ORIGINAL

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.

PETITION FOR REHEARING *EN BANC*

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Appellant, pursuant to Rules 220(a), 219(b), & 240, SCACR, petitions this Court for rehearing (*en banc*) of State v. Perez, Op. No. 2015-UP-217 (S.C.Ct.App. filed May 8, 2015) (the "Opinion").[1] Due to misapprehension of applicable law and overlooking relevant facts the Court should grant rehearing and issue a revised opinion reversing Appellant's conviction and sentence. The grounds for this petition, and its requested relief, are set forth in greater detail below.

Arguments

I. This Court has overlooked evidence that creates a reasonable possibility that the excluded testimony of Mother 2 affected the jury's verdict.

The state's case against the Appellant was based entirely on the testimony of Minor 1 and Minor 2; it did not introduce an iota of physical evidence linking the Appellant to any crime. In such a scenario, where a conviction balances on the knife-edge of witness credibility, a criminal defendant must be allowed to explore all sources of bias. Further, if the testimony of Minor 1 and Minor 2 is truly as "substantially similar" as the Court believes, then it is even more critical the Appellant present an explanation for that similarity. The exclusion of Mother 2's U visa testimony prevented the Appellant from advancing a meritorious defense theory to the jury and undercut the defense theory presented. While this Court was correct in recognizing that the exclusion of Mother 2's testimony was a violation of the Confrontation Clause, this Court overlooked the evidence of the great harm this exclusion caused and should thus amend its order.

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[1] The Opinion was originally filed on April 29, 2015, but was re-filed on May 8, 2015, to remove references to the name of the mother of Minor 2. In order to harmonize this Petition with the re-filed Opinion, "Mother 1" will refer to the mother of Minor 1, while "Mother 2" will refer to the mother of Minor 2. This accommodation should in no way imply consent to Respondents' Petition to Seal or to the removal of this case file from the ACMS system.

"A violation of the defendant's Sixth Amendment right to confront the witness is not *per se* reversible error" only if the "error was harmless beyond a reasonable doubt." State v. Graham, 314 S.C. 383, 385, 444 S.E.2d 525, 527 (1994). Proving harmless error is a "heavy burden." See e.g. Anderson v. Warden, 696 F.2d 296, 300 (4th Cir. 1982) (en banc) ("Harm is presumed to have come from the constitutional error, and the state has the 'heavy burden' of proving harmlessness beyond a reasonable doubt.").[2]

The phrase "harmless beyond a reasonable doubt" means there must be "no reasonable *possibility*" that the error contributed to the verdict. State v. Henderson, 286 S.C. 465, 334 S.E.2d 519, 522-23 (Ct. App. 1985) (emphasis added); U.S. v. Hasting, 461 U.S. 499, 506, 103 S.Ct. 1974, 1979 (1983). An error that impairs a defense theory creates this reasonable possibility. E.g. U.S. v. Brady, 561 F.2d 1319 (9th Cir. 1977) (Trial court's refusal to allow cross-examination on a prior source of narcotics undercut the defense theory that the victim was lying of out fear when she named the defendant as her supplier.); Stack v. U.S., 519 A.2d 147 (D.C. 1986) (Trial court's refusal to allow cross-examination on prior assault to decedent excluded evidence that "went to the heart of [the] defense theory" that someone else struck the fatal blow.); Baucham v. State, 881 So.2d 95 (Fla.Dist.Ct.App. 2004) (Trial court's refusal to allow cross-examination on defendant's prior complaints about police officers excluded evidence that was necessary to prove bias or motive for excessive force against defendant.); People v. Wilson, 965 N.E.2d 667 (Ill.Ct.App. 2012). Wilson is especially instructive, as the state had no

[2] The State's harmless error argument in its brief consisted of the latter half of one sentence. (Resp. Brief p. 42). This is inadequate and constitutes abandonment of this argument. See 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).

physical evidence of the crime and the state's case hinged on credibility; the Illinois Court of Appeals found that it was improper to find harmless error ("it would be circular") where witness credibility was the most important issue. Wilson 965 N.E.2d at 667.

