PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions

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

Opinion No. 2015-UP-217 (S.C. Ct. App. filed May 8, 2015)

Appellate Case No. 2015-001576

The State of South Carolina,

Respondent/Petitioner,

v.

Venancio Diaz Perez,

Petitioner/Respondent.

RETURN TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED BY PETITIONER/RESPONDENT PEREZ

Petitioner/Respondent Perez has presented five questions to this Court.

1. 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?
2. 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?
3. 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), SCRE?
4. Did the Court of Appeals err in applying *State v. Wallace*, 384 S.C. 428, 683 S.E.2d 275 (2009), which is an alteration to Rule 404(b), SCRE, that is both legally unsound and not approved by the legislature?
5. Did the Court of Appeals err in failing to order a new judge be chosen for resentencing?

(Petition for a Write of *Certiorari* filed by Petitioner/Respondent at p. 2.)

STATEMENT OF THE CASE

Respondent was indicted for the offense of lewd act on a minor (Indictment 2010-GS-10-7731) and criminal sexual conduct with a minor in the first degree (Indictment 2010-GS-10-730). He pled not guilty and proceeded to trial by jury on January 14, 2013. At the conclusion of his trial, the jury found him guilty of lewd act on a minor and assault and battery of a high and aggravated nature (hereinafter, ABHAN), as a lesser-included offense of criminal sexual conduct with a minor in the first degree (hereinafter "CSC with a minor first degree"). The trial court sentenced Respondent to a 15 year term of incarceration on the lewd act conviction and a consecutive 10 year sentence on the ABHAN conviction. The trial court also ordered Respondent to be placed on the Central Registry of Child Abuse and Neglect on the lewd act conviction.

Respondent appealed his convictions and sentences, raising three issues on appeal – two addressing evidentiary rulings – *i.e.*, the admission of other bad acts committed by Petitioner/Respondent against another Minor 2 and the exclusion of testimony about the status of any U-visa application filed by the mother of Minor 2 – and one addressing sentencing. The Court of Appeals affirmed the convictions, but reversed the case for resentencing. *State v. Perez*, Op. No. 2015-UP-217 (S.C. Ct. App. filed May 8, 2015). Petitions for Rehearing filed by both parties were denied, and Perez has filed his Petition for a Writ of Certiorari to which the State is herein responding.[1]

ARGUMENT

I.

The Court of Appeals properly upheld the admission of evidence of the other bad acts commited against Minor 2 under the common scheme or plan exception to Rule 404(b), SCRE, inasmuch as there was a close degree of similarity between the acts and the similarities outweighed the dissimilarities. (Questions III and IV)

BACKGROUND

In Camera Hearing – Testimony of Minor 1

Minor 1, the victim in this case, testified that when she was about seven years old, she used to be taken care of by a babysitter, Angelica, in Angelica's family home. When Minor 1 started going to Angelica's, Angelica lived in a trailer, but she later moved into a house. (JA p. 28, lines 2-6; p. 28, lines 18-23.) Angelica had two daughters, Minor 3 and her younger sister. Living with Angelica's family was a man, who was a friend of her husband. (JA p. 28, lines 7-13.) Minor 1 testified that she did not go to Angelica's anymore because Angelica's husband – Petitioner/Respondent Perez – hurt her. (JA p. 28, lines 14-17.) The first time was in the trailer, and he hurt her more than once in the trailer. (JA p. 28, line 21 – p. 29, line 3.)

[1] The State has also petitioned this Court for a writ of *certiorari* to review that part of the opinion in which the Court of Appeals found the sentences imposed to be vindictive and in violation of Perez's due process rights and remanded the case for resentencing.

Asked to tell the judge about one time he hurt her in the trailer, Minor 1 said her brother was sleeping in the living room and she and Minor 3 were playing outside. She went inside to get her PSP from Minor 3's room. (JA p. 29, lines 4-17.) As she sat on the bed, she was grabbed and taken into the closet. Once inside, without saying anything to her, he put his hands under her clothes and "stuck" his finger inside of her "front private," which she uses to go to the bathroom. (JA p. 29, line 17 – p. 30, line 9.) He let her go and she ran outside to Minor 3 and her younger sister. (JA p. 30, lines 10-13.)

On another occasion, Minor 1 and her two year old brother were inside the trailer. Her brother was sleeping, and Minor 1 was trying to go to sleep. (JA p. 30, lines 14-25; p. 32, lines 7-8.) The other children were outside. (JA p. 30, line 25 – p. 101, line 4.) Minor 1 then went to get her PSP from the bedroom farthest from the front door when he grabbed her and took her into the closet. Without saying anything, he put his hand under her clothes and touched her on her "behind private." (JA p. 31, lines 7-23; p. 32, lines 9-13.) Frightened, Minor 1 pushed her way out of the closet and ran into the living room. (JA p. 32, lines 1-6.)

