No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT WAYNE WILSON,

Petitioner,

v.

THE STATE OF CALIFORNIA,

Respondent.

On Petition For Writ Of Certiorari To The
Court of Appeal of the State of California
First Appellate District, Division Four

Petition for writ of certiorari

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Questions presented

In a prosecution for child sexual abuse, does testimony that only four percent of child sexual abuse allegations are false violate the defendant's rights to trial by jury, to the presumption of innocence, and to due process?

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Petition for writ of certiorari

Petitioner Robert Wayne Wilson respectfully petitions for a writ of certiorari to the California Court of Appeal, First Appellate District, Division Four, in *People v. Robert Wilson,* No. A150500.

Parties to the proceedings

The parties to the proceedings below were petitioner, Robert Wayne Wilson, and Respondent, the People of the State of California.

Opinions below

On March 27, 2019, the California Court of Appeal issued a partially published opinion affirming Mr. Wilson's convictions. Appendix ("App.") C; see *People v. Wilson,* 33 Cal.App.5th 559 (Cal. Ct. App. 2019). The Court of Appeal denied Mr. Wilson's petition for rehearing on April 24, 2019. App. B. Mr. Wilson's petition for review was denied in the California Supreme Court on July 17, 2019. App. A.

The relevant trial court proceedings are unpublished.

Jurisdiction

The California Supreme Court denied discretionary review on July 17, 2019. App. A. This Court has jurisdiction pursuant to 28 U.S.C. section 1257(a).

Constitutional provisions involved

The Sixth Amendment provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."

Section 1 of the Fourteenth Amendment to the United States Constitution provides, in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

Statement of the case

After his first trial ended in jury deadlock, Mr. Wilson was convicted at a second trial of twelve counts of child sexual abuse under California Penal Code section 288(b)(1) and one count of continuous sexual abuse under section 288.5, an alternative charge. App. C, pp. 1-2, 5.[1]

All of the counts stemmed from allegations that he abused

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[1] Mr. Wilson was sentenced to 104 years in state prison. The trial court dismissed the section 288.5 conviction at sentencing. California law provides that a defendant cannot be convicted of both individual child sexual abuse charges under section 288 and a continuous sexual abuse charge covering the same time period. See App. C, pp. 34-37.

L.D., his girlfriend's daughter. App. C, pp. 1-2, 5. Aside from L.D.'s testimony, the prosecution presented prior act testimony by J.D., Mr. Wilson's ex-wife's son, alleging that Mr. Wilson had abused him more than a decade earlier, when he would have been three or four years old, and the testimony of Mr. Wilson's ex-wife, J.D.'s mother, alleging that Mr. Wilson had raped her. App. C, pp. 2-5.[2] No physical evidence was presented. App. C, pp. 2-9.[3]

Over objection, the prosecutor was allowed to present expert testimony by Dr. Anthony Urquiza.[4] Dr. Urquiza testified about Child Sexual Abuse Accommodation Syndrome. App. C, pp. 7-8, 14-20. He also testified, over objection, that false allegations of child sexual abuse happen "very infrequently or rarely," and that a "classic" Canadian study found the frequency of false allegations to be "pretty low, just about 4%." App. D (43RT 5334-5335); App.

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[2] Mr. Wilson's ex-wife did not testify at his first trial (38RT 4219, 4227); at his second trial, she testified over defense objection. App. C, pp. 11-13.

[3] The prosecution presented no physical evidence, and the defense was precluded from presenting expert testimony that the type of abuse J.D. alleged would have resulted in injury that his caretakers would have noticed. App. C, pp. 26-29.

[4] See 2CT 312, 317; 38RT 4264 (pretrial objections).

C, pp. 20-21. He added that "in none of those cases" making up the 4% "was it a child who made the allegation that was false, it was somebody else." See App. D (43RT 5334-5335); App. C, p. 20.

On cross-examination, Urquiza added that the study that produced the 4% statistic was "probably one of the best studies we have," and that overall, the 12 to 15 studies on the issue produced a range of statistics, from 1% to 6%. See App. D (43RT 5358); App. C, pp. 20-21.[5] Dr. Urquiza also testified that in his career, in which he had personally treated at least 1000 children, he had come across only two cases in which a child made an allegation he believed to be false. App. D (43RT 5307, 5365-5366).