The Fourth Circuit also recently addressed harmless error in U.S. v. Watson, 703 F. 3d 684 (4th Cir. 2013), where the defendant (Watson) was found guilty of possession of a firearm by a felon. The Fourth Circuit found admission of a defendant's statement made in an unlawful custodial arrest was not harmless because:

> (1) the absence of direct evidence showing that Watson possessed the revolver and the ammunition [that resulted in his conviction]; (2) the defense's theory, albeit speculative and circumstantial in its own right, that Jackson [another person in the building] planted the firearm in Watson's room; and (3) the jury's questions relating to Watson's statement [the jury wished to re-read Watson's statement regarding the revolver multiple times].

Id. at 699.

The Oregon Court of Appeals has specifically addressed exclusion of U visa[3] testimony in a harmless error context. See State v. Del Real-Galvez, No. A153489, __ P.3d __, 2015 WL 1500246 (Or. Ct. App. filed April 1, 2015).[4] In Real-Galvez, a minor accused the defendant of sexual assault, and based on accusation the minor's mother applied for a U visa. According to the Oregon Court of Appeals:

> Because [minor's] mother had applied for an opportunity to stay in the United States on the ground that her daughter had been sexually abused

[3] A U visa requires the certification of an agency in the investigation or prosecution in the qualifying criminal activity. 8 C.F.R. § 214.14(b)(3). (R. p. 301 ll. 18-23). The qualifying agency can, at any time, withdraw this certification and thus revoke a U visa holder's ability to remain in this country legally. 8 C.F.R. § 214.14(i)(A).

[4] *available at* http://www.publications.ojd.state.or.us/docs/A153489.pdf (last visited May 11, 2015).

> and coerced, a jury could reasonably infer that [minor], out of a desire to help her mother obtain a U visa, had a personal interest in testifying against defendant.

Id. The court further held this was *not* harmless error because "[t]he jury was not fully informed about [minor's] potential motive to fabricate allegations against defendant and [minor's] potential interest in testifying in a certain manner." Id. see also State v. Valle, 298 P.3d 1237, 1244 (Or. Ct. App. 2013) (en banc) (finding exclusion of U visa testimony not reversible error).

Both Mother 1 and Mother 2 have legal residency in this country by virtue of the testimony of their children against the Appellant. Their legal residency is contingent on their children's cooperation with law enforcement and can be revoked at any time. A jury may reasonably infer that one or both of the mothers have pressured their children to provide similar testimony in order to maintain legal status (and maintain their family unit). The exclusion of Mother 2's testimony also prevented the Appellant from advancing a defense that the minors were fabricating or altering their testimony to protect their mothers' legal status; any attempt by one of the minors to recant or revise her testimony would likely result in the deportation of their mother. This is a powerful argument that attacks the credibility, bias, and motivation of both the mothers and the children, and the trial court disallowed it. Such a defense was not a flight of fancy; even the state admitted that the story told by Minor 1 was different (*i.e.* less severe allegations) than the final product presented to the jury. (R. pp. 339 ll. 17-19, 390 ll. 4-7, 391 ll. 18-20). Trial counsel was allowed to present an argument that Minor 1 was "making it all up", but trial counsel was not allowed to make the same argument for Minor 2. The fact that one witness was presented with motive to fabricate, and one was not, was extremely

prejudicial to the Appellant's case, as it undercut Appellant's motive argument as to Minor 1.[5] Finally, even the trial jury recognized the significance of U visa testimony; the day after a U visa for Mother 1 was discussed, juror number 102 was excused from the jury panel for performing unauthorized research "on the visa kits or visa situation." (R. p. 368).

This Court is presented with a scenario similar to Watson: (1) no strong evidence of the crime committed (here, there is no physical evidence); (2) a defense theory (though not as "speculative and circumstantial" as that in Watson) that was undermined by a constitutional error; and (3) recognition by the jury of the importance of the evidence. Appellant's defense theory was compromised, and thus he is entitled to a new trial.

