ORIGINAL

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions

J. C. Nicholson, Circuit Court Judge

Opinion No. 2015-UP-217
Heard February 5, 2015 – Filed April 29, 2015
Withdrawn, Substituted, and Refiled May 8, 2015

State of South Carolina .....Respondent,

v.

Venancio Diaz Perez .....Petitioner.

PETITION FOR A WRIT OF *CERTIORAI*

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on June 23, 2015.

QUESTIONS PRESENTED

I. Did the Court of Appeals err when it failed to reverse the trial court for providing a structurally unsound trial with two constitutional errors after Perez refused an off-the-record plea offer made by the trial judge?

II. Did the Court of Appeals err when it held that the trial court's exclusion of substantial evidence of a mother and child's motivation to lie to maintain legal U.S. residency was harmless beyond a reasonable doubt?

III. Did the Court of Appeals err when it affirmed the exclusion of "prior bad acts" testimony of another minor accuser that does not fall within one of the exceptions found in Rule 404(b), SCRCP?

IV. Did the Court of Appeals err in applying State v. Wallace, which is an alteration to Rule 404(b), SCRE, that is both legally unsound and not approved by the legislature?

V. Did the Court of Appeals err in failing to order a new judge be chosen for resentencing?

STATEMENT OF THE CASE

On July 15, 2010, Petitioner Venancio Diaz Perez was arrested for Criminal Sexual Conduct with a Minor. (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, South Carolina. (R. p. 18). The State was represented by

[1] S.C. Code § 16-3-655(A) (Supp. 2010).
[2] S.C. Code § 16-15-140 (Supp. 2010).

Deborah Herring-Lash and Jennifer McCoy of the Charleston County Solicitor's Office, and Perez was represented by the late Andrew Grimes and Christina Parnell of the Charleston County Public Defender's Office. (R. p. 18).

Before trial began, counsel for the State and for Perez met with the trial judge for an "informal conference". (R. pp. 554-55, 660). At this conference, the trial judge stated that if the case was tried before him non-jury, he would find Perez guilty of Assault and Battery of a High and Aggravated Nature[3] ("ABHAN" – a lesser included offense of CSC) and Lewd Act. (R. p. 554, 660). The trial judge then made a plea offer to Perez, which the trial judge described later as: "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." (R. pp. 554-55). Perez refused this offer, and trial proceeded.

Perez's accuser was a minor female (Minor 1) whom his wife babysat in their home. (R. pp. 10-13, 16-17, 134, 432, 434, 438-39). The State sought to introduce the evidence of another minor female accuser (Minor 2 – another child whom his wife babysat) pursuant to Rule 404(b), SCRCP. (R. pp. 438-39, 552).[4] Accordingly, the trial court held a hearing on the admissibility of Minor 2's testimony on January 14, 2013. After taking testimony from Minor 1 and Minor 2 in camera, the trial court, over Perez's objection, ruled Minor 2 would be allowed to testify under Rule 404(b), citing State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009). (R. pp. 113-14). At this hearing the Court also ruled Perez would be allowed to examine Mother 1 (Minor 1's mother) about her legal residency and her application for a U visa.[5]

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[3] State v. Fennell, 340 S.C. 266, 274, 531 S.E.2d 512, 516-17 (2000).
[4] Minor 2's case was not prosecuted.
[5] A U visa ("U nonimmigrant status") legalizes the status of an undocumented immigrant

Trial proceeded, with Perez re-asserting the objections above as testimony was presented. (R. pp. 240, 249, 468). On January 15, 2013, Mother 1 testified as to her residency status and U visa application. Later that day, Mother 2 testified; however, when Perez's counsel attempted to cross-examine Mother 2 on her residency status and U visa application, the trial court *sua sponte* excluded any cross examination on these subjects. (R. pp. 259-60, 265-66). The trial court later allowed a proffer of this testimony. (R. pp. 263-65).

The next day, juror number 102 was excused from the jury panel for performing unauthorized research "on the visa kits or visa situation." (R. p. 368). The state concluded its case on January 16, 2013, without presenting any physical evidence of Perez's guilt. Perez presented his defense the same day.