On appeal, Mr. Wilson contended that allowing Dr. Urquiza's testimony about the rate of false allegation violated his constitutional rights to, among other things, the presumption of innocence, due process of law, and trial by jury. The Court of Appeal held, in the published portion of its opinion, that the trial court abused its discretion in admitting the testimony. App. C (slip opn., pp. 1, 23-24). But it rejected Mr. Wilson's argument that

[5] At Mr. Wilson's first trial, Urquiza had testified that the false allegation rates shown by the studies ranged from "as low as about 1%" to "a high end of about 6 or 8% . . . ." See 27RT 2621.

the error violated his federal constitutional rights, and declined to apply the *Chapman* standard of review for prejudice. App. C (slip opn. pp. 24-25); see *Chapman v. California,* 386 U.S. 18, 24 (1967). Applying, instead, the standard for state-law error, the court found the error harmless and affirmed Mr. Wilson's convictions. App. C (slip opn., pp. 25-26).

The Court of Appeal denied Mr. Wilson's rehearing petition on April 24, 2019. App. B. The California Supreme Court denied his petition for review on July 17, 2019. App. A.

Reasons for granting the writ

Certiorari should be granted to decide whether testimony that only four percent of child sexual abuse allegations are false violates a criminal defendant's constitutional rights.

State and federal statutes ordinarily govern the admissibility of evidence, and juries are tasked with determining the reliability of the evidence presented at trial. *Perry v. New Hampshire,* 565 U.S. 228, 237 (2012). But "when evidence 'is so extremely unfair that its admission violates fundamental conceptions of justice,'" this Court has "imposed a constraint tied to the Due Process Clause." *Ibid,* citing *Dowling v. United States,*

493 U.S. 342, 352 (1990) and *Napue v. Illinois,* 360 U.S. 264, 269 (1959).

False evidence falls into this category. *Napue, supra,* 360 U.S. at p. 269. But this Court has also said that "[t]he aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false." *Lisenba v. California,* 314 U.S. 219, 235-357 (1941). Due Process thus prohibits evidence that is "so extremely unfair that its admission violates fundamental conceptions of justice." *Perry, supra,* 565 U.S. at p. 237.

It is clear, for example, that due process would not tolerate the use of an indictment or other charging document as evidence. *Taylor v. Kentucky,* 436 U.S. 478, 485 (1978). Nor would it tolerate, for example, the introduction of evidence of a defendant's race, unless made relevant by a particular feature of the case. See, e.g., *Pena-Rodriguez v. Colorado*, 137 S.Ct. 855, 867-868 (2017); *Zant v. Stephens,* 462 U.S. 862, 885 (1983); cf. *Buck v. Davis,* 137 S.Ct. 759, 776 (2017).

The evidence at issue here shares similarities with the types of evidence that due process does not tolerate. Statistical evidence

about the rate of false accusation is untethered from the facts of any particular case – from the question whether the defendant did what he was accused of doing with the requisite intent. It is made relevant only by the fact that the defendant has been accused. It converts the fact that an accusation had been made into a probability of guilt, upending the presumption of innocence. See *Coffin v. United States,* 156 U.S. 432, 453-461 (1895).[6]

Certainly, due process would not tolerate testimony that 96% of people accused of robbery are guilty; that 96% of prosecution witnesses tell the truth; that 96% of alibis are false; that 96% of confessions are true; or that 96% of criminal defendants are guilty. Yet despite the number of cases, over the years, in which state and federal courts have confronted testimony about the rate or rarity of false allegations in child sexual abuse cases, no consensus has been reached as to whether such testimony violates due process.

In at least one case involving rape,[7] and in several involving

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[6] Tracing the deep historical roots of the presumption of innocence, the Court quoted the Emperor Julian, who asked, "'If it suffices to accuse, what will become of the innocent?'" *Coffin, supra,* 156 U.S. at p. 455.

[7] *State v. Kinney,* 762 A.2d 833, 844-845 (Vt. 2000)

child sexual abuse – ironically, perhaps, given the "'special risk'" of wrongful conviction for such crimes (*Kennedy v. Louisiana,* 554 U.S. 407, 443-445) – courts have held that such testimony does not offend due process.[8] Other courts, however, have held that such testimony resulted in an unfair trial, violating the defendant's due process rights.[9]

The question presented is of significant import, not only because it implicates the presumption of innocence and goes to the fundamental question of how guilt may constitutionally be proven, but because it determines the harmless error standard to be applied, and hence, in this case, as in many cases, the outcome.

