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.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

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II. Did the Trial Court commit reversible error under Rules 403 & 611, SCRE, and the Confrontation Clause by refusing to allow the Appellant to fully cross-examine the mother of the State's Lyle witness about the visa she received, with the assistance of the Solicitor's office, because she was the mother of a crime victim?

III. Was the Trial Court's imposition of maximum, consecutive sentences after the accused's refusal of an off-the-record plea offer vindictive and a violation of the accused's due process rights, when the Trial Court supports its decision with evidence that was not objective, relevant, reliable, and trustworthy?

STATEMENT OF THE CASE

On July 15, 2010, Appellant Venancio Diaz Perez was arrested for Criminal Sexual Conduct with a Minor ("Minor 1"). (R. p. 12). He was formally indicted for Criminal Sexual Conduct with a Minor ("CSC")[1] and Lewd Act on a Minor ("Lewd Act")[2] on November 8, 2010. (R. pp. 10, 16). The cases were tried together January 14-18, 2013, before Judge J.C. Nicholson in Charleston County, South Carolina. (R. p. 18). The State was represented by Deborah Herring-Lash and Jennifer McCoy of the Charleston County Solicitor's Office, and Perez was represented by Andrew Grimes and Christina Parnell of the Charleston County Public Defender's Office. (R. p. 18).

The jury acquitted Perez of CSC, but did find him guilty of the lesser-included offense of Assault and Battery of a High and Aggravated Nature ("ABHAN")[3] and Lewd Act. (R. pp. 9, 15, 553-54) The Court sentenced Perez to ten years imprisonment for the former, and fifteen years imprisonment for the latter. (R. pp. 8, 14, 554-56). The Court ordered these sentences to be served consecutively. (R. pp. 8, 14, 554-56). Perez served his Notice of Appeal on January 25, 2013. (R. p. 6-7).

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[1] S.C. Code § 16-3-655(A) (Supp. 2010).
[2] S.C. Code § 16-15-140 (Supp. 2010).
[3] State v. Fennell, 340 S.C. 266, 274, 531 S.E.2d 512, 516-17 (2000).

ARGUMENT

Appellant Venancio Diaz Perez is entitled to a new trial. The State bolstered their case with the unnecessary and inadmissible propensity evidence of another minor accuser. The Trial Court then refused to allow Perez to investigate the bias of this accuser's mother, who, like the victim's mother, was seeking legal status in exchange for this testimony. Finally, the Trial Court punished Perez with maximum, consecutive sentences because he refused the plea offer made by the Trial Court. These errors, jointly and independently, demand that this Court reverse and remand this action to the Court of General Sessions for a new trial.

I. The Trial Court committed reversible error in admitting Minor 2's highly prejudicial testimony of prior bad acts.

Perez's arrest arises out of the allegations of Minor 1, who was being babysat by his wife, Angelica Carmona at the couple's trailer (later house) in North Charleston. (R. pp. 10-13, 16-17, 134, 432, 434, 438-39). In the course of trial, the State sought to introduce the testimony of Minor 2, another minor female cared for by Carmona who accused Perez of similar, and worse, acts that the State refused to prosecute.[4] (R. p. 552). Though Minor 2's testimony was subject to a limiting instruction (R. p. 249), her testimony hopelessly tainted any hope Perez had for a fair trial and merits a reversal by this Court.

[4] Perez and Carmona had a daughter roughly the same age as the Minors; Charleston County Department of Social Services conducted an investigation of possible abuse of this child, and found no proof of abuse. (R. p. 447).

A. Evidence of prior bad acts – law.

Generally, evidence of prior crimes or bad acts is inadmissible to prove the specific crime charged; however, an exception exists for evidence tending to establish (1) motive, (2) intent, (3) the absence of mistake or accident, (4) 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 other, or (5) the identity of the person charged with the present crime. See State v. Lyle, 125 S.C. 406, 416, 118 S.E. 803, 807 (1923); Rule 404(b), SCRE. For the common scheme or plan exception to apply, a close degree of similarity or connection between the prior bad act and the crime charged is necessary. State v. Timmons, 327 S.C. 48, 52, 488 S.E.2d 323, 325 (1997). The connection between the prior bad act and the charged crime must be more than just a similarity, as a common scheme or plan concerns more than just the commission of similar crimes; some connection between the crimes is necessary. Id. Under the common scheme or plan exception, there must be a close degree of similarity or connection between the prior bad act and the crime charged which enhances the probative value of the evidence so as to outweigh its prejudicial effect. State v. Hough, 325 S.C. 88, 95, 480 S.E.2d 77, 80 (1997). Lyle demands that the defendant be given the benefit of the doubt where this connection is not clearly perceived. State v. Tutton, 354 S.C. 319, 327, 580 S.E.2d 186, 190 (Ct. App. 2003).