One day, after Angelica's family had moved from the trailer to the house, he showed Minor 1 his "private" as the other children played. (JA p. 32, line 17 – p. 33, line 17.)

On another occasion at the house, Minor 1 and Minor 3 were playing with their PSPs when he asked one of them to help him fix the bathroom wall. Minor 1 went into the bathroom to help him. (JA p. 33, line 18 – p. 34, line 3.) He gave Minor 1 a bucket of nails to hold as he worked on the wall. When he finished, Minor 1 tried to leave but could not because he had locked the door. (JA p. 34, lines 4-9.) He then touched her on her breasts with his hands, and he bit her on one of her breasts leaving a little temporary mark. (JA p. 34, lines 9-19.)

On other occasions, he tried to touch her, but did not. (JA p. 34, lines 20-22.) One day, while all of the other children were outside, Minor 1 and her brother were inside. While her brother slept on Minor 3's bed, Minor 1 lay on it watching a movie. He came home while she

was watching the movie and chased her. To get away from him, she went under Minor 3's bed where he could not reach her. (JA p. 34, line 23 – p. 105, line 18.) On another day, Minor 1 and Minor 3 were playing hide and seek. Minor 1, not realizing that he was in a closet, went in there to hide. (JA p. 35, line 19 – p. 36, line 4.) He grabbed her and, with his hands, he touched her, under her clothes, on her skin. (JA p. 36, lines 5-13.)

Eventually Minor 1 told her mother what had happened, and they went to the police station. (JA p. 36, line 16– p. 39, line 20; p. 41, lines 6-9.)

On cross-examination during the motion hearing, Minor 1 testified that after she went to the police station, she went to see Ms. Jessica. That meeting with Ms. Jessica was recorded on video; during that meeting, she spoke of everything that had happened to her. During her later meetings with Ms. Jessica, she worked on writing a story for her mother and stepfather about everything that had happened to her. (JA p. 39, line 21 – p. 40, line 18; p. 43, lines 19-24.) During one of her meetings with Ms. Jessica, Minor 1 was asked whether Petitioner/Respondent had ever put his finger inside of her and she replied that he had not. Minor 1 explained that she had said that because she was confused about which story Ms. Jessica was talking about. (JA p. 42, line 15 – p. 43, line 18.)

Minor 1 testified on cross-examination that she did not remember the first time she went to Angelica's house to be babysat, but she thought she was out of school and it was in the summer. (JA p. 44, lines 11-20.) Her mother would take her in the morning before she went to work, and her mother would pick her up at night at around 7:00 or 8:00. (JA p. 44, line 21 – p. 45, line 12.) Sometimes Petitioner/Respondent would be at work and not in the home while Minor 1 was there, but usually he came home from work at night before she left. (JA p. 45, lines 13-25.) The things that he did to her, he did after he came home from work. (JA p. 46, lines 1-4.) The second day she was in the home of Petitioner/Respondent and Angelica, Petitioner/Respondent put his finger inside her and started to touch her while they were in the

closet. (JA p. 46, line 5 – p. 47, line 2.) He made no threats, and Minor 1 did not remember him making any promises to her. (JA p. 47, lines 3-11.) When this happened, Minor 3 was outside with her younger sister, but Minor 1 did not know where Angelica was. (JA p. 47, lines 17-24.) The other man who lived in the home, Samuel, was at work. (JA p. 47, line 25 – p. 48, line 6.)

Minor 1 was unable to remember how much time passed between the first and second time Petitioner/Respondent assaulted her. (JA p. 48, line 22 – p. 49, line 7.) But on the second time, Minor 3, her younger sister, and her brother were outside at the food truck. Minor 1's brother was sleeping, and she was trying to sleep when she decided to retrieve her PSP from the family's bedroom. (JA p. 49, lines 8-14.) Petitioner/Respondent did not use any weapons, he did not threaten to use any weapons, and he made no threats to her. (JA p. 49, lines 17-23.) While Petitioner/Respondent sometimes bribed her with money, Minor 1 did not remember him doing so on this occasion. (JA p. 49, line 24 – p. 50, line 6.)

Minor 1 testified on cross-examination these were the only two incidents that happened in the trailer. (JA p. 50, lines 7-14.) She was not sure of the order in which the assaults took place in the house, but the worst thing that happened in the house was when she went in the bathroom to help Petitioner/Respondent and he bit her on her breast leaving a little temporary mark. (JA p. 50, line 13 – p. 51, line 11.) She did not tell her mother until at least a month after that incident. (JA p. 51, lines 12-14.)