This Court should grant review to guide the lower courts, and make clear that due process does not tolerate testimony that turns an accusation into a probability of guilt.

(testimony that false reporting of rape is about 2%, about the same as the false reporting rate for other crimes, not plain error that "strikes at the heart of defendant's constitutional rights").

[8] E.g., *Adesiji v. State,* 854 F.2d 299, 300-301 (8th Cir. 1988) (testimony that it is "extremely rare" for children to make false allegations did not render trial fundamentally unfair); see pp. 15-17, below.

[9] *Snowden v. Singletary,* 135 F.3d 732, 739 (11th Cir. 1998); *People v. Julian,* 34 Cal.App.5th 878, 886 (Cal. Ct. App. 2019); see pp. 13-15, below.

I. Despite the frequent recurrence of this issue, no consensus has emerged on the important question whether testimony that only a small percentage of child sexual abuse allegations are false violates the Federal Constitution.

Over the past three and a half decades, courts in at least twenty jurisdictions have addressed claims relating to testimony about false allegation rates in child sexual abuse cases,[10] or,

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[10] Most of the cases involve experts describing studies on the rate of false allegation or providing statistics gleaned from research. *United States v. Brooks*, 64 M.J. 325, 326-330 (C.A.A.F. 2007); *United States v. Mullins,* 69 M.J. 113, 115-118 (C.A.A.F. 2010); *United States v. Magnan,* 756 Fed. Appx. 807, 812-816 (10th Cir. 2018); *Snowden v. Singletary,* 135 F.3d 732, 737-739 (11th Cir. 1998); *Hill v. Anglea,* 2019 WL 2369461, at *2, 6-9 (E.D. Cal. 2019) (unpub.); *King v. Frauenheim,* 2019 WL 4425093, at *9-12 (N.D. Cal. 2016) (unpub.); *United States v. Causey,* 2011 WL 4712075, at *6, 20 (W.D. La. 2011) (unpub.), aff'd, 568 F. Appx. 269 (5th Cir. 2014); *State v. Lindsey*, 720 P.2d 73, 75-78 (Ariz. 1986); *People v. Julian,* 34 Cal.App.5th 878, 880-889 (Cal. Ct. App. 2019); *Wheat v. State,* 527 A.2d 269, 274-275 (Del. 1987); *Powell v. State,* 527 A.2d 276, 279-280 (Del. 1987); *Alvarez-Madrigal v. State,* 71 N.E.3d 887, 892-896 (Ind. Ct. App. 2017); *State v. Pitsenbarger,* 2015 WL 1815989, at *3, 5-11 (Apr. 22, 2015, Iowa Ct. App. 2015) (final publication decision pending); *State v. Myers*, 382 N.W.2d 91, 92-98 (Iowa 1986); *Aguirre v. State*, 379 P.3d 1149, 2016 WL 4736088, at *3-6 (Kan. Ct. App. 2016) (unpublished per curiam memorandum opinion); *Murray v. State,* 2018 WL 5310156, at *1-4 (Md. Ct. Spec. App.) (unreported); *People v. Peterson,* 537 N.W.2d 857, 869-870 (Mich. 1995); *State v. Oslund,* 469 N.W.2d 489, 495-496 (Minn. Ct. App. 1991); *State v. Williams,* 858 S.W.2d 796, 800-801 (Mo. Ct. App. 1993); *State v. W.B.,* 17 A.3d 187, 201-203 (N.J. 2011); *State v. Harrison,* 340 P.3d 777, 778-781 (Or. Ct. App. 2014); *Commonwealth v. Cepull,* 568 A.2d

sometimes, cases of rape.[11]

In California alone, Courts of Appeal have addressed more than twenty cases in which a prosecution expert (in most instances, Dr. Urquiza, the same witness who testified in this case) provided testimony about the rate or rarity of false allegations.[12]

247, 249-250 (Pa. Super. Ct. 1990); *Wiseman v. State,* 394 S.W.3d 582, 584-588 (Tex. Ct. App. 2012); *Wilson v. State,* 90 S.W.3d 391, 392-394 (Tex. Ct. App. 2002); *State v. Morales-Pedrosa*, 879 N.W.2d 772, 777-781 (Wis. Ct. App. 2016).

In at least one case, the expert's testimony statistics appear to have been based entirely on her own experience, rather than on any studies. See *Eze v. Senkowski,* 321 F.3d 110, 131 (2d Cir. 2003).