If the prior bad act is not the subject of a conviction, the trial court must first determine if clear and convincing evidence exists of the act. State v. Gaines, 380 S.C. 23, 29, 667 S.E.2d 728, 731 (2008). This determination is reviewed under a "clearly erroneous" standard. State v. Wilson, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001). After determining clear and convincing evidence supports a finding the defendant committed a

prior bad act, the court must determine whether the evidence falls within the common scheme or plan exception. Tutton at 326, 580 S.E.2d at 190. This determination is a matter of law reviewed *de novo*. Id. at 326-27, 580 S.E.2d at 190.

The South Carolina Supreme Court has set forth the following non-exclusive factors when determining whether there is a close degree of similarity between the bad act and the crime charged in a sexual abuse case: (1) the age of the victims when the abuse occurred; (2) the relationship between the victims and the perpetrator; (3) the location where the abuse occurred; (4) the use of coercion or threats; and (5) the manner of the occurrence, for example, the type of sexual battery. State v. Wallace, 384 S.C. 428, 433-34, 683 S.E.2d 275, 277-78 (2009).[5]

Lyle requires the proponent of common scheme or plan evidence to answer a simple threshold question: What is the common scheme or plan evidence offered to prove? If the answer is some key fact, such as identity, then, the court should proceed with a similarity analysis. If the answer is that common scheme or plan evidence is *only* offered to show the crimes are similar, then the court need proceed no further, because what is really being offered is inadmissible character evidence. If all that the common scheme or plan proves is that the defendant committed an act in the past and that makes it more likely he committed the charged crime, then the evidence is nothing more than character and propensity evidence trying to sneak around Rule 404(a), SCRE, through Rule 404(b)'s back door. Without asking this basic first question, there is no logically

[5] The Appellant does not believe these factors, and the Supreme Court's decision in Wallace, are consistent with the holdings of Lyle, but this is an argument for the Supreme Court. See Jean Hoefer Toal, et al., Appellate Practice in South Carolina 12 (2nd ed. 2002) ("The Court of Appeals is an error-correction court, whereas the Supreme Court is a law-giving court.").

consistent way to differentiate inadmissible propensity evidence from admissible common scheme or plan evidence; otherwise, the exception that is 404(b) swallows 404(a)'s rule.

The Supreme Court recognized the need to return to the basic reasoning of Lyle in State v. Fonseca, 393 S.C. 229, 229, 711 S.E.2d 906, 906 (2011). The Supreme Court adopted the Court of Appeals' decision as its own in this opinion. Id. Fonseca recognized the "thin disguise" of character evidence costumed in the threadbare garb of motive, intent, or common scheme or plan evidence in a child sex case. State v. Fonseca, 383 S.C. 640, 649, 681 S.E.2d 1, 5 (Ct. App. 2009).

South Carolina appellate courts have examined situations that clearly fit the mold of a "scheme or plan". In State v. McClellan, a father began abusing each of his daughters about the time they reached age 12. 283 S.C. 389, 323 S.E.2d 772 (1984). The father would enter their bedroom late at night, waking them, and taking one of his three daughters to his bedroom. Id. There he would explain the Biblical verse that children are to "Honor thy Father", and would also indicate he was teaching them how to be with their husbands. Id. In State v. Weaverling, an uncle engaged in a grooming scheme with his nephew. State v. Weaverling, 337 S.C. 460, 523 S.E.2d 787 (Ct.App.1999). The accused in Weaverling showed pornographic materials to the child repeatedly while performing oral sex upon him, which occurred over 100 times. Id. In both of these cases, it is clear that the prior bad acts are introduced not for proof of propensity to commit crimes, but for the inference that the defendant "developed a criminal scheme and employed that scheme." Tutton at 331, 580 S.E.2d at 192.

