THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions

J. C. Nicholson, Circuit Court Judge

2010-GS-10-07730
2010-GS-10-07731
Appellate Case No. 2013-000179

State of South Carolina .....Respondent,

v.

Venancio Diaz Perez .....Appellant.

INITIAL REPLY BRIEF OF APPELLANT

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REPLY

The Respondent does not address several salient points of Appellant's arguments for reversal. It does not address Appellant's assertion of Lyle in Appellant's Issue/Argument I. It does not establish how the bias evidence of Appellant's Issue/Argument II is irrelevant. Finally, it sidesteps addressing the allegations and arguments of Appellant's Issue/Argument III regarding the impropriety of the trial court's sentence. This Court must reverse the court below and remand for a new trial.

I. The Respondent has not proved how Lyle allows the admission of prior bad acts under the facts of this case.

Rule 404(b), SCRE, and State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923) are still valid law in this state. While the Respondent cites this law in its brief, it does not analyze the facts of this appeal using them; if it had, it would find that the testimony of Minor 2 should have been excluded.

The testimony of Minor 2 was admitted as evidence of a "common scheme or plan" under Rule 404(b), SCRE. (Trial Tr. p. 319).[1] Under Lyle, a "common scheme or plan" is: "...a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others..." Lyle, 118 S.E. at 807. While Rule 404(b), SCRE, uses the shorter "common scheme or plan" in the text of the rule, the notes to this rule clarifies that "...the South Carolina rule [404(b)] **limits** the use of evidence of other crimes, wrongs, or acts **to those enumerated in State v. Lyle**..." Rule 404, SCRE, Notes (2014) (emphasis added).

[1] The Appellant would note that in its curative instruction the trial court did not explain to the jury what a "common scheme or plan" was in this context.

In Lyle, the defendant (Lyle) was accused of issuing a forged check at a bank in Aiken. Lyle, 118 S.E. at 805. Lyle's defense was alibi, and the State sought to admit five other forgeries. Id. at 805-6. Two of the forgeries occurred in Aiken on the same day as the charged crime. Id. Three of the forgeries occurred in Georgia in a span ranging from nine days to eight weeks before the crime. Id.

The court ruled that the two Aiken forgeries were admissible under the common scheme or plan exception, but the three Georgia forgeries were not admissible. Id. at 808-11. The court did not refuse to admit the Georgia forgeries because they were dissimilar, but because they failed the threshold question of what they were being offered to prove. The Aiken forgeries were admitted as a common scheme or plan because they established identity. Id. at 808. The court then posited several reasons the similar Georgia crimes could be admitted. It first asked if the Georgia forgeries were relevant to prove identity. Id. Even though "the Georgia crimes were similar," the court concluded they did not bear on the issue of identity. Id. The court then asked if the evidence bore on the question of intent and concluded they did not. Id. at 810-11.

Finally, the Lyle court asked if a plan or system was "an essential ingredient of the crime charged." Id. at 811. The court concluded it was not. Id. The court stated its rationale:

> Proof of a common plan or system, therefore, in this connection 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. If, as we have seen, no such connection was shown to exist between the separate Georgia offenses and the Aiken crime as would constitute them practically "a continuous transaction" or as would otherwise render this evidence relevant to prove identity, and if, as we have held, the evidence was not competent on the

> question of intent, it follows that it was not admissible merely to show plan or system.

Id. (citations omitted). See also People v. Molineux, 61 N.E. 286, 306 (N.Y. 1901) ("Some connection between the crimes must be shown to have existed in fact and in the mind of the actor, uniting them for the accomplishment of a common purpose.").[2]

Lyle has not been overruled. The Respondent has not made a showing that the testimony of Minor 2 is evidence of "a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others" under Lyle.[3] Minor 2's allegations are analogous to Lyle's alleged Georgia forgeries, which were ruled inadmissible by the South Carolina Supreme Court. The testimony of Minor 2 (as edited by the trial court) may present a similar alleged bad act, but it does not present evidence of a scheme or plan. Proof of any bad acts with Minor 2 provides no proof whatsoever that the Appellant engaged in any inappropriate acts with Minor 1. Minor 2's testimony is pure propensity evidence, and it was wrongly admitted.[4] This Court must reverse and remand for a new trial.

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[2] The Lyle court's opinion was based in part on Molineux.

[3] State v. McClellan, 283 S.C. 389, 323 S.E.2d 772 (1984) and State v. Weaverling, 337 S.C. 460, 523 S.E.2d 787 (Ct.App.1999) (cited in Appellant's Brief) stand as examples of the proper application of Lyle in the context of alleged sexual abuse.

[4] The Respondent contends that the Appellant has not challenged the trial court's finding that the Respondent found clear and convincing evidence of bad acts, and that the Appellant has not challenged the trial court's finding that the probative value of the bad acts evidence outweighs its prejudice. (Resp. Init. Brief pp. 27, 29). This argument is hypertechnical and incorrect. See Toole v. Toole, 260 S.C. 235, 240, 195 S.E.2d 389, 390-91 (1973) ("an exercise in semantics without any significance of substance"). The Appellant has argued that the trial court has ruled in error, and has specifically cited the prejudicial effect of the admission of Minor 2's testimony. His objections are preserved and properly asserted, and to rule otherwise is a return to a "...primitive stage of formalism, when the precise word was the sovereign tailsman and every slip was fatal." Wood v Duff-Gordon, 222 N.Y. 88, 91, 118 N.E. 214 (N.Y. 1917) (Cardozo, J.).