This Court supports its finding of harmless error by pointing out that Appellant "proffered no evidence" supporting its contentions, but this is incorrect. During Mother 2's proffered cross-examination, she provided testimony on when she learned of U visas ("recently") (R. p. 263 ll. 19-20), whether the Solicitor's office assisted her in obtaining a U visa ("no") (R. p. 263 ll. 21-24), whether a "victim advocate or helper" assisted her in obtaining a U visa ("no") (R. p. 264 ll. 3-5), where she obtained the information on U visas (see below) (R. p. 264 ll. 14-18), and whether she had applied for government benefits ("no") (R. p. 264 ll. 19-21).

It is completely irrelevant that the transcript of Mother 2's responses did not support the defense theory. However, Mother 2's demeanor, body language, and other similar non-verbal cues may have actually supported the defense theory by showing

[5] If the minors' testimony is truly "substantially similar", as this Court contends, then the prejudice to the Appellant is compounded.

dishonesty.[6] "The fact that testimony is not contradicted directly does not render it undisputed." Black v. Hodge, 306 S.C. 196, 198, 410 S.E.2d 595, 596 (Ct. App. 1991). Further, it is naïve to believe that Mother 2 would fold on the witness stand and admit any misconduct; this is not a television courtroom drama. Witnesses sometimes lie – this is why juries must hear evidence of a witness's possible motivation to lie. The existence of a U visa puts Mother 2's credibility at issue, and therefore her responses must be evaluated by the jury for their veracity:

> Even where the evidence is uncontradicted, the jury may believe all, some, or none of the testimony, and where the credibility of the witness has been questioned, the matter is properly left to the jury to decide:
>
> > The fact that evidence is not contradicted by direct evidence does not render it undisputed, as there still remains the question of its inherent probability and the credibility of the witnesses or his interest in the result. To justify a Court in instructing a jury that a witness has told the truth, and in directing a verdict based on the truthfulness of his evidence, there must be nothing in the circumstances or surroundings tending to impeach the witness or to throw discredit on his statements. **If there is anything tending to create distrust in his truthfulness, the question must be left to the jury.**

Ross v. Paddy, 340 S.C. 428, 434, 532 S.E.2d 612, 615 (Ct. App. 2000) (quoting Terwilliger v. Marion, 222 S.C. 185, 188, 72 S.E.2d 165, 166 (1952)) (emphasis added) see also Okatie River v. Southeastern Site Prep, 353 S.C. 327, 338, 577 S.E.2d 468, 474, (Ct. App. 2003) ("Credibility determinations regarding testimony are a matter for the

[6] It is well-established that a significant portion of how humans communicate is non-verbal. See e.g. Jeff Thompson, *Is Nonverbal Communication a Numbers Game?* (Sept. 30, 2011) *available at* https://www.psychologytoday.com/blog/beyond-words/201109/is-nonverbal-communication-numbers-game (last visited May 11, 2015).

finder of fact, who has the opportunity to observe the witnesses...").[7]

The very existence of a U visa creates a question of credibility, as the Oregon Court of Appeals recognized:

> [The defendant] presented information, in the form of [accuser's] own testimony, that [accuser] 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 [accuser] had a personal interest in testifying that she had been abused.** Simply put, [accuser] 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.

State v. Valle, 298 P.3d 1237, 1233-34 (Or. Ct. App. 2013) (en banc) (emphasis added).[8]

According to this Court "there is no question Mother 2's veracity and potential bias was an important issue." (Opinion pp. 3-4). By taking Mother 2's testimony at face value, this Court has, in effect, improperly ruled on the credibility and weight of that testimony and usurped the role of the jury. This is inappropriate for an appellate court. "In a law case, the credibility and weight to be accorded evidence is solely for the fact finder to determine." Hanna v. Palmetto Homes, Inc., 300 S.C. 535, 537, 389 S.E.2d 164, 165 (Ct. App. 1990); see Parsons v. Georgetown Steel, 318 S.C. 63, 67, 456 S.E.2d 366, 368 (1995) (stating the credibility and weight of testimony is for the trier of fact). Additionally, if there is some manner of coordination between the U visas and the minors' testimony, any such coordinated effort will have taken place *sub rosa*, hidden

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[7] This is also well-settled in other jurisdictions: "The following principle is equally well established, both in terms of its acceptance and antiquity: 'The court cannot determine, and thereby take away from the jury, the right to pass upon the credibility of oral testimony, even though it is without conflict.'" Ex parte Anonymous, 806 So. 2d 1269, 1276-77 (Ala. 2001) (quoting Swindall v. Ford, 63 So. 651, 655 (Ala. 1913)).