B. Lyle hearing testimony.

Because the State wished to introduce testimony of alleged misconduct with Minor 2, the Trial Court conducted a hearing pursuant to State v. Lyle prior to trial, where the Minors presented the following testimony:

Minor 1 (victim)

(1-a) Minor 1 testified that once when she went inside her babysitter's trailer to retrieve a PlayStation Portable ("PSP") from Perez's daughter's room, Perez approached her, pulled her into a closet, and digitally penetrated her vagina. (R. pp. 29-30).

(1-b) Minor 1 testified that once when went inside her babysitter's trailer to retrieve a PSP from Perez's daughter's room while the family was at a food truck, Perez approached her, pulled her into a closet, and digitally penetrated her anus. (R. pp. 31-32).

(1-c) Minor 1 testified that once when her friends were inside the babysitter's trailer pretending to be singers in front of the television ("playing like superstars"), Perez exposed his penis to her. (R. pp. 33, 51-52).

(1-d) Minor 1 testified that once at the babysitter's house,[6] Perez asked Minor 1 to assist him in repairing a wall. After repairing the wall, Perez refused to allow Minor 1 to leave and touched her breasts and vagina and bit her on her breast. (R. pp. 33-34, 50-51).

(1-e) Minor 1 testified that once at the babysitter's house, Perez chased her in an attempt to "touch" her and forced her to hide under the bed from him. (R. pp. 35, 52).

[6] Carmona originally lived in a trailer, but eventually moved to a house in North Charleston. (R. pp. 13, 32, 139, 202).

(1-f) Minor 1 testified that once she went inside the babysitter's house playing hide-and-seek and decided to hide in a closet. Minor 1 testified that Perez was in that closet and that he grabbed her and touched her vagina. (R. pp. 35-36, 53-54).

(1-g) Minor 1 testified that Perez would attempt to bribe her with money. (R. pp. 49-50).

Minor 2 (Lyle witness)

(2-a) Minor 2 testified that once she fell asleep watching High School Musical at the babysitter's house and Perez touched her vagina. (R. pp. 62-63).

(2-b) Minor 2 testified that once Perez touched her vagina and anus in a bedroom near the kitchen of the babysitter's house. (R. p. 63). However, under cross-examination, Minor 2 admitted that she alleged that Perez had either vaginal or anal intercourse[7] with her in her initial forensic interview. (R. pp. 73-75, 85-86). In cross-examination, it became apparent in her initial forensic interview she stated Perez had threatened her with a knife to perform these acts. (R. pp. 85-86).

(2-c) Minor 2 testified that Perez threatened her ("he'll keep being mean to me") to keep her quiet about his acts. (R. p. 64). However, under cross-examination it became apparent that in her initial forensic interview she stated that Perez had threatened her with a knife. (R. pp. 75, 86).

(2-d) Under cross-examination, Minor 2 testified that Perez did *not* attempt to bribe her with gifts. (R. pp. 78, 93).

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[7] It is worthwhile to note that Minor 2 would have been approximately eight years old at this time. (R. pp. 13, 229, 504). Presumably, such an act would have left injury that would have been noticeable by medical personnel, as State's witness Dr. Anne Abel testified that a larger object would likely cause more damage. (R. p. 353). However, the State chose not to go forward with a prosecution for these acts. (R. p. 552).

(2-e) Under cross-examination, Minor 2 testified that Perez did *not* attempt to bite her. (R. p. 78).

(2-f) Under cross-examination, Minor 2 testified that Perez did *not* attempt any untoward acts while she was playing games with other children. (R. p. 80).

(2-e) Under cross-examination, Minor 2 testified that Perez "touched" her when she was helping him repair a doorknob. (R. pp. 80-81).

The Trial Court found that under Wallace, that there was a close degree of similarity between the bad acts and those accused of Perez, specifically finding a similarity in: (1) the ages of the Minors, (2) the relationship between the Minors and Perez, (3) the location of the alleged abuse, (4) "the manner of the occurrence, such as type of sexual battery". (R. pp. 113-14). The Trial Court further found under Rule 403, SCRE, that this testimony was more probative than prejudicial. (R. p. 114). The Trial Court also excluded any testimony of Minor 2 regarding her allegations of intercourse with Perez.[8] (R. p. 114).

C. Trial testimony.

Minor 1 (victim)

Minor 1 was called first as a witness. With some notable exceptions, her trial testimony was largely consistent with her Lyle hearing testimony:

(1-a) Minor 1 testified that once when she went inside her babysitter's trailer to retrieve a PlayStation Portable ("PSP") from Perez's daughter's room, Perez approached her, pulled her into a closet, and digitally penetrated her vagina. (R. pp. 140-41). This was substantially similar to her Lyle hearing testimony. (R. pp. 29-30).

