury again found Tice guilty and he was sentenced to two consecutive life terms in 2003.⁶⁴ Eventually, in part

⁵⁸ *Id.* at *7.

⁵⁹ Case Timeline, *supra* note 35.

⁶⁰ *Id.*; *see also* Tice, 2009 U.S. Dist. LEXIS 83931, at *14.

⁶¹ Tice, 2009 U.S. Dist. LEXIS 83931, at *7-8.

⁶² *Id.* at *8.

⁶³ *Id.*; *see also* Tice v. Commonwealth, 563 S.E.2d 412 (Va. Ct. App. 2002).

⁶⁴ Tice, 2009 U.S. Dist. LEXIS 83931, at *8; *see also* Case Timeline, *supra* note 35.

as a result of the appellate court reversing the conviction against one defendant and the Governor of Virginia granting a conditional pardon to two additional defendants, these men have all been freed and recognized as having been wrongfully convicted.⁶⁵

In sum, the fates of the Norfolk four defendants were sealed the moment that they falsely confessed. Because the court excluded Ballard's voluntary admission to working as a lone-wolf, despite the DNA testing that exonerated all four and matched Ballard—evidence which was introduced at trial—the jury credited the prosecution's joint participation theory and convicted all four defendants. The case of the Norfolk Four—troubling as it is—is just one example of many cases plagued by the “confession effect.”⁶⁶

C. Bias In Action: Mr. Cope's Prosecution.

The same “confession effect” that plagued the investigation and prosecution of the Norfolk Four was at work in Petitioner's case. As with the Norfolk Four, multiple factors increased the chances that the jury would disregard the exculpatory DNA evidence and instead credit Mr. Cope's confessions. The confessions in Petitioner's case contained vivid details of the crime (although there many glaring

⁶⁵ *Tice*, 2009 U.S. Dist. LEXIS 83931, at *8; *see also Case Timeline*, *supra* note 35.

⁶⁶ *See supra* note 13.

inconsistencies with the known facts).⁶⁷ The prosecution, furthermore, presented a theory (albeit an implausible one that was unsupported by any evidence or by the confession) to reconcile the confession evidence with the exonerating DNA evidence—namely, that Mr. Cope intentionally ushered James Sanders into his family’s home in the middle of the night to “serve[] up his daughter for his and . . . Sanders’ own perverse pleasures and took her life. They did it together.”⁶⁸ The presence of detailed confessions, including a re-enactment of the crime, in combination with the supposedly reconciling theory—however far-fetched it may have been—dramatically increased the chances that the jury would convict—unless the defense was allowed to expose the emptiness of that theory.⁶⁹

Petitioner’s case, moreover, involved witness testimony that was very likely tainted by the false confessions. The victim’s sister, who testified at trial, did not mention securing the front door on the night of the murder (testimony that supported the prosecution’s theory) until nearly three years after the crime, as prosecutors were preparing her to testify.⁷⁰ This kind of belated corroborating detail is

⁶⁷ *Cope*, App. 4a, 405 S.C. at 327-29, 748 S.E.2d at 199-201.

⁶⁸ App. 7a; 405 S.C. at 330, 748 S.E.2d at 201.

⁶⁹ Kassir, *supra* note 10, at 436.

⁷⁰ Petition for Writ of Certiorari at 6, *Billy Wayne Cope v. South Carolina* (2014); see also *State v. Cope*, App. 7a; 405 S.C. at 331; 748 S.E.2d at 201; Record on Appeal at 2090-91, *State v. Cope*, 405 S.C. 317 (2013).

typical of witness testimony that has been influenced by the existence of a confession.

Finally, and critically for constitutional purposes, as in the Norfolk Four, the introduction of exonerating DNA evidence was not enough to overcome the weight of the confession evidence in the face of the prosecution's explanatory theory, because Mr. Cope was precluded from introducing forceful exculpatory evidence to debunk this theory. Mr. Cope attempted to rebut the government's theory of joint participation by offering evidence that the third-party, Sanders, regularly attempted and committed similar crimes—sexual assaults of women in the same neighborhood—by entering these women's homes without leaving any signs of forced entry, and acting as a lone-wolf perpetrator.⁷¹ He also offered evidence of Sanders' jailhouse admissions that contradicted the state's conspiracy theory.⁷² And just as in the Norfolk Four, the trial court excluded the evidence.⁷³ These exclusions crippled Mr. Cope's ability to refute the government's newly minted joint participation theory, and thereby sealed his fate. All of the evidence about the nature of false confessions and jury decisionmaking confirms the massive unconstitutional prejudice a defendant suffers when the prosecution is allowed to float wild unsupported theories, but the defense is barred from presenting

⁷¹ *Cope*, App. 11a-12a; 405 S.C. at 335-36, 748 S.E.2d at 203-04.

⁷² R. 3427-31.

⁷³ R. 891-93, 3433.

uncontested facts that would expose those theories for what they are.

