PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM DORCHESTER COUNTY
Court of General Sessions

Kristi Lea Harrington, Circuit Court Judge

Opinion No. 5265 (S.C. Ct. App. Filed August 20, 2014)

THE STATE, Respondent,

v.

WAYNE MCCOMBS, Petitioner

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for petitioner certify that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on September 18, 2014.

QUESTIONS PRESENTED

1. Should the Supreme Court, applying the deferential abuse of discretion standard to evidentiary rulings, reverse the Court of Appeals and uphold the Circuit Court's decision to suppress evidence as inadmissible under SCRE 404(b)?

2. Should the Supreme Court correct the Court of Appeals' application of the *Wallace* decision and defiance of the longstanding rule against propensity evidence?

STATEMENT OF THE CASE

Petitioner McCombs was indicted for lewd act on a minor. 2009-GS-18-1493. The case was called for trial on March 5, 2012, before the Honorable Kristi L. Harrington. In a pretrial hearing on evidentiary and other matters, Judge Harrington took up the State's motion in limine seeking to admit evidence of a prior bad act by McCombs.

Specifically, the State sought to present evidence that McCombs had in 2001 assaulted an eleven-year-old girl who was a guest at a pool party at his home; McCombs had pled guilty in 2001 to an assault that took place inside his home during the time of the party. After hearing testimony of witnesses to both the 2001 and the 2009 incidents, and after argument by counsel for the State and McCombs, Judge Harrington excluded the state's proposed evidence on the grounds that it was impermissible propensity evidence and rejected the State's argument that the 2001 incident established a "common scheme or plan" with the 2009 incident. Because the State insisted the exclusion of the 2001 evidence significantly impaired its ability to prosecute its case, the jury was not sworn.

The State appealed, and after briefing and oral argument, the Court of Appeals reversed the evidentiary ruling of the circuit court. *State v. McCombs*, Opinion No. 5265 (S.C. Ct. App. Filed August 20, 2014). Petitioner seeks a writ of certiorari to review that decision.

ARGUMENT

THIS COURT SHOULD ACCEPT REVIEW OF THE COURT OF APPEALS' DECISION IN ORDER TO REVISIT *STATE V. WALLACE'S* RADICAL DEPARTURE FROM THIS COURT'S LONGSTANDING, WELL-CONSIDERED PROTECTIONS AGAINST THE UNDULY PREJUDICIAL EFFECT OF PROPENSITY EVIDENCE.

This Court's 2009 decision *State v. Wallace*, 384 S.C. 428, 434, 683 S.E.2d 275, 278 (2009) professed to correct the Court of Appeals' reliance on *State v. Tutton,* 354 S.C. 319, 580 S.E.2d 186 (Ct.App.2003), "which appears to require a connection beyond a degree of similarity in the details of the crime charged and the bad act evidence." Instead, *Wallace* held that to determine whether evidence establishes a common scheme or plan, trial courts need merely weigh the number of similarities against the dissimilarities between the prior conduct and the charged conduct.

In so doing, rather than correct any misapprehension by the Court of Appeals of the then-prevailing precedent, this Court's *Wallace* opinion made a fundamental break with precedent that has stood in South Carolina since 1923 and the bedrock decision in *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923).

In setting forth the standard for review of the admissibility of prior crimes of a defendant, *Lyle* notes the "universal" and "firmly established" nature of the bar against the use of prior bad acts to "merely to raise an inference or to corroborate the prosecution's theory of the defendant's guilt of the particular crime charged." *Id.* at 406, 118 S.E. at 807. *Lyle*, and Rule 404(b) of the South Carolina Rules of Evidence, which codified *Lyle*, recognizes several exceptions to the bar against admission of prior bad acts, including an exception for admission of evidence of prior bad acts that establish a

"common scheme or plan" with the charged conduct; as *Lyle* makes clear, such evidence must be more than merely similar:

> The acid test is its logical relevancy to the particular excepted purpose or purposes for which it is sought to be introduced. If it is logically pertinent in that it reasonably tends to prove a material fact in issue, it is not to be rejected merely because it incidentally proves the defendant guilty of another crime. But the dangerous tendency and misleading probative force of this class of evidence require that its admission should be subjected by the courts to rigid scrutiny. Whether the requisite degree of relevancy exists is a judicial question to be resolved in the light of the consideration that the inevitable tendency of such evidence is to raise a legally spurious presumption of guilt in the minds of the jurors. Hence, if the court does not clearly perceive the connection between the extraneous criminal transaction and the crime charged, that is, its logical relevancy, the accused should be given the benefit of the doubt, and the evidence should be rejected.