[8] The State nonetheless presented this evidence to the Trial Court during sentencing. (R. p. 552).

(1-b) Minor 1 testified that once when went inside her babysitter's trailer to retrieve a PSP from Perez's daughter's room while the family was at a food truck, Perez approached her, pulled her into a closet, touched her vagina and anus without penetration. (R. pp. 141-42). This differed from her Lyle hearing testimony, where she testified that Perez digitally penetrated her anus. (R. pp. 31-32).

(1-c) Minor 1 testified that once when her friends were inside the babysitter's trailer pretending to be singers in front of the television ("playing like superstars"), Perez exposed his penis to her. (R. pp. 147-49). This was substantially similar to her Lyle hearing testimony. (R. pp. 33, 51-52).

(1-d) Minor 1 testified that once at the babysitter's house, Perez asked Minor 1 to assist him in repairing a wall. After repairing the wall, Perez refused to allow Minor 1 to leave and touched her breasts and vagina and bit her on her breast. (R. pp. 150-51). This was substantially similar to her Lyle hearing testimony. (R. pp. 33-34, 50-51).

(1-e) Minor 1 testified that once at the babysitter's house, Perez chased her in an attempt to "touch" her and forced her to hide under the bed from him. (R. p. 155). This was substantially similar to her Lyle hearing testimony. (R. pp. 35, 52).

(1-f) Minor 1 testified that once she went inside the babysitter's house playing hide-and-seek and decided to hide in a closet. Minor 1 testified that Perez was in that closet and that he grabbed her and touched her vagina and anus. (R. pp. 152-53). This differed from her Lyle hearing testimony, where she testified that Perez only touched her vagina. (R. pp. 35-36, 53-54).

(1-g) Minor 1 testified that Perez would attempt to bribe her with money to allow him to continue touching her. (R. p. 156). This was substantially similar to her Lyle hearing testimony. (R. pp. 49-50).

Minor 2 (Lyle witness)

Minor 2 testified several days later, and was offered subject to the Trial Court's restriction that Minor 2's allegations of intercourse were to be excluded. (R. p. 226). Her testimony differed greatly than that proffered at the Lyle hearing:

(2-a) Minor 2 testified that once she fell asleep watching High School Musical at the babysitter's house and Perez touched her vagina ("top privates"). (R. pp. 235-36). This was substantially similar to her Lyle hearing testimony. (R. pp. 62-63).

(2-b) Minor 2 testified that once Perez touched her vagina and anus in a bedroom near the kitchen of the babysitter's house. (R. pp. 233-35). Minor 2 *did not* testify that Perez had intercourse with her in this encounter, nor did she testify that he had threatened her with a knife to make her enter this bedroom, as she did in her forensic interview. (R. pp. 85-86).

(2-c) Minor 2 testified that Perez threatened her ("he'll do something bad to me") to keep her quiet about his acts. (R. pp. 238-39). Minor 2 *did not* testify that Perez threatened her with a knife, as she did in her forensic interview. (R. pp. 75, 86).

(2-d) Minor 2 *did not* testify that Perez attempted to bribe her with gifts.

(2-e) Minor 2 *did not* testify that Perez attempted to bite her.

(2-f) Minor 2 *did not* testify that Perez attempted any untoward acts while she was playing games with other children (*e.g.* hiding in a closet while they were playing hide-and-seek).

(2-e) Minor 2 *did not* testify that Perez "touched" her when she was helping him repair a doorknob, as she did in the Lyle hearing. (R. pp. 80-81).

Perez renewed his objection to this testimony, but this objection was overruled and the Trial Court issued a limiting instruction to the jury. (R. pp. 240, 249). Perez subsequently moved for a mistrial.[9] (R. p. 468).

D. There is no evidence of any criminal scheme or plan.

The State presents no logical connection between the abuse of Minor 1 and Minor 2 that evidences any criminal scheme or plan. The only similarity[10] between the abuse is that it occurred; there is no evidence of grooming (as in Weaverling) and no evidence of a plan to abuse the Minors (as in McClellan). The differences of the testimony of the Minors further reinforce a lack of scheme or plan:

a) Minor 1 alleged abuse at the babysitter's trailer and house, while Minor 2 only alleged abuse at the house.

b) Minor 1 did not allege Perez threatened to keep her quiet, while Minor 2 did make this allegation.

c) Minor 1 alleged that Perez attempted to bribe her with gifts, while Minor 2 made no such allegation.

d) Minor 1 alleged that Perez bit her during the commission of one of his acts, while Minor 2 made no such allegation.