In two cases, the courts addressed the trial court's refusal to allow *defendants* to present evidence about the rate of false allegation. *United States v. Ingham,* 42 M.J. 218, 226 (C.A.A.F. 1995); *State v. Parkinson,* 909 P.2d 647, 653-654 (Idaho Ct. App. 1996).

[11] *State v. Vidrine,* 9 So.3d 1095, 1110-1111 (La. Ct. App. 2009); *Kinney*, *supra,* 762 A.2d at pp. 844-845.

[12] In many of those cases, the testimony has given rise to an appellate issue. Aside from Mr. Wilson's case, the only other published case on this topic is *Julian, supra,* 34 Cal.App.5th 878. There are, however, many unpublished cases addressing this testimony on appeal: *People v. Lawson*, No. A146409, 2018 WL 6288178, at *6-8 (Nov. 30, 2018); *People v. Melara,* No. A148104, 2018 WL 1773420, at *6-10 (Apr. 13, 2018); *People v. Gilles*, No. A149141, 2017 WL 4684346, at *1, 4 (Oct. 19, 2017); *People v. Castillo*, No. H041520, 2016 WL 7217593, at *4, 7-8 (Dec. 13, 2016); *People v. Saucedo*, No. F068999, 2016 WL 3219120, at *16 (June 2, 2016); *People v. Daniels*, No. C070580, 2015 WL 3901980,

While courts across the country have generally condemned testimony about the rate of false allegation,[13] no consensus has

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at *7 (June 25, 2015); *People v. Chapa*, No. C070247, 2015 WL 729345, at *5-7 (Feb. 19, 2015); *People v. King*, No. H036078, 2013 WL 6860504, at *19 (Dec. 30, 2013); *People v. Carrillo*, No. C069357, 2012 WL 4127680, at *3 (Sept. 30, 2012); *People v. Steinway*, No. C057907, 2012 WL 2126839, at *14-15 (June 13, 2012); *People v. Solis*, No. B202998, 2009 WL 1204564, at *3-6 (May 5, 2009). In several additional cases, testimony about the rate of false allegation was presented, but was not an issue on appeal. See *People v. Valdez*, No. B292791, 2019 WL 4409125, at *5 & fn. 2 (Sept. 16, 2019); *People v. Hernandez*, No. A154012, 2019 WL 3072617, at *3 (July 15, 2019); *People v. Dugar,* No. A148964, 2019 WL 1375787, at *5 (Mar. 27, 2019); *People v. Munoz*, No. B262422, 2016 WL 818002, at *2 (Mar. 2, 2016); *People v. Ramirez*, No. F056369, 2010 WL 969204, at *1, fn. 1 (Mar. 18, 2010).

In some of the California cases, as well as in some cases from other jurisdictions, experts have testified that false allegations are rare or virtually nonexistent, without assigning a numerical frequency. See *People v. Haley,* No. C074632, 2018 WL 6734635, at *8 (Dec. 24, 2018); *People v. Aunko*, No. A146054, 2018 WL 360171, at *4-7 (Jan. 11, 2018); *People v. Pool*, No. F060131, 2011 WL 2279512, at *3-4 (June 10, 2011) (expert opined that children "overwhelmingly do not report abuse falsely"); *Adesiji v. State,* 854 F.2d 299, 300 (8th Cir. 1988); *Torrefranca v. Schriro,* 2007 WL 163100, at *6-8 (D. Ariz. 2007), aff'd, 280 Fed. Appx. 607 (9th Cir. 2008); *Lawrence v. State,* 796 P.2d 1176, 1177 (Okla. Ct. Crim. App. 1990); *Commonwealth v. Seese*, 517 A.2d 920, 921-922 (Pa. 1986).

[13] See *Julian, supra,* 34 Cal.App.5th at pp. 886-887 (citing cases); see also App. C (slip opn, pp. 21-23, citing cases); but see *Alvarez-Madrigal, supra,* 71 N.E.3d at pp. 892-896 (Ct. App. Ind. 2017) (testimony that less than 2 to 3 out of 1000 are making up claim was not impermissible vouching; even if vouching, was not reversible error); see *id.* at pp. 896-898 (Barnes, J., concurring)

emerged on the question whether such testimony violates the Federal Constitution.