Id. On this basis, the *Lyle* court determined that in his trial for forgery, evidence of prior forgeries by the defendant in other states and separated by days or weeks, was inadmissible because no "connection was shown to exist" to show the prior incidents and the charged incident constitute a "a continuous transaction." The *Lyle* court had no such concern admitting evidence of other acts of the defendant that occurred in the same town in South Carolina within minutes of one another because those acts tended to establish a continuing course of conduct with the charged offense; that is, they were logically connected and, therefore, relevant.

In the Court of Appeals decision that *Wallace* overturned, [1] that court undertook a painstaking review of the case law from *Lyle* through that time. That review made plain

[1] This Court's *Wallace* decision also resulted in the summary reversal of the Court of Appeals' decision in *State v. Hubner*, 362 S.C. 572, 608 S.E.2d 463 (Ct. App. 2005),

that in the long arc of this state's precedent from *Lyle* to the present, some degree of inconsistency had arisen, such that some cases had strayed from *Lyle's* wisdom to allow admission of prior bad acts that were merely similar, while others correctly demanded more than mere similarities among events separated by time or distance before such evidence properly falls under the common scheme or plan exception to the general bar on admission of prior bad acts. *State v. Wallace*, 364 S.C. 130, 139, 611 S.E.2d 332, 337 n. 2 (Ct. App. 2005) rev'd, 384 S.C. 428, 683 S.E.2d 275 (2009). While noting these inconsistencies, the Court of Appeals wrote,

> Wallace is correct that some of the appellate decisions appear to focus exclusively on the alleged close similarity between the other crime and the crime charged, while others look beyond mere close similarity to consider the system or connection between the two. Nevertheless, sorting out any apparent inconsistencies in the appellate decisions of this state is not the province of this court.

Id. Indeed, this Court did take up *Wallace* and had at that time an opportunity to harmonize the law of the common scheme or plan exception with its origins in *Lyle*. Instead, *Wallace* is a radical departure from *Lyle* which has opened the floodgates to what was once deemed impermissible propensity evidence. In reviewing the present case and the decision upon which it is based, this Court should be guided by the rationale articulated in this Court's decision in *State v. Brooks*, 341 S.C. 57, 62, 533 S.E.2d 325, 328 (2000): "When the prior bad acts are similar to the one for which the appellant is being tried, the danger of prejudice is enhanced." This Court should reaffirm that the common scheme or plan exception is a narrow one that is not to be used as a backdoor through which otherwise inadmissible evidence may be delivered to the jury room.

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which admonished the State that the bar for admissibility under *Lyle* is not lowered "simply because sexual crimes are involved."

1. THE COURT OF APPEALS' DECISION SHOULD BE REVIEWED AND REVERSED BECAUSE IT FAILED TO PROPERLY APPLY THE STANDARD OF REVIEW.

Appellate standards afford great deference to the wisdom and judgment of trial courts in determining the admissibility of evidence; such determinations should only be reversed in exceptional circumstances. *State v. Adams*, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (2003). "An appellate court will not reverse a trial court's finding of fact simply because it would have decided the case differently." *State v. Pichardo*, 367 S.C. 84, 96, 623 S.E.2d 840, 846 (Ct. App. 2005). On review of criminal cases, an appellate court is limited to determining whether the trial judge abused his discretion. *See State v. Wilson,* 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001). An abuse of discretion occurs when the conclusions of the circuit court either lack evidentiary support or are controlled by an error of law. *State v. Bryant,* 356 S.C. 485, 489–90, 589 S.E.2d 775, 777 (Ct.App.2003).

Even if this Court declines to limit or abandon its holding in *Wallace*, it should reverse the decision of the Court of Appeals below because that court abandoned the proper standard of review and wholly substituted its judgment on the facts for that of the trial court.[2]

Here, the trial court heard testimony from three witnesses over the course of two days; during that time, the trial court had the ability to weigh both the credibility of the proposed evidence and the legal justifications provided for its admission. The trial court

[2] Procedurally, this Court's decision in *Wallace* affirmed the judgment of the trial court in admitting the evidence. While the trial court in *Wallace* had not made findings on the record regarding the logical connection between the charged conduct and the prior bad act, this Court could have taken a more narrow approach, in keeping with the standard of review, and found that the logical connection was apparent on its face and any failure to so articulate was harmless error.

had the best vantage point to appraise the clarity of the witnesses' memories and the logical relevance, if any, of events that took place eight years in the past to those forming the substance of the present case. On the second day of the pretrial hearing, after argument from counsel, the trial court ruled from the bench. R. at 102-104. While the trial court did not robotically tick through the relevancy and prejudice standards in the manner of an appellate opinion, no such mechanistic approach is required, and the trial court did make clear that it had considered the non-exhaustive list of factors from *Wallace* in arriving at its decision.