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[9] This motion was made on January 17, 2013, (two days later), but the Trial Court acknowledged that this issue was preserved for appeal. (R. p. 468)

[10] The Trial Court excluded Minor 2's allegations of intercourse with Perez. (R. p. 114). While this exclusion was justified by the Trial Court by citing Wallace, Perez believes that such a redaction of the testimony is impermissible, as set forth by the Court of Appeals in Wallace. See State v. Wallace, 364 S.C. 130, 141, 611 S.E.2d 332, 338 (Ct. App. 2005) ("The law should not permit a trial judge to make similar that which is different by redacting a part of the testimony.").

The only relevant similarities in this case are the ages of the Minors and the fact they took place at a babysitter's house. The lack of connection between these two acts is exactly the situation where Lyle demands that a defendant be given the benefit of the doubt.

The admission of Minor 2's testimony was not harmless and has caused Perez significant prejudice. Much like in Tutton, the evidence against Perez consisted of the Minors' accusations against him. Tutton at 334, 580 S.E.2d at 194. Also like Tutton, there was no medical evidence of abuse, and Perez denied the accusations made against him. Id. Without the testimony of Minor 2, there is not overwhelming evidence of Perez's guilt, especially in light of the fact that the jury acquitted Perez of CSC with Minor 2's testimony admitted and the questions of Minor 1's truthfulness. (R. pp. 205, 460-61).

The Trial Court's limiting instruction (R. p. 249 ll. 1-15) could not cure the prejudice to Perez's defense. It does not provide sufficient detail on what exactly constitutes a "common scheme or plan" and omits important language clarifying this exception found in Tutton ("...part of an overall plan or scheme devised by him to perpetuate the type of misconduct that occurred...").

Accordingly, the testimony of Minor 2, even in the edited and limited form presented to the jury, does not provide proof of any plan or scheme to perpetuate abuse of the Minors; its prejudice to Perez's defense warrants reversal of the Trial Court and a new trial.

II. The Trial Court committed reversible error in excluding evidence of witness Amanda Maldonado's potential bias.

The mothers of Minor 1 and Minor 2, who were both undocumented immigrants at the time of Perez's arrest, both received assistance from the State in preparing applications for U Visas, which both women received because of their daughters' cooperation with the State. The Trial Court limited cross-examination of Minor 2's mother regarding her U Visa application and her immigration status; this was important evidence of bias and its exclusion violates Perez's rights under the Confrontation Clause and merits him a new trial.

A defendant has the right to cross-examine a witness concerning bias under the Confrontation Clause. Davis v. Alaska, 415 U.S. 308 (1974); State v. Brown, 303 S.C. 169, 399 S.E.2d 593 (1991); U.S. Const. amend. VI; U.S. Const. amend. XIV. "'On cross-examination, any fact may be elicited which tends to show interest, bias, or partiality' of the witness." State v. Brewington, 267 S.C. 97, 101, 226 S.E.2d 249, 250 (1976) (quoting 98 C.J.S. Witnesses § 560a (1957)); see also Rule 608(c), SCRE ("Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced.").

A U Visa ("U nonimmigrant status") legalizes the status of an undocumented immigrant who "...been helpful, is being helpful, or is likely to be helpful to a certifying agency in the investigation or prosecution of the qualifying criminal activity..." 8 C.F.R. § 214.14(b)(3). Such a *quid pro quo* transaction is a powerful indicator of bias on the part of a witness, and other courts have recognized its importance. In State v. Valle, the lower court excluded the victim's testimony regarding her seeking and obtaining a U Visa as a

victim of crime. 298 P.3d 1237, 1240 (Or. Ct. App. 2013) (en banc). The Oregon Court of Appeals reversed and remanded for a new trial, finding that:

> ...[the victim] had applied for a U visa on the ground that she was a victim of abuse. From that testimony alone, a jury could infer that [the victim] had a personal interest in testifying that she had been abused. Simply put, [the victim] had applied for an opportunity to stay in the country on the ground that she had been abused; based on that fact, a jury could reasonably infer that she had a personal interest in testifying in a manner consistent with her application for that opportunity.