Two courts have found that testimony about the rate of false allegation violated the defendant's right to due process. In *Snowden v. Singletary, supra,* 135 F.3d 732, the Eleventh Circuit held that the defendant's due process rights were violated by testimony, by an expert who interviewed a child witness, that 99.5% of children tell the truth about sexual abuse, and that the expert had not personally encountered any instance where a child had invented a lie about sexual abuse. *Id.* at pp. 737-739.

And in *Julian, supra,* 34 Cal.App.5th 878, the California Court of Appeal relied on *Snowden* and held that testimony that the rate of false allegations was between one and eight percent,

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(testimony was inadmissible but defendant failed to preserve the issue and error was not fundamental); cf. *Causey*, *supra,* 2011 WL 4712075, at *20 (trial counsel were not ineffective in failing to object to testimony about the percentage of accusers who make false allegations because an objection would have been properly overruled); *Morales-Pedrosa*, *supra,* 879 N.W.2d at pp. 777-781 (defense counsel was not ineffective in failing to object to testimony agreeing that it is "commonly understood that approximately 90 percent of reported cases are true" where Wisconsin law did not address the issue); *Harrison, supra*, 340 P.3d at pp.779-781 (trial court did not err in failing to sua sponte strike testimony that over 95 percent of child sexual abuse disclosures are true).

with one study showing a rate of four percent, deprived the defendant of his right to a fair trial. *Id.* at p. 886.[14]

Other courts, while stopping short of holding that such testimony violates the constitutional right to due process, have reversed, emphasizing the fundamental nature of the error. The Delaware Supreme Court, in *Powell*, held that the testimony "clearly deprived [the defendant] of a substantial right and jeopardized the fairness and integrity of his trial." *Powell, supra,* 527 A.2d at p. 280.

Still others, reversing convictions where testimony about false allegation rates was presented, have emphasized that their interpretation of state rules of evidence must take into account the defendant's right to a fair trial. *Wheat*, *supra,* 527 A.2d at pp. 274-275 (Delaware Supreme Court); *Myers*, *supra*, 382 N.W.2d at p. 99 (Iowa Supreme Court).

The Oklahoma Court of Criminal Appeals has held that it is

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[14] Because the trial attorney in *Julian* did not object, the Court of Appeal treated the issue as one of ineffective assistance of counsel. *Julian, supra,* 34 Cal.App.5th at 887. But, citing *Snowden, supra,* 135 F.3d 732, it explicitly found that the evidence deprived Julian of a fair trial. *Id.* at p. 886.

"fundamental" error to allow expert to testify that children under 10 do not lie about sexual abuse. *Lawrence, supra,* 796 P.2d at p. 1177. And the Missouri Court of Appeals has held that allowing an expert to testify that the rate of lying among children is "very low, less than three percent" was "fundamental error" giving rise to "manifest injustice." *Williams, supra,* 858 S.W.2d at p. 801.

Some courts, on the other hand, have explicitly concluded that testimony about the rate of false allegation did not violate due process in the context of the particular case. In *W.B.*, the New Jersey Supreme Court, in a 4-3 decision, held that expert testimony about the statistical credibility of victim witnesses is inadmissible because it "deprives the jury of its right and duty" to decide the question of the victim's credibility "based on evidence relating to the particular victim and the particular facts of the case." *W.B., supra,* 17 A.3d at pp. 202-203. Acknowledging that the appropriate harmless error test may turn on whether there was a violation of the constitution (*id.* at p. 202, fn. 12), the court held that in the totality of the circumstances, the defendant was not deprived of his right to a fair trial. See *id.* at p. 203.

The dissent, however, would have held that the error violated the defendant's right to a fair trial. *W.B., supra,* 17 A.3d at pp. 208-210 (Albin, J., joined by Long, J., and Hoens, J., dissenting).

In *Hill v. Anglea,* the district court, citing *Snowden v. Singletary*, recognized that in some circumstances, expert testimony that improperly vouches for the victim's credibility may invade the province of the jury and deny the defendant a fair trial. *Hill v. Anglea, supra,* 2019 WL 2369461, at *8. But the court distinguished *Snowden* and held that the defendant's trial attorney could not have been ineffective for failing to object to the statistical testimony because objection would have been futile. *Id.* at 9.[15]

In *McCafferty v. Leapley,* 944 F.2d 445, the Eighth Circuit held that an expert's testimony that research shows that "less than one percent of the population" lie about child sexual abuse did not violate the defendant's right to due process. See *id.* at pp.