[8] Appellant would note that in Valle the accuser applied for her U visa *after* she went to the police, just as the accusers in this case. Valle at 1239.

from the world. This requires a certain amount of leeway be granted in making proof. Cf. Island Car Wash, Inc. v. Norris, 292 S.C. 595, 600-601, 358 S.E.2d 150 (1987) (applying this concept in the context of proof of a civil conspiracy).

However, even if one takes Mother 2's testimony at face value, it is apparent that she received assistance from the state in obtaining a U visa:

> Q. ...Do you remember how you came across the name of the attorney that is helping you apply for this visa?
> A. Yes.
> Q. And how is that?
> A. When we went for her to have her questioning and exam they gave us several information sheets and that was one of them.
> Q. And have you applied then for this U-Visa?
> A. **Yeah, because they recommended that we do it.**

(R. p. 264 ll. 9-18) (emphasis added).

The "questioning and exam" referenced by Mother 2 was Minor 2's intake interview at the police station and her examination at the Dee Norton Lowcountry Children's Center ("DNLCC"). (R. pp. 64-69, 71-72). "They" from line 18 who recommended Mother 2 pursue a U visa is ambiguous, and either refers to the North Charleston Police Department or the DNLCC. Regardless of whom "they" was referring to, the transcript indicates that Mother 2 was provided information on her U visa in conjunction with her police report.

While the excluded testimony of Mother 2 only occupies roughly two pages, its exclusion undercut the Appellant's theory of defense; regardless of whether this Court believes Appellant would prevail at trial, it creates a reasonable *possibility* that the outcome of the trial would be different. Appellant would ask this Court to amend its original opinion and reverse the trial court's conviction.

II. The doctrine of cumulative error now demands full reversal of the trial court.

According to this Court's opinion, the trial court violated two of Appellant's fundamental rights under the sixth (the Confrontation Clause) and fourteenth (Due Process) amendments to the United States Constitution. This Court has already held that the latter violation warrants a partial reversal; taken together, these two violations demand a full reversal.

Under the doctrine of cumulative error, "the aggregation of errors may produce a cumulative effect of prejudice, where individually, the prejudice is insufficient to justify reversal." State v. Freeman, 319 S.C. 110, 459 S.E.2d 867 (Ct.App.1995). Additionally:

> ...the court must be alert to avoid even harmless, erroneous rulings that when considered together may undermine the fairness of the factfinding process. Consistent commission of erroneous rulings may well deprive an aggrieved litigant of due process unless the cumulative effect of the errors does not affect the outcome of trial.

Tennant v. Marion Health Care Foundation, 459 S.E.2d 374, n.28 (W.Va. 1995)[9] In Freeman, the defendant demonstrated "14 different instances where the trial judge interrupted, made unsolicited comments, interjected his opinion, or arbitrarily limited cross-examination of the State's investigating officers." Freeman, 459 S.E.2d at 875.

This Court has held there is a "reasonable likelihood" that Appellant's sentence was based on his exercise of his right to a jury trial. We cannot determine from the record when Appellant's exercise of his right first began to effect his trial. However, this Court has also identified another clear violation of his Sixth Amendment rights that took place earlier in this trial. Taken together, these errors should give this Court enough questions

[9] Tennant is cited with approval by the Freeman court.

about the fairness of Appellants' entire trial to "err on the side of caution" and extend the partial reversal of this verdict to a full reversal.

III. The Court misapprehends the application of State v. Lyle and Rule 404(b), SCRE.

This Court applies State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009) to find that a "common scheme or plan" exists under Rule 404(b), SCRE. However, this Court does not cite State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923), whose enumeration of prior bad acts exceptions was explicitly incorporated into Rule 404(b). The facts before this Court do not fit the exceptions as set forth in Lyle (and therefore 404(b)), and thus the Opinion should be amended to reverse the trial court.