II. This Case Demonstrates The Devastating Effect Of Excluding Third-Party Guilt Evidence In The Face Of Confession Evidence And Provides The Court With The Opportunity To Clarify The Proper Circumstances Under Which Such Evidence Can Be Constitutionally Excluded.

Due to the pernicious “confession effect” detailed above, the exclusion of defense evidence of third-party guilt can cripple a defendant’s ability to persuade a jury to disregard the prosecution’s theory for explaining away DNA.⁷⁴ For example, juries have convicted innocent individuals in cases in which the defendant confessed and the defendant was able to introduce extremely significant exonerating evidence such as DNA evidence, but the court excluded corroborating evidence of third-party guilt that undermined the prosecution’s attempt to reconcile the confession with the exculpatory evidence. The case of the Norfolk Four, highlighted above, powerfully illustrates the point. *See* Part I.B, *supra*.

The case of Rolando Cruz is similarly illustrative, although the initially excluded exculpatory evidence that Cruz was able to introduce was the third-party’s voluntary and unsolicited admissions of guilt, rather

⁷⁴ Andrew Martin, *The Prosecution’s Case Against DNA*, New York Times Magazine (November 25, 2011), available at www.nytimes.com/2011/11/11/27/magazine/dna-evidence-lake-county.html?pagewanted=all.

than DNA evidence. On February 25, 1983, 10-year-old Jeanine Nicarico was kidnapped from her family's Naperville, Illinois home and was raped and murdered.⁷⁵ Despite the absence of any physical or eyewitness evidence tying Rolando Cruz to the crime, he was tried three times—and convicted twice—based on police testimony that he had made incriminating statements that were tantamount to a confession. In those statements he allegedly described a dream or vision about the case that contained facts only the murderer would have known.⁷⁶ Two other men, Alejandro Hernandez and Stephen Buckley, were also charged.⁷⁷

During the first trial, the state tried all three men together.⁷⁸ Both Cruz and Hernandez (also tried based on various statements attributed to him) were convicted and sentenced to death, but the jury hung on the charges against Buckley.⁷⁹ On direct appeal, the Illinois Supreme Court reversed both Cruz's and Hernandez's convictions and remanded for a new

⁷⁵ *People v. Cruz*, 643 N.E.2d 636, 640 (Ill. 1994).

⁷⁶ *Id.* at 641.

⁷⁷ *Id.* at 640; see also *Rolando Cruz*, Innocence Project, http://www.innocenceproject.org/Content/Rolando_Cruz.php (last visited Feb, 23, 2014).

⁷⁸ *Cruz*, 643 N.E.2d at 639.

⁷⁹ *Id.*

trial based on the trial court's failure to sever the defendants' trials.⁸⁰

By the time of the remand, there had been a shocking development in the case. A man named Brian Dugan was arrested for a rape and murder of an eight-year-old girl.⁸¹ In the course of his efforts to avoid a death sentence for that crime, he agreed to provide the State Police with detailed accounts of all the crimes he had committed.⁸² He ultimately described two rape/murders, one murder, and three rapes he had committed.⁸³ One of these was the kidnapping, rape and murder of Jeanine Nicarico—the crimes for which Cruz and Hernandez had been sentenced to death.⁸⁴ With regard to each of these crimes, he described how he acted alone.⁸⁵ The authorities were able to corroborate his account that he acted alone in the other five cases.⁸⁶

⁸⁰ *People v. Cruz*, 521 N.E.2d 18 (Ill. 1988).

⁸¹ Lawrence Marshall, *Litigating in the Shadow of Innocence*, 68 U. PITT. L. REV. 191, 205 (2006).

⁸² *See id.* at 206.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

Despite this extraordinary development, the State tried Cruz again in 1990.⁸⁷ The prosecutors argued that Dugan's detailed confession did not negate the impact of Cruz's statements largely because Dugan and Cruz could have acted together (despite the absence of any evidence that the two had ever met, much less raped and murdered little girls together).⁸⁸ As would later be the case in *Cope*, Cruz's defense fought mightily to have the jury hear all the evidence showing that Dugan's confessions to all the other crimes was accurate and that his account of always having acted alone was fully corroborated in those other cases.⁸⁹ Yet, much like the trial court in *Cope*, the judge disallowed that evidence and the jury was left without critical information showing that the defense evidence about Dugan's statements was far more compelling than the prosecution was leading the jury to believe.⁹⁰ The jury again convicted Cruz and he was again sentenced to death (Hernandez was also eventually reconvicted, but the judge spared him a death sentence).⁹¹

⁸⁷ *Cruz*, 643 N.E.2d at 640; see also Thomas Frisbie and Randy Garrett, Case Summary, *Center on Wrongful Convictions* (last revised Feb. 7, 2001), <http://www.law.northwestern.edu/legalclinic/wrongfulconvictions/exonerations/documents/ilcruzchart.pdf>.