[15] Two of the cases holding that due process was not violated did not involve statistics, but rather expert testimony that false allegations are rare. See *Adesiji, supra,* 854 F.2d at p. 300; *Torrefranca v. Schriro, supra,* 2007 WL 163100, at *6-8.

452-454. And in *Kinney*, the Supreme Court of Vermont held that testimony about the incidence of false reporting by complaining witnesses in rape cases invades province of jury, but found that the error was not "plain"; i.e., it was not "so grave and serious that it strikes at the heart of defendant's constitutional rights." *Kinney, supra,* 762 A.2d at pp. 843-844.[16]

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[16] Other courts have reversed on state law or other grounds obviating the need to address whether the Federal Constitution was violated. See, e.g., *Lindsey*, *supra,* 720 P.2d at pp. 78-79 (Arizona state high court reversing two counts of incest; affirming two counts of sexual exploitation based on photos and not dependent on credibility); *Pitsenbarger, supra,* 2015 WL 1815989, at *9-10 (Court of Appeals of Iowa, reversing on ineffective assistance of counsel grounds; court "lack[s] confidence that [defendant] received a fair trial"); *Aguirre, supra,* 379 P.3d 1149, 2016 WL 4736088, at *3-6 (Court of Appeals of Kansas, unpublished per curiam memorandum opinion affirming grant of new trial); *Murray, supra*, 2018 WL 5310156, at *4-5 (unreported) (Maryland Court of Special Appeals, reversing); *Cepull, supra,* 568 A.2d at pp. 249-250 (Superior Court of Pennsylvania, affirming grant of new trial); *Vidrine*, *supra,* 9 So.3d at p. 1111 (Court of Appeals of Lousiana reversing).

Finally, in some cases, courts have found that testimony about the rate at which children lie in making sexual abuse allegations was harmless error under state law, and have not addressed the due process question, in some cases, possibly because the defense did not raise the constitutional issue. See *Wilson, supra,* 90 S.W.3d at p. 393 (Texas Court of Appeals); *Oslund, supra,* 469 N.W.2d at pp. 495-496 (Minnesota Court of Appeals); *Peterson,* 537 N.W.2d at p. 869 (Michigan Supreme Court); see also *Magnan, supra,* 765 Fed. Appx. at pp. 813-816 (Tenth Circuit, in federal direct appeal, holding that testimony about rate of false allegation, even if plain error, was not

In sum, while many courts have addressed issues arising from the presentation of testimony about the rate of false allegation of child sexual abuse, and in some cases, rape, no consensus has emerged on the significant question whether such testimony violates the Federal Constitution.

II. The Court of Appeal's conclusion that false allegation rate testimony does not violate the Constitution was wrong.

The Court of Appeal in this case recognized that Dr. Urquiza's testimony about false allegation rates "plac[ed] a thumb on the scale for guilt." App. C (slip opn., p. 24). Yet it rejected Mr. Wilson's contention that the testimony violated his constitutional rights, noting only that "[i]n similar situations" the California Supreme Court has applied the standard of review for prejudice that applies to state law error. App. C (slip opn., p. 25).

The Court of Appeal was wrong. The Sixth Amendment entitles criminal defendants to trial by jury. Jurors – "the lie detector[s]" in our system of justice (*United States v. Scheffer,* 523

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prejudicial); *Mullins, supra,* 69 M.J. at pp. 116-118 (Court of Appeals for the Armed Forces holding that error, though plain, was not prejudicial).

U.S. 303, 312-313 (1998)) – are to approach a criminal case with the presumption of innocence, a presumption that can be overcome only by proof beyond a reasonable doubt that the defendant did the act or acts alleged with the requisite intent. *Coffin, supra,* 156 U.S. at pp. 453-454 (1895); see *Apprendi v. New Jersey,* 530 U.S. 466, 476-479 (2000). Due process protects against "dilution" of the presumption of innocence and the reasonable doubt burden of proof. *Taylor v. Kentucky, supra,* 436 U.S. at pp. 484-486.

Dr. Urquiza's testimony did not merely "dilute" the presumption – it upended it. Evidence about false allegation rates has nothing to do with whether an individual defendant did the act or acts alleged with the requisite intent. Indeed, the same or similar testimony could be given in any child sexual abuse or rape trial – or, for that matter, in any trial. See *Vidrine, supra,* 9 So.3d at pp. 1109-1110 (expert testified about FBI statistics on false reports of rape and other violent crimes); *Cepull, supra,* 568 A.2d at pp. 249-250 (expert testified that FBI statistics found only three percent rape reports are false, the same figure applicable to other crimes such as robbery or burglary); *Kinney, supra,* 762 A.2d

at pp. 843-844 (expert compared false allegation rates in rape cases to false allegation rates for other crimes).