Valle at 1243.

Alejandra Jimenez, mother of Minor 1, testified that the City of North Charleston Police Department's Victim Advocate told her about the possibility of her obtaining a U Visa and assisted her with preparing the application. (R. pp. 213-14, 220-22, 227-28). The Victim Advocate also testified that she encouraged Jimenez to apply and that the Solicitor's office signed off on Jimenez's application. (R. pp. 296-97, 300-302). However, the Trial Court excluded any testimony from Amanda Maldonado, mother of Minor 2, regarding her immigration status and her U Visa pursuant to Rule 403, SCRE, Rule 611, SCRE, and State v. Jenkins, 322 S.C. 360, 474 S.E.2d 82 (Ct. App. 1996).[11] (R. pp. 259-60, 265-66). Maldonado's proffered testimony indicates that her U Visa was also encouraged and facilitated by the Solicitor's office. (R. pp. 263-65).

The jury that decided Perez's fate was *not* aware that *both* Alejandra Jimenez, mother of Minor 1, and Amanda Maldonado, mother of Minor 2, would not be legal residents of the United States but for the U Visas the State was helping them obtain. Maldonado applied, with the encouragement and assistance of the State, for an opportunity to legally stay in this country on the basis that her daughter had been abused.

[11] The Trial Court refers to State v. Jenkins as "State v. Jennings" in the record. (R. p. 265).

Based on this fact, a jury could reasonably infer that she had a personal interest in making certain her daughter testified in a manner consistent with her application for that opportunity. See Valle at 1243. However, the Trial Court excluded all of Maldonado's testimony related to her immigration status and her efforts to obtain a U Visa. (R. pp. 260, 265). There was no physical evidence of Perez's alleged misconduct with the Minors, and DSS found no abuse occurred with his daughter (R. pp. 353, 390, 447). The jury had a right to know that Maldonado was receiving assistance from the State in exchange for her daughter's testimony; it would have been a powerful closing argument to point out that *all* testimony against Perez was "bought and paid for" by the State via U Visas.[12] The exclusion of this critical and highly relevant testimony prevents Perez from fully confronting the witnesses against him and mandates that this Court reverse the Trial Court and remand for a new trial.

III. The sentence imposed by the trial court was vindictive and violated Perez's due process rights.

A criminal must be sentenced based on the crime he was convicted of, not a crime he was acquitted of. Further, a criminal defendant must never be punished for exercising his right to a jury trial. Unfortunately, the Trial Court violated both of these proscriptions and Perez is entitled to, at a minimum, resentencing before another judge.

A. The Trial Court impermissibly punished Perez for exercising his right to a jury trial.

It is a due process violation to punish a person for exercising a protected statutory or constitutional right. State v. Higgenbottom, 344 S.C. 11, 14-15, 542 S.E.2d 718, 720

[12] This is especially relevant in light of the allegations of dishonesty on the part of the Minors. (R. pp. 205, 460-61).

(2001). A trial court may not impose a greater sentence on a defendant because the defendant exercised his constitutional right to stand trial rather than plead guilty. See Alabama v. Smith, 490 U.S. 794 (1989); Davis v. State, 336 S.C. 329, 520 S.E.2d 801 (1999). The South Carolina and United States Constitutions grant every criminal defendant the absolute right to plead not guilty and to be tried by a jury. U.S. Const. art. III, § 2; U.S. Const. amend. VI; S.C. Const. art. I, § 14.

The sentencing judge's mere disavowal of considering the defendant's assertion of his right to a jury trial is insufficient to avoid reversal in South Carolina, without an otherwise appropriate basis appearing in the record. In State v. Brouwer, despite the trial judge's comments that he would never punish someone for exercising his or her right to a jury trial, the majority opinion found the trial judge improperly considered that fact during sentencing, "especially since the record fail[ed] to reflect an otherwise appropriate basis for Brouwer's disparate sentence." 346 S.C. 375, 388, 550 S.E.2d 915, 922 (Ct. App. 2001); cf. North Carolina v. Pearce, 395 U.S. 711, 726 (1969) ("whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear... so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal."); Higgenbottom (A defendant's due process rights are violated when, in response to the defendant's motion for reconsideration and without any reasons on the record, the judge increases his sentence.). However, any basis for the court's sentence placed on the record by the judge must be based on "relevant, reliable and trustworthy" evidence. State v. Gulledge, 326 S.C. 220, 229, 487 S.E.2d 590, 594 (1997).