⁸⁸ *Id.*

⁸⁹ *Id.* at 649-50.

⁹⁰ *Id.* at 649-50.

⁹¹ *Id.* at 639.

On Cruz's appeal, the Illinois Supreme Court reversed, holding that Cruz was entitled to present the evidence necessary to prove up its claim that Dugan committed the crime, and did it alone.⁹² The court stated, "The Dugan-Cruz linkage was an essential element of the State's case. Defendant was thus entitled to rebut the evidence of that linkage with nonprejudicial and relevant evidence."⁹³ Even though some of the other crimes did not qualify as so close as to constitute a general *modus operandi*, the court recognized that the pivotal point was that "Dugan *always acted alone* in all of his other similar crimes" and that this was plainly "probative of whether Dugan committed this crime *with defendant*."⁹⁴

Cruz was acquitted in his third trial.⁹⁵ By that time even more powerful evidence of Dugan's guilt had emerged: DNA evidence proved that his semen was found in Jeanine Nicarico. Charged were dropped against Hernandez. As for Dugan, he was ultimately charged under the theory that he acted alone and was convicted and sentenced to death. (That sentence was later modified to a life sentence

⁹² *Id.* at 656.

⁹³ *Id.*

⁹⁴ *Id.* (emphasis added).

⁹⁵ Ken Armstrong & Maurice Possley, *Prosecution on Trial in DuPage*, Chicago Tribune (Jan. 12, 1999), <http://truthinjustice.org/dupage.htm>; see also Rolando Cruz, *supra* note 77.

without parole when Illinois abolished the death penalty in 2011.)

There is a direct connection between the Cruz case and the Cope case. The events in *Cruz* show the impact of depriving the defense of the right to present evidence relating to a person's other crimes. That evidence can be critical not only to show that the other person committed those crimes, but to show that he did so alone, thus undercutting the prosecution's efforts to argue that evidence of the third party's guilt could easily be reconciled with the defendant's guilt under a theory they acted together.

Like that of Rolando Cruz, Mr. Cope's defense was substantially crippled by the court's exclusion of the exculpatory evidence of Sanders' other known attacks as well as his jailhouse confession that implicated himself as the lone perpetrator. Because the state proposed a joint participation theory to explain and reconcile the exculpatory DNA evidence with Mr. Cope's confessions, Mr. Cope's defense hung on his ability to debunk this theory. As in the Cruz case, the fact that Sanders *always acted alone* in his other crimes—which were also sexual assaults committed against women in the same neighborhood that lacked any signs of forced entry and were committed shortly after the murder of Mr. Cope's daughter—is probative of whether Mr. Cope and Sanders acted together or whether Sanders acted alone. Depriving Mr. Cope of the ability to present this evidence of Sanders' lone-wolf predations crippled Mr. Cope's ability to present a complete defense. This case consequently provides the Court

with an appropriate vehicle to offer critical guidance on the circumstances under which exculpatory evidence of third-party guilt can be constitutionally excluded as this case powerfully demonstrates the devastating effect of excluding compelling third-party guilt evidence in the face of confession evidence.

CONCLUSION

Petitioner's case dramatically illustrates the overwhelming power of confession evidence and provides the Court with the opportunity to clarify for the lower courts the critical importance of allowing defendants to marshal all relevant evidence to rebut the powerfully biasing confession evidence. As the research and case studies presented herein demonstrate, confession evidence can be so powerful that it can even trump DNA evidence that should cause jurors to reject it. In order to enable juries to fairly evaluate the strength of the prosecution's explanatory theory presented to reconcile an apparent discrepancy between a confession and exonerating DNA evidence, it is important to protect a defendant's ability to introduce corroborating evidence of third-party guilt that undermines the prosecution's explanatory theory.

Twice in the last five years, first in *Corley v. United States*, and then again in *J.D.B. v. North Carolina*, this Court has recognized that police interrogations can produce a "frighteningly high

number of false confessions.”⁹⁶ These false confessions make up a “frighteningly high” percentage—approximately 25%—of the 312 DNA exonerations to date. One of the lessons learned from the work of the Innocence Network is that in order to prevent these false confessions from ripening into wrongful convictions, defendants often need more than DNA evidence. To combat the blinding effect of confession evidence, defendants need to be able to introduce evidence of third-party guilt, including of the third-party’s other crimes. Only in this way can defendants be assured that they can present a coherent and credible narrative of actual innocence to the jury. Because this case presents a proper vehicle for the Court to address the important issue of false confessions and the appropriate use of the Due Process and Compulsory Process Clauses to secure the right to present a meaningful defense and to serve as a bulwark against wrongful convictions, the Court should accept this case.

Respectfully submitted,

⁹⁶ *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2401 (2011) (quoting *Corley v. United States*, 556 U.S. 303, 321 (2009)); *Corley v. United States*, 556 U.S. 303, 320-21 (2009) (citation omitted).

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