Yet in jurors' minds, it may be sufficient to prove guilt beyond a reasonable doubt. From Dr. Urquiza's testimony, jurors could conclude, without considering any evidence specific to this case, that there was a 96% chance that Mr. Wilson was guilty. See *United States v. Fatico,* 458 F.Supp. 388, 406, 409-411 (E.D.N.Y. 1978) (if quantified, reasonable doubt might equate to 95% certainty); Note: The Incompatibility of Due Process and Naked Statistical Evidence, 68 Vand. L. Rev. 1407, 1409 (2015) (arguing that in certain circumstances, the use of "naked statistical evidence" constitutes a due process violation).

In effect, Dr. Urquiza's statistics converted the fact that an accusation had been made to a probability of guilt, inviting the jury to consider Mr. Wilson's "status as a defendant as evidence tending to prove his guilt." *Taylor v. Kentucky, supra,* 436 U.S. at p. 487; see *Coffin, supra,* 156 U.S. at p. 455 (quoting Julian: "'If it suffices to accuse, what will become of the innocent?'"). Such evidence "'violates fundamental conceptions of justice . . . .'" *Perry v. New Hampshire, supra*, 565 U.S. at p. 237.

III. This case presents an ideal vehicle to address this important question of constitutional law.

The question whether testimony about false allegation rates is mere evidentiary error, or whether it violates the Federal Constitution is significant, not only because this testimony runs counter to fundamental principles of our criminal justice system: that jurors are the arbiters of credibility; that accusation is not evidence; and that criminal defendants are presumed innocent until proven guilty beyond a reasonable doubt by evidence establishing the elements of the crime.

In individual cases, the answer to this question determines the standard of review for harmlessness, and thus may well determine whether the defendant's conviction, obtained after the jury has been informed that 96% of defendants facing child sexual abuse charges are guilty, may stand or must fall. See *W.B., supra,* 17 A.3d at p. 202, fn. 12 (New Jersey high court recognizing that the appropriate harmless error test may turn on whether error is constitutional; affirming after concluding error was not constitutional); *Kinney, supra,* 762 A.2d at pp. 844-845 (Vermont Supreme Court affirming; holding that although evidence of false

reporting of rape was inadmissible and prejudicial, it did not constitute plain error, i.e., it did not result in a miscarriage of justice or strike at the heart of defendant's constitutional rights).

Mr. Wilson's case presents an ideal vehicle for resolution of this issue. The Court of Appeal held that the error was harmless under the state-law harmless error standard. App. C (slip opn., pp. 24-26.) But application of the *Chapman* standard of harmless error review would likely lead to a different result. See *Chapman v. California, supra,* 386 U.S. at pp. 24-26.

The jury in Mr. Wilson's first trial deadlocked, suggesting that it did not unanimously resolve the credibility question in favor of L.D. *Krulewitch v. United States,* 336 U.S. 440, 444-445 (1949) (holding that erroneously admitted evidence was not harmless given earlier mistrials and the fact that the case posed a credibility contest between defendant and complaining witness).

More, given the nature of the error, it is unlikely that the prosecution will be able to prove beyond a reasonable doubt that it did not affect the verdict, for two reasons. First, when inadmissible evidence is presented to the jury by an expert, its potency is enhanced. *Buck v. Davis, supra,* 137 S.Ct. at p. 777.

More, also as in *Buck, supra,* 137 S.Ct. at p. 776, the error coincided precisely with the central question at trial: were L.D.'s allegations true, or false? The question before the jurors was whether L.D. was truthful when she accused Mr. Wilson. Dr. Urquiza's statistics told them there was at least a 96% chance that she was.

Mr. Wilson's case thus vividly demonstrates the necessity of resolving the important constitutional question presented: whether the Constitution tolerates conviction on the basis of evidence, unrelated to the particular defendant or alleged criminal acts, that quantifies the probability of the defendant's guilt based only on the fact that an accusation has been made.

Conclusion

For the foregoing reasons, Mr. Wilson asks this Court to grant his Petition for a Writ of Certiorari.

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Respectfully submitted,

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