The parties gave closing arguments on January 17, 2013, and the jury arrived at a verdict on January 18, 2013. (R. pp. 470-515, 535). The jury acquitted Perez of CSC, but found him guilty of the lesser-included offense of ABHAN; they also found Perez guilty of Lewd Act. (R. pp. 9, 15, 553-54). The trial court sentenced Perez to ten years imprisonment for the former, and fifteen years imprisonment for the latter. (R. pp. 8, 14, 554-56). The trial court ordered these sentences to be served consecutively. (R. pp. 8, 14, 554-56). At this time, Perez objected to this sentence as vindictive in the following exchange:

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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). A U visa requires the certification of an agency in the investigation or prosecution in the qualifying criminal activity. Id. (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).

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).

Perez served his Notice of Appeal on January 25, 2013. (R. p. 6-7). The Court of Appeals heard oral arguments on February 5, 2015, and issued its opinion on April 29, 2015, affirming in part and reversing in part the trial court. The State filed a Motion to Seal the record on or about April 29, 2015, which the Court of Appeals denied by order dated May 8, 2015. (R. pp. 647-51). The Court of Appeals refiled its opinion on May 8, 2015, redacting the name of the mother of one of the witnesses. (R. pp. 652-57). Both the State and Perez filed Petitions for Rehearing on May 13, 2015, (R. pp. 658-93) which the Court of Appeals denied by order dated June 23, 2015. (R. p. 694). This petition followed.

ARGUMENT

The Court of Appeals found that the trial court violated Perez's rights under the Confrontation Clause[6] by limiting his cross-examination of a witness,[7] and found the trial court further violated Perez's rights under Due Process[8] by punishing him for not taking a guilty plea (offered by the trial judge, not the Solicitor). However, the Court of Appeals

[6] U.S. Const. amend. VI; U.S. Const. amend. XIV.
[7] The State apparently does not contest this holding of the Court of Appeals, as it was not addressed in its Petition for Rehearing. (R. pp. 658-67).
[8] U.S. Const. art. III, § 2; U.S. Const. amend. VI; S.C. Const. art. I, § 14.

only reversed Perez's sentence instead of ordering a full reversal and remand for new trial. Perez's refusal of trial court's plea offer took place at the beginning of trial; taking into account other errors that took place between the refusal and sentencing there is, at a bare minimum, an appearance that he was not given a fair trial. This Court must reverse the Court of Appeals and remand for a new trial. Further, the trial court's violation of the Confrontation Clause hamstrung Perez's theory of defense, and is serious enough error to independently warrant reversal.

The Court of Appeals (and trial court) also failed to apply the facts to the test of State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923), which is not only still good law, but also explicitly incorporated into Rule 404(b), SCRCP. Instead, it applied the overly expansive test of State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009), which Perez asks this Court to overturn on the grounds that it does not comply with Lyle and that it alters Rule 404(b) without the consent of the legislature.

Finally (and in the alternative), should this Court decide to affirm the reversal of the sentence only, Perez would ask this Court to order that it take place before a different judge.

Perez asks this Court to issue a writ of *certiorari* so that it may review and ultimately correct these errors of the Court of Appeals. Perez asks this Court to consider the following in support of his petition:

I. The Court of Appeals erred by failing to consider the cumulative effect of the errors it identified in the trial below.

The Court of Appeals correctly found that (1) the exclusion of Mother 2's U visa testimony violated Perez's rights under the Confrontation Clause and (2) the trial court's sentence was vindictive and violated Perez's rights under Due Process. The Court of

Appeals, however, only reversed the trial court on sentencing. This is reversible error because the cumulative effect of these (admitted) errors so taints the underlying trial that a full reversal and remand for a new trial is necessary.

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). 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.

The cumulative effect of the errors identified by the Court of Appeals demands full reversal of the trial court. In finding that the trial court's sentence was vindictive (and thus violated due process), the Court of Appeals held the following:

> We find there is a reasonable likelihood the trial court sentenced Perez on the improper basis of Perez exercising his right to go to trial. Further, the record suggests a basis for the sentence was the fact that the trial court thought Perez was guilty of the first-degree criminal sexual conduct offense for which he was not convicted.