Lyle, the seminal case on prior bad acts evidence, describes the "common scheme or plan" exception as: "*...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 (emphasis added). This definition of the "common scheme or plan" exception is explicitly incorporated into Rule 404(b): "...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).

Lyle has not been overruled or vacated. The Court's opinion does not show how the facts meet the requirements of Lyle, and thus it must be amended to reverse the Appellant's conviction.

For the purposes of preservation, Appellant further argues that the Supreme Court's holding in Wallace does not comport with Rule 404(b) and Lyle and the opinion should be amended to reverse the trial court. See generally Rauch Wise, *Roland B.*

Molineux and his Illegitimate Offspring: The History and Mystery of 404(b), 38 Champion 28 (July/August 2014).

IV. The Court's decision to reverse the sentence and remand requires clarification.

The Opinion (Part III) is silent as to whether Appellant's resentencing will occur before the original trial judge or before a new judge. Appellate courts in other jurisdictions have remanded similarly-situated cases for resentencing before a different judge. See e.g. Lindsay v. U.S., 84 A.3d 50 (D.C. 2014). Appellant would request any re-sentencing be before a new judge.

For the purposes of preservation, Appellant also requests the Court's clarification on the role of ABA Standard 14-3.3(f) in its decision to reverse the trial court's sentence. See Harden v. State, 276 S.C. 249, 255, 277 S.E.2d 692, 694-95 (1981).

V. This Court should re-hear this appeal *en banc*.

Pursuant to Rule 219(b), Appellant suggests that any rehearing that takes place before this Court be conducted *en banc*. The Wallace line of cases are fatally at odds with the requirements of Rule 404(b) and Lyle. If this Court believes there is an interpretation of the law in which these authorities exist in harmony with one another, an *en banc* opinion would provide substantial guidance for future criminal practitioners.

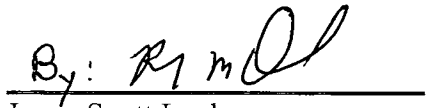
Further, the admissibility of U Visas is an issue of first impression in South Carolina. A definitive opinion from this full Court would provide helpful guidance and certainty to future criminal law practitioners as South Carolina's immigrant population grows.

Finally, there is a dearth of case law in South Carolina discussing judicial participation in plea negotiations and vindictiveness in sentencing. A definitive opinion from this full Court would provide helpful guidance to the bench and bar.

Conclusion

For the above argument, the Appellant requests that this Court rehear this appeal, *en banc*, and issue a revised opinion reversing the trial court *in toto*. In the alternative, the Appellant requests that this Court clarify its Opinion as set forth above.

Dated: 13th day of May, 2015

By: 

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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. 2013-000179

CERTIFICATE OF SERVICE

I certify that a true copy of the Petition for Rehearing EN BANC 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, and Mr. Venancio Diaz Perez #353944, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 13th day of May, 2015.

By: _____

Robert M. Dudek
Chief Appellate Defender

SUBSCRIBED AND SWORN TO before me
this 13th day of May, 2015.

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

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RECEIVED
MAY 13 2015
SC Court of Appeals

May 13, 2015

The Honorable Jenny Abbott Kitchings
Clerk, S.C. Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: The State v. Venancio Diaz Perez
Appellate Case No. 2013-000179

Dear Ms. Kitchings:

Please find enclosed the original and six copies of the petition for rehearing. The petition for rehearing *en banc* is also being filed separately but simultaneously today.

If you have further questions, do not hesitate to contact me.

Sincerely,

RMd

Robert M. Dudek
Chief Appellate Defender

RMD/smf

cc: Amie L. Clifford, Esquire

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May 13, 2015

The Honorable Jenny Abbott Kitchings
Clerk, S.C. Court of Appeals
Post Office Box 11629
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Re: The State v. Venancio Diaz Perez
Appellate Case No. 2013-000179

Dear Ms. Kitchings:

Please find enclosed the original and 18 copies of the petition for rehearing *En banc*.

If you have further questions, do not hesitate to contact me.

Sincerely,

RMD

Robert M. Dudek
Chief Appellate Defender

RMD/smf

cc: Amie L. Clifford, Esquire