Perez was sentenced to fifteen years for his conviction for Lewd Act and ten years for ABHAN. (R. pp. 8, 14, 554-56). These were the maximum sentences for each crime, and the Trial Court ordered Perez to serve them consecutively, thus effectively sentencing him to twenty-five years in prison. (R. pp. 8, 14, 554-56). Following the imposition of this sentence, the following colloquy took place between the Trial Court and Perez's trial counsel:

Defense Counsel:	Your Honor, one more matter. I normally don't bring this up but given the sentence we would object to it as being vindictive.
Trial Court:	I'm sorry, what now?
Defense Counsel:	We object to the sentence being run consecutively as being vindictive and punishing Mr. Perez for going to trial. I think there were -- and this is where I'm a little reluctant to go into detail but we did have -- I think I have to, to preserve Mr. Perez's rights to make the record clear. We did have an in-chambers conference where we talked about potential pleas --
Trial Court:	I didn't have an in-camera conference. I was talking to the two of you unofficially, off the record trying to work out a plea. Now, if you want to put that on the record I'll put that on the record. I very clearly told you that if I was trying this case nonjury I would find him guilty of lewd act and high and aggravated. If you wanted to enter a plea I would do away with the high and aggravated and let him plead to the lewd act and give you a range of 10 to 15.
Defense Counsel:	Yes, sir.
Trial Court:	That's what I told you.
Defense Counsel:	Yes, sir.
Trial Court:	Now, if you want to take exception to that, that's fine. That was an informal conference where I was trying to assist you and the solicitor in dismissing the case. Is that what you were doing?
Defense Counsel:	Yes, sir.
Trial Court:	Because if it is it's the last time I will speak with you without a court reporter present.
Defense Counsel:	I apologize. But, yes, sir. I think I have to.
Trial Court:	Pardon? It was not an in-camera hearing. I was trying to facilitate the disposition of this case.

Defense Counsel:	I apologize if I mischaracterized a hearing. You are correct. It was unofficial. It was off the record, but that was what was said.
Trial Court:	Pardon?
Defense Counsel:	That's an accurate summary of what was said.
Trial Court: Okay.	Now, do you want to make a motion on that, what I put on the record?
Defense Counsel:	Yes, sir.
Trial Court:	What's your motion?
Defense Counsel:	That running these sentences consecutively is punishing Mr. Perez for his right to go to trial.
Trial Court:	Motion is denied. This Court is of the opinion that the little girl was abused. This Court is also of the opinion that there was penetration, digital penetration based upon her sworn testimony. The jury has found her not guilty. The Court's of the opinion he's guilty of all the charges from the testimony I've heard. So it's not any abuse in giving him the consecutive. You understand?
Defense Counsel:	Yes, sir.
Trial Court:	All right. Motion denied. Anything else?
Defense Counsel:	No, sir.
Trial Court:	Thank you very much.

(R. p. 554 l. 7 – p. 556 l. 17).

The Trial Court offered Perez a sentence of ten to fifteen years, and dismissal of his other charges, in exchange for a guilty plea to Lewd Act. (R. pp. 554-55). After this deal was refused, and after the jury returned a verdict finding him not guilty of CSC (but guilty of ABHAN) and guilty of Lewd Act, the Trial Court sentenced him to at total of twenty-five years in prison. (R. pp. 8, 14, 554-56). This scenario on its face smacks of punishment for Perez exercising his right to trial by jury. Apparently recognizing this concern, the Trial Court did attempt to place on the record grounds for its decision (R. p. 556 ll. 5-12), but these grounds are not objective and do not rise to the level of "relevant, reliable and trustworthy" evidence:

First, the Court incorrectly found that there was digital penetration. In order to find a person guilty for CSC of any degree, there must be a finding of "sexual battery". S.C. Code § 16-3-655 (Supp. 2010). "Sexual battery" is defined as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body..." S.C.Code § 16-3-651(h) (Supp. 2010). Digital penetration is considered sexual battery. (R. pp. 11, 124, 337). The jury made no finding of "sexual battery" (*i.e.* digital penetration) necessary for a conviction for CSC; in fact, it acquitted Perez of this crime. (R. p. 536). The jury instead found Perez guilty of ABHAN, which required no finding of "sexual battery" (*i.e.* digital penetration). (R. pp. 337, 524-25, 536). This is problematic, as the United States Supreme Court has held that any fact that leads to enhancement of a sentence must be proven beyond a reasonable doubt to a jury. Apprendi v. New Jersey, 530 U.S. 466 (2000). Accordingly, it was improper for the Trial Court to consider this finding in sentencing.