(R. p. 656). While the trial judge does not specifically state when he formulated the intent to punish Perez for pursuing a trial, he does mention a specific conference where he made an off-the-record plea offer that Perez rejected. (R. pp. 554-55). This conference took place before trial. (R. p. 660). After Perez rejected the trial court's plea offer, the trial

court ruled during trial to exclude any testimony regarding Mother 2's immigration status or her U visa application. While the Court of Appeals was correct in holding this was a violation of Perez's rights under the Confrontation Clause, it did not make the connection between this violation and the Due Process violation it identified in sentencing. The apparent connection between these the violation of the Confrontation Clause at the outset of trial with the violation of the Due Process Clause at the end calls into question the entire conduct of the trial. These are errors that permeate "[t]he entire conduct of the trial from beginning to end" so that the trial cannot "'reliably serve its function as a vehicle for determination of guilt or innocence.'" Arizona v. Fulminante, 499 U.S. 279, 309 (1991) quoting Rose v. Clark, 478 U.S. 570, 577-578 (1986). The cumulative effect of these errors is to create a structural defect in the constitution of the trial mechanism; such an error demands a full reversal. See State v. Rivera, 402 S.C. 225, 247, 741 S.E.2d 694, 705 (2013).

Other errors not recognized by the Court of Appeals, added to those recognized above, further support the contention that Perez's trial was structurally unsound. Off-the-record plea negotiations by the trial judge (like what occurred here) are a clear 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 strictly the law of South Carolina, its reasoning is sound; further, it is persuasive and instructive. See State v. Blakely, 402 S.C. 650, 663, 742 S.E.2d 29, 36 (Ct. App. 2013). Additionally, the trial court's ruling under Wallace to allow Minor 2 to testify (also made after Perez rejected the plea offer) was another error that led to a structurally unfair trial for Perez (See Section III).

"The due process clause protects not only against express judicial improprieties but also against conduct that threatens the 'appearance of justice.'" Aiken County v. BSP Div. of Envirotech Corp., 866 F.2d 661, 678 (4th Cir.1989) (quoting Aetna Life Insurance Co. v. Lavoie, 475 U.S. 813, 825 (1986)). The Court of Appeals has identified two constitutional errors that occurred in this trial after Perez refused the trial court's plea offer. Even if nothing further untoward occurred, there is an appearance of unfairness and injustice. This Court must reverse the Court of Appeals and remand this case for a new trial.

II. The Court of Appeals erred by holding the trial court's exclusion of Mother 2's U visa testimony, which showed her, and her daughter's, interest, bias, and lack of credibility was "harmless beyond a reasonable doubt."

The state's case against Perez was based entirely on the testimony of Minor 1 and Minor 2; it did not introduce one iota of physical evidence linking Perez 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 of Appeals believes, then it is even more critical Perez presents an explanation for that similarity. The exclusion of Mother 2's U visa testimony prevented Perez from advancing

a meritorious defense theory to the jury and undercut the defense theory as presented. While the Court of Appeals was correct in recognizing that the exclusion of Mother 2's testimony was a violation of the Confrontation Clause, the Court of Appeals decision that it was "harmless beyond a reasonable doubt" contradicts well-settled case law from around the nation.

The Court of Appeals correctly held that the exclusion of Mother 2's testimony was a violation of Perez' rights under the Confrontation Clause. (R. pp. 654-55). This ruling of the Court of the Appeals has not been challenged, and is thus the law of the case. Robinson v. Estate of Harris, 391 S.C. 114, 705 S.E.2d 41 (2011) (unchallenged ruling, whether correct or not, is law of the case). The question before this Court is whether exclusion of evidence critical to a criminal defendant's theory of defense, and critical to the credibility of a witness, is "harmless beyond a reasonable doubt".

A. Error that impairs a defense theory cannot be "harmless beyond a reasonable doubt."

"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). 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). Proving error harmless beyond a reasonable doubt 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.").[9]

Whether an error is harmless depends on the particular facts of each case, including:

> the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and of course the overall strength of the prosecution's case.

State v. Mizzell, 349 S.C. 326, 333, 563 S.E.2d 315, 318-19 (2002) (quoting Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986)). However, these factors are not exhaustive. State v. Graham, 314 S.C. 383, 444 S.E.2d 525 (1994) An error that impairs a defense theory creates a reasonable possibility that the error contributed to the verdict. 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.).