The trial court was obliged to balance concerns over the nature of the proof of the 2001 incident (that is, not by way of a conviction but by way of the 2001 victim's testimony) and the variance between that victim's testimony with the testimony of the officer who investigated the 2001 incident; the significant factual differences between the charged incident and the prior bad act; and the fact that these two isolated incidents were separate by nearly eight years. Weighing these factual matters suggested a lack of logical relevancy between the two incidents; balancing this tenuous logical relevancy against the overwhelming tendency of such evidence to prejudice the defendant, the trial court rejected the admission of the evidence and followed the directive from *Lyle*: "if the court does not clearly perceive the connection between the extraneous criminal transaction and the crime charged, that is, its logical relevancy, the accused should be given the benefit of the doubt, and the evidence should be rejected." *Lyle* at 417, 118 S.E. at 807.

Irrespective of this Court's decision in *Wallace*, an awareness of which the trial court acknowledged, there is no abuse of discretion here that warrants reversal of the trial court's evidentiary ruling. While the Court of Appeals may have weighed the facts and

the law differently, that is not the standard on appellate review, and it was error for the Court of Appeals to substitute its judgment for that of the trial in the absence of any abuse of discretion.

2. THE COURT OF APPEALS' DECISION SHOULD BE REVIEWED AND REVERSED BECAUSE, IF ALLOWED TO STAND, THE COURT OF APPEALS APPLICATION OF *STATE V. WALLACE* UNWISELY EVISCERATES NEARLY 90 YEARS OF GUIDANCE FOR THE ADMISSIBLITY OF PROPENSITY EVIDENCE.

The Court of Appeals based its decision below on an application of the factors laid out in *Wallace*. The trial judge, to whom the State argued *Wallace* as the controlling precedent, considered the *Wallace* factors and determined that while some superficial similarities between the 2001 and 2009 case are observable, they are not so substantial as to overcome the bar against admission of propensity evidence. Because *Wallace* remains in force, the trial judge was obligated to consider its effect on the admission of evidence in this case.

But instead of endorsing the trial court's thoughtful application of *Wallace*, the Court of Appeals decision in this case appears to open the door propped open by *Wallace* to permit nearly every imaginable type of prior bad act, so long as the charged conduct and the prior conducts are more similar than dissimilar. To allow this view of the rules governing the admission of prior bad acts to stand would be to all but eliminate the rule's practical effect.

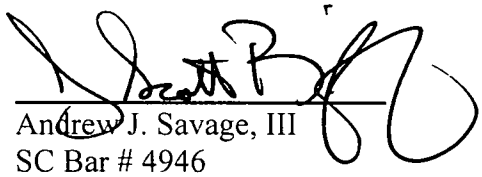
To the extent that *Wallace*, and, by extension, the Court of Appeals' decision in the present case, rewrite the rules of evidence in criminal sexual conduct cases to approve of evidence on the basis of similarities of the *type* of conduct charged, they are

inconsistent with the plain meaning of the rule and the long line of Supreme Court cases disfavoring propensity evidence. To correct this inconsistency, this Court should revisit, as Justice Pleicones suggested in his dissent, the holding in *Wallace*. In revisiting *Wallace*, this Court should return to the principles that were first articulated in *State v. Lyle* and that remain valid today: The present case involves two distinct allegations whose facts, if true, would satisfy the elements of the same criminal statute. But *Lyle* requires more. Rule 404(b) of the South Carolina Rules of Evidence requires more. Fairness requires more. Because it involves two allegations with two different victims, separated in time by nearly a decade, connected only by superficial similarities, this case offers an ideal vehicle for correcting the *Wallace* opinion's ill-considered evisceration of the longstanding rule prohibiting admission of propensity evidence.

CONCLUSION

For the reasons stated above, petitioner asks the Court to grant the petition for a writ of certiorari.

Respectfully submitted,



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PROOF OF SERVICE

I, Scott Bischoff, certify that I have served the within Petition for Writ of Certiorari on Respondent by hand delivering two copies of the same at the below address:

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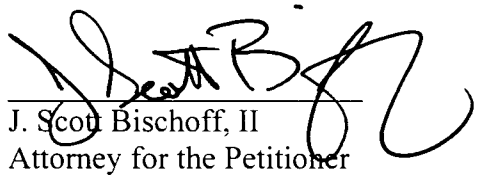
I further certify that all parties required by Rule to be served have been served.

This 16th day of October, 2014.



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