II. The Respondent does not establish how the excluded bias evidence was somehow irrelevant.

A possible *quid pro quo* exchange of favorable testimony for legalized immigration status is evidence of bias that a criminal defendant has a constitutional right to explore and expose. The Brown case, cited by the Respondent, clearly sets forth this right: "The Confrontation Clause guarantees a defendant the opportunity to cross-examine a witness concerning bias. Considerable latitude is allowed in the cross-examination of an adverse witness for the purpose of testing bias." State v. Brown, 303 S.C. 169, 171, 399 S.E.2d 593 (1991) (citations omitted). The fact that Minor 2 was not an alleged victim of a crime (because the Respondent refused to pursue charges) is irrelevant to whether a court admits bias evidence. The United States Constitution and Rule 608, SCRE, provide that bias of a *witness* (not just an alleged victim) may be explored by a defendant, and the existence of criminal charges has no bearing this analysis. Respondent's attempt to distinguish State v. Valle, 298 P.3d 1237 (Or. Ct. App. 2013) falls flat for this very reason.

Further, Respondent's argument that the bias evidence was somehow irrelevant is also without basis:

> **Proof of bias is almost always relevant** because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony. Rule 608(c), SCRE, preserves South Carolina precedent holding that generally, anything having a legitimate tendency to throw light on the accuracy, truthfulness, and sincerity of a witness may be shown and considered in determining the credit to be accorded his testimony.

State v. McEachern, 399 S.C. 125, 141, 731 S.E.2d 604 (Ct. App. 2012) (citations and quotations omitted, emphasis added). Respondent does not specify the "confusion" that exploring the bias of the mother of Minor 2 would create because there would be none.

Finally, the assertion the introduction of "other impeachment evidence" and "inconsistencies" during cross examination somehow renders harmless the exclusion of bias is without merit. (Resp. Init. Brief p. 42). The implication of a *quid pro quo* exchange of testimony for visa cannot be "otherwise adduced" from the testimony that the mother of Minor 2 presented to the jury. (Trial. Tr. pp. 269-84). If the testimony of Minor 1 and the testimony of Minor 2 are as similar as the Respondent contends, then the jury must know that the mother of each minor also received a similar reward for it. This Court must reverse the trial court and remand for a new trial.

III. The Respondent does not address the Appellant's allegations or authority regarding vindictiveness in sentencing.

In addressing Appellant's third issue on appeal (vindictiveness in sentencing), the Respondents focus on the arguments made by trial counsel, but not on the statements made on the record by the trial court in support of the sentence. The Respondent apparently does not dispute, or cannot dispute, Appellant's assertion that the grounds set forth by the trial court (Trial Tr. pp. 624-26) were not supported by "relevant, reliable and trustworthy" evidence, and that they were evidence of partiality, prejudice, or pressure. See State v. Gulledge, 326 S.C. 220, 229, 487 S.E.2d 590, 594 (1997); Garrett v. State, 320 S.C. 353, 356, 465 S.E.2d 349, 350 (1995).

Respondent does not address Appellant's supplemental authority, Lindsay v. United States, __ A.2d __, 12-CM-1211 & 12-CM-1336 (D.C. Issued January 30, 2014)[5] and Appellant's assertion that the off-the-record plea negotiation by the judge is a violation of the principles of Lindsay and ABA Standard 14-3.3(f). Both of these authorities speak to the dangerous coercive effect judicial participation in plea negotiations can create, and Lindsay is an example of how judicial participation in plea negotiations can require re-sentencing. Because the Respondent has not addressed these arguments, this Court may treat the failure to respond as a confession that the Appellant's position is correct. Turner v. South Carolina Dep't of Health and Envtl. Control, 377 S.C. 540, 661 S.E.2d 118 (Ct. App. 2008).

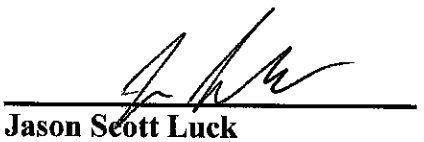
Finally, the majority of Respondent's arguments in response to Appellant's third issue fail to cite any legal basis for their positions, and thus should be considered abandoned and treated as a confession that the Appellant's positions are correct. Id.; State v. Colf, 332 S.C. 313, 322, 504 S.E.2d 360, 364 (Ct. App.1998) (finding a conclusory, two-paragraph argument that cited no authority other than an evidentiary rule was abandoned).

As the Respondent has not adequately responded to the Appellant's third issue on appeal, this Court must reverse and remand for a new sentencing hearing.

[5] Pursuant to Rule 208(b)(7), SCACR, Appellant's attorneys served Respondent with this supplemental authority on February 5, 2014, well over a month before the Respondent submitted its initial brief.

CONCLUSION

For the argument set forth above, the Appellant asks this Court to reverse the trial court and remand for a new trial, or in the alternative to reverse the trial court's sentence and remand for a new sentencing hearing before a new judge.



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7 April 2014

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CERTIFICATE OF SERVICE

I certify that I deposited the Appellant's Initial Reply Brief in the United States Mail, postage prepaid, on April 7, 2014, addressed to the following (in **bold**):

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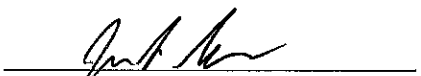

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