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[9] The State's harmless error argument in its brief consisted of the latter half of one sentence. (R. p. 630). 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).

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. Further, the Court of Appeals of Oregon has specifically found that excluded U visa testimony was not harmless error. In State v. Del Real-Galvez, No. A153489, __ P.3d __, 2015 WL 1500246 (Or. Ct. App. filed April 1, 2015),[10] a minor accused the defendant of sexual assault, and based on that 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 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 held exclusion of U visa testimony 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).

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

According to Perez's trial counsel: "...our theory of defense is...this never happened...She's making it up for whatever reason..." (R. p. 106). Thus, Perez's defense theory was that the accuser(s) were lying. The trial court's refusal to allow Perez to cross-examine Mother 2 on her residency status and U visa undermined this theory by preventing him from presenting evidence that could reasonably support a finding that Minor 1 and Minor 2 were lying to support their mothers' U visas.

Both Mother 1 and Mother 2 have legal residency in this country solely by virtue of their children's testimony against Perez. Their legal residency is contingent on their children's cooperation with law enforcement and can be revoked at any time.[11] Any attempt by one of the minors to recant or revise her testimony would likely result in the deportation of her mother, as the minor would no longer be "helpful" as described in 8 C.F.R. § 214.14(b)(3); see also n.5, *supra*. A jury may reasonably infer that one or both of the mothers have pressured[12] their children to provide similar testimony in order to maintain legal status (and maintain their family unit). Perez was able to advance only half of this argument (as to Minor 1) in closing arguments; he was foreclosed from making the same argument as to Minor 2. (R. pp. 485-86, 489). Minor 2's testimony therefore becomes stronger because it was not subjected to the same level of scrutiny as Minor 1.

This Court is presented with a scenario similar to Watson. First, there is no physical evidence of the alleged crimes. Second, the excluded evidence (and

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[11] 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).

[12] Such an argument is not a flight of fancy; even the State admitted that the accusations of Minor 1 were 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).

constitutional error) bears directly on the theory that the accuser(s) are lying by providing a plausible explanation why. Third, though Perez's defense theory is strong, even a "speculative and circumstantial" defense theory is sufficient under Watson. Finally, the jury did recognize the importance of U Visas in this case: the day after the defense questioned Mother 1 about her U Visa, juror number 102 was excused from the jury panel for performing unauthorized research "on the visa kits or visa situation." (R. p. 368). There is also substantial similarity to the facts of Del Real-Galvez.

Finally, the Van Arsdall factors indicate that the error was not harmless. Mother 2 was the prosecution's witness, and her testimony was necessary to support their prior bad acts evidence. The excluded U visa testimony was not cumulative with any other testimony and could not be otherwise adduced from another witness. Mother 2's testimony was the only evidence of her U visa, so there was no other evidence contradicting or corroborating it. Due to the trial court's ruling, no cross-examination of Mother 2 would or could elicit information on her (and her child's) veracity based on Mother 2's immigration status. Finally, the prosecution's case was based solely on the testimony of minors and lacked any physical evidence.

There is more than a reasonable possibility that the trial court's decision to limit U visa testimony contributed to the verdict. This Court must reverse the Court of Appeals (and the trial court) and remand for a new trial.

B. Error that prevents the finder of fact from making a credibility determination cannot be "harmless beyond a reasonable doubt".

Issues of credibility are exclusively the province of the jury, and Court of Appeals committed reversible error by ruling on them, instead of allowing credibility to be weighed in a new trial. The existence of a U visa puts Mother 2's credibility and Minor

2's credibility at issue, and therefore Mother 2's responses must be evaluated by the jury, not an appellate court, 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 finder of fact, who has the opportunity to observe the witnesses…").[13] People v. Wilson, 965 N.E.2d 667 (Ill.Ct.App. 2012) is especially instructive, as there the state had no physical evidence of the crime (just as here) and the state's case hinged on credibility (just as here); 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.

[13] 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)).

The Oregon Court of Appeals recognizes the very existence of a U visa creates a question of credibility:

> [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). Perez 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.