Second, the Trial Court incorrectly considered Perez guilty of CSC. The Trial Court stated on the record that it believed Perez to be "guilty of all the charges", presumably including CSC (which he was acquitted of). (R. pp. 536, 556).

Third, the Trial Court incorrectly considered the criminal status of Minor 1: "The jury has found her [Minor 1] not guilty." (R. p. 556). Minor 1 was not on trial in this matter, and her innocence or guilt is irrelevant.

Finally, even though the Trial Court previously excluded testimony of alleged intercourse between Minor 2 and Perez, this testimony was brought up by the State during sentencing. (R. pp. 114, 552).

The imposition of a "trial tax" in sentencing, combined with a lack of objective, relevant, reliable, and trustworthy evidence to support the enhanced sentence, merits a new trial, or at the minimum a new sentencing hearing before a different judge.

B. The record reflects evidence of partiality and prejudice on the part of the Trial Court

While sentencing judges are given deference to their decisions, an appellate court may reverse such a decision in the event of a constitutional violation or that the sentencing judge acted with partiality, prejudice, or pressure. Garrett v. State, 320 S.C. 353, 356, 465 S.E.2d 349, 350 (1995). The Trial Court stated on the record that it believed Perez to be "guilty of all the charges", presumably including CSC, which he was acquitted of. (R. pp. 536, 556). The Trial Court stated on the record that "there was penetration, digital penetration", when this was an element of CSC, which he was acquitted of. (R. pp. 536, 556). The plea offer (from the Trial Court, not the State) was made off-the-record, in violation of ABA Standards and is evidence of pressure to accept a guilty plea.[13] The comment: "The jury has found her [Minor 1] not guilty" indicates a

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[13] The off-the-record plea offer by the Trial Court is a violation of ABA Standard 14-3.3(f):

> All discussions at which the judge is present relating to plea agreements should be recorded verbatim and preserved, except that for good cause the judge may order the transcript of proceedings to be sealed. Such discussions should be held in open court unless good cause is present for the proceedings to be held in chambers. Except as otherwise provided in this standard, the judge should never through word or demeanor, either directly or indirectly, communicate to the defendant or defense counsel that a plea agreement should be accepted or that a guilty plea should be entered.

Harden v. State, 276 S.C. 249, 255, 277 S.E.2d 692, 694-95 (1981). While this standard is not the law of South Carolina, it is persuasive and instructive. See State v. Blakely, 402 S.C. 650, 663, 742 S.E.2d 29, 36 (Ct. App. 2013). While the Appellant believes that

bias toward the victim, and thus the State. The comment: "...it's the last time I will speak to you without a court reporter present" also indicates bias against the defense. Such prejudice, partiality, and pressure merits at new trial, or at the minimum a new sentencing hearing before a different judge.

CONCLUSION

Critical errors have occurred that have prevented Perez from getting the fair trial he is entitled to under the law. Perez would ask this Court to reverse the Trial Court and remand this action to the Court of General Sessions for a new trial, or at the minimum a new sentencing hearing before a different judge.

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violation of this standard should constitute pressure *per se*, this is an argument that must be made before the Supreme Court. See Toal, *supra*.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions

J. C. Nicholson, Circuit Court Judge

Appellate Case No. 2013-000179

State of South Carolina .....Respondent,

v.

Venancio Diaz Perez .....Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies the Final Brief and Final Reply Brief comply with Rule 211(b), SCACR.

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

J.C. Buddy Nicholson Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

VENACIO DIAZ PEREZ,

APPELLANT

APPELLATE CASE NO. 2013-000811

CERTIFICATE OF SERVICE

I certify that a true copy of the Final Brief of Appellant and Final Reply Brief of Appellant in the above referenced case has been served upon Amie L. Clifford, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 this 10th day of June, 2014.

Robert M. Dudek
Chief Appellate Defender

SUBSCRIBED AND SWORN TO before me
this 10th day of June, 2014.

(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.