The Court of Appeals was correct in holding "**there is no question Mother 2's veracity and potential bias was an important issue.**" (R. pp. 654-55) (emphasis added). By then taking Mother 2's testimony at face value, the Court of Appeals has, in effect, improperly ruled on the credibility and weight of that testimony and usurped the role of the jury. This is simply not the role of 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 also 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 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). The usurpation of the trier of fact's role by the

Court of Appeals is not harmless error, and reversal and remand for a new trial is necessary.

C. The Court of Appeals ignored evidence in the record of the assistance Mother 2 received in obtaining her U visa.

The Court of Appeals supports its finding of harmless error by pointing out that Perez "proffered no evidence" supporting its defense theory, but this is incorrect. Mother 2 plainly states that she received assistance from the state (or its agent) to obtain her 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 [Minor 2] 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 plainly states that Mother 2 was provided information on her U visa in conjunction with her police report.

Further, what Mother 2 *did not* say, and what she denied, is evidence just as important as what she *did* say. 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 appear at first to support the defense theory. "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, Mother 2's demeanor, body language, and other similar non-verbal cues may have actually supported the defense theory by showing dishonesty. 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?* Psychology Today (Sept. 30, 2011).[14] 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 precisely why juries must hear evidence of a witness's possible motivation to lie. Accordingly, the Court of Appeals was in error in its holding of "no evidence", and it should thus be reversed and this case remanded for a new trial.

III. The Court of Appeals erred in affirming the trial court's admission of the testimony of Minor 2, which does not meet any of the exceptions of Rule 404(b), SCRCP.

The trial court applied 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. (R. pp. 113-14). However, the trial court did 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

[14] *available at* https://www.psychologytoday.com/blog/beyond-words/201109/is-nonverbal-communication-numbers-game (last visited May 11, 2015).

404(b). The facts before the trial court did not fit the exceptions as set forth in Lyle (and therefore 404(b)), and the Court of Appeals (and the trial court) must be reversed.

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).

The trial court did not find 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..." Instead, it ignored the clear requirements of the exception set forth by Lyle and Rule 404(b) and applied the test of Wallace: a "close degree of similarity" in the bad acts indicated the existence of a common scheme or plan. (R. p. 653).

Lyle has not been overruled or vacated. To the extent that Wallace is good law (see Section IV), Wallace would complement Lyle, not supplant it. The requirements of Lyle were not considered, or even cited, by the Court of Appeals (or the trial court), and thus this case should be reversed and remanded for a new trial.

IV. Wallace was wrongly decided and should be overturned, along with the reversal of this verdict and remand for a new trial.

Wallace greatly expanded the "common scheme or plan" exception to Rule 404(b), and its progeny have expanded this exception to a point where the exception swallows the rule. It is time for this Court to reconsider this impermissible and illegal expansion of the "sex crime exception" to Rule 404(b). According to Wallace other sex

crimes are admissible as "prior bad acts" if:

> When determining whether evidence is admissible as common scheme or plan, the trial court must analyze the similarities and dissimilarities between the crime charged and the bad act evidence to determine whether there is a close degree of similarity. When the similarities outweigh the dissimilarities, the bad act evidence is admissible under Rule 404(b).

Wallace at 433, 683 S.E.2d at 277-78 (internal citations omitted). However, the requirement for a "close degree of similarity" undercuts any analysis for prejudice under Rule 403, SCRE, by presenting the jury with two confusingly similar crimes. E.g. State v. Gore, 283 S.C. 118, 121, 322 S.E.2d 12, 13 (1984) (When the prior bad acts are "strikingly similar to the one for which the appellant is being tried, the danger of prejudice is enhanced.").

More importantly, Wallace completely circumvented the statutory process for amending the South Carolina Rules of Evidence. Justice Pleicones foresaw this problem in his dissent in Wallace:

> ...our cases holding that evidence of other acts of sexual misconduct is admissible in a trial for criminal sexual conduct with a minor as a "common scheme or plan" under Rule 404(b), SCRE, have, in effect, created an exception to the rule's exclusion of propensity evidence. Compare, e.g., Vogel v. State, 315 Md. 458, 554 A.2d 1231 (Ct.App.1989). We have repeatedly held in non-sexual offense cases that, "the mere presence of similarity only serves to enhance the potential for prejudice," State v. Tuffour, 364 S.C. 497, 613 S.E.2d 814 (Ct.App.2005) *vacated on other grounds* 371 S.C. 511, 641 S.E.2d 24 (2007) *internal citations omitted*, yet under the majority's view, similarity is the touchstone of admissibility in child sexual offense cases. In my view, if we are to permit the admission of propensity evidence in these types of cases, then we should propose a new rule of evidence, and encourage public comment. See e.g. Rules 413 and 414, Fed.R.Evid.; Rule 404(c), Az. R. Evid. In light of the controversy engendered by these rules in other jurisdictions...I believe that thorough scrutiny is warranted.

Wallace at 435-36, 683 S.E.2d at 279 (Pleicones, J., dissenting). The United States Congress, in a tacit admission that Rule 404 does not contain a "sex crime exception",

had to use the legislative process to introduce a "sex crime exception" similar to Wallace to the Federal Rules of Evidence. See Fed. R. Evid. 412 & 413; Rauch Wise, *Roland B. Molineux and his Illegitimate Offspring: The History and Mystery of 404(b)*, 38 Champion 28, 34 (July/August 2014) (hereinafter "Wise").

The only manner in which an exception like that found in Wallace may be promulgated is found in the South Carolina Code:

> All rules and amendments to rules governing practice and procedure in all courts of this State promulgated by the Supreme Court shall be submitted by the Supreme Court to the Judiciary Committee of each House of the General Assembly during a regular session, but not later than the first day of February during each session. Such rules or amendments shall become effective ninety calendar days after submission unless disapproved by concurrent resolution of the General Assembly, with the concurrence of three-fifths of the members of each House present and voting.

S.C. Code § 14-3-950; see also S.C. Code § 14-3-640; S.C. Const. Art. V § 4. There is no record that the exception of Wallace was promulgated according to this statute; therefore, Wallace is not good law and should be overturned, the Court of Appeals reversed, and this case remanded for a new trial.

V. The Court of Appeals erred in not remanding to a new judge.

The Court of Appeals' opinion (Part III) is silent as to whether Perez's resentencing will occur before the original trial judge or before a new judge. (R. pp. 655-56). To the extent the Court of Appeals ordered re-sentencing before the same judge, it is in error. The Court of Appeals was clear in its finding of vindictiveness:

> We find there is a reasonable likelihood the trial court sentenced Perez on the improper basis of Perez exercising his right to go to trial. Further, the record suggests a basis for the sentence was the fact that the trial court thought Perez was guilty of the first-degree criminal sexual conduct offense for which he was not convicted.

(R. p. 656). If the sentencing process is as tainted as the Court of Appeals sets forth, any resentencing must take place before a new judge. Ordering such a change is consistent with other jurisdictions. See e.g. Lindsay v. U.S., 84 A.3d 50 (D.C. 2014) (remanding for sentencing before a new judge after a finding of vindictiveness in sentencing). Accordingly, if this Court chooses to not reverse and remand for a new trial, Perez would ask that any opinion from this Court that reverses only the sentence specify that a new sentencing hearing occur before a new judge.

CONCLUSION

In our society, sexually-based offenses are considered especially heinous. Society's disgust,[15] however, does not provide carte blanche to ignore the law that applies equally to all persons, no matter what crime they stand accused of. Perez asks this Court to issue a writ of *certiorari*, reverse the Court of Appeals, and remand this case for a new, fair trial.

[15] Disgust with these manner of crimes is evident in the opinion of State v. Blanton, 316 S.C. 31, 446 S.E.2d 438 (Ct. App. 1994), a criminal sexual conduct appeal. In Blanton the original opinion (decided March 7, 1994) contained the following sentence: "However, where a sexual offense is charged, evidence of similar prior sexual acts of sexual misconduct are admissible to establish the identity of the defendant and to show a lewd disposition on his part." Wise at n. 41. This sentence was removed after a petition for rehearing. Id.

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STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

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

Opinion No. 2015-UP-217 (S.C. Ct. App. filed 4/29/2015)
10-GS-10-07730, 07731

THE STATE,

RESPONDENT,

V.

VENANCIO DIAZ PEREZ,

APPELLANT

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on Amie L. Clifford, Esquire, at the 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 and the S.C. Court of Appeals this 23rd day of July, 2015.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 23rd day
of July, 2015.

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