She testified further on cross-examination about the incident involving Petitioner/Respondent showing her his private part. At that time, Minor 3 was sitting on the other side of the couch from where Minor 1 was sitting and her younger sister was playing in front of the television. (JA p. 51, line 22 – p. 52, line 12.) She also repeated that during the incident when Petitioner/Respondent was chasing her around the house, she went under Minor 3's bed. Petitioner/Respondent did not touch her on that occasion, but he frightened her. The other children were outside. (JA p. 52, line 13 – p. 123, line 11.) On the occasion when Minor 1

and Minor 3 were playing hide and seek, she hid in the closet and the man, who was already in the closet, grabbed her. It was not Samuel. Minor 3 was looking for her, but Minor 1 did not know where Minor 3's sister or mother were. (JA p. 53, line 12 – p. 54, line 14.)

On redirect examination, Minor 1 explained that when she told the defense attorney that she was thinking about a different story she meant a different time. (JA p. 57, lines 16-19.) Minor 1 also said that Petitioner/Respondent did not go to work every day, that there were times when he was home all day, and she occasionally saw him on Saturdays. (JA p. 57, lines 20-25.) She also said that during the summer, she would be at Angelica's for the whole day. (JA p. 58, lines 1-4.) When asked to explain who she was referring to when she spoke of the man's closet, she said she was talking about Samuel and that the closet was his room. But she also said that the man who came into the closet was not Samuel; it was Petitioner/Respondent. She said that she did not know Petitioner/Respondent's name at the time; she only recognized him by his face and she knew that he was Minor 3's father. (JA p. 58, lines 5-23.)

In Camera Hearing – Testimony of Minor 2

Minor 2, who was a few weeks shy of her 11th birthday when she testified, said she used to go to a babysitter whose name she cannot remember, but the babysitter had children including Minor 3. (JA p. 59, line 21 – p. 60, line 17.) Minor 2 does not go to that babysitter's anymore, but she does not know why. (JA p. 60, line 20 – p. 61, line 9). A long time after Minor 2 stopped going to that babysitter, she was in a store with her mother when she told her some bad things had happened to her at that babysitter's house, once in the room of another man who lived there and once in the living room. (JA p. 61, line 10 – p. 62, line 16.)

Testifying about one of the occasions, Minor 2 said she was in the living room watching High School Musical Three, and she fell asleep. The man came up behind her and touched her in her front private, but she did not remember if it was on top of or under her clothes. The man said nothing to her. (JA p. 62, line 17 – p. 63, line 13.) On another day, when Minor 2 was in

the room by the kitchen at the babysitter's house, the man touched her in her "front privates" and her "back privates." He did not say anything to her, and she did not say anything to him. (JA p. 63, line 18 – p. 64, line 7.) On another occasion, Minor 2 was in the wife's bedroom at the babysitter's house when the man told her that, if she told anyone, he would keep being mean to her, and, if she did not tell anyone, he would stop being mean to her. Minor 2 told no one until she told her mother in the store. (JA p. 64, lines 8-21.)

On cross-examination, Minor 2 said that she knew that Minor 1 was in court because she says Petitioner/Respondent also did some things to her, but she does not know what she says he did. (JA p. 68, lines 11-25.) Minor 2 said she had not talked to Minor 1 about what Petitioner/Respondent did to her, and did not remember saying anything, about what Minor 1 was saying Petitioner/Respondent had done to her, during her recorded interview at the Lowcountry Children's Center (LCC). (JA p. 69, lines 1-18.) Minor 1 reported what happened to her before Minor 2 ever told anyone what had happened to her. She said that when her mother had asked her if anything had happened to her, she had said no. She did not tell her mother until sometime later, when she was in a grocery store and upset with her mother. (JA p. 69, line 19 – p. 71, line 17.)

Minor 2 was cross-examined extensively about her recorded LCC interview. While she could not remember some of what had happened during the interview and what she had said, she did remember saying that Petitioner/Respondent had touched her more than once, she thought Petitioner/Respondent was in love with her, one time he waited for her to arrive from school, one time his wife was outside, and that one incident occurred in another man's room. She also testified that during the LCC interview she said that one time, at around 1:00 in the middle of the day, Petitioner/Respondent put his penis inside her butt and then he went up and down once he was inside her. (JA p. 71, line 18 – p. 76, line 14.) Minor 2 said that, during her LCC interview, she said Petitioner/Respondent threatened her to get her to go into the room

with him on that occasion, but that he did not threaten her with a knife. She did not remember saying, during her LCC interview, that he used a knife and she could not remember what he threatened her with. (JA p. 75, lines 7-19.) Minor 2 could not remember who was in the house when this happened and thought she was alone in the house with Petitioner/Respondent. But she testified she remembered saying during her LCC interview that other people – the babysitter and her children – were there, but that they were sleeping. (JA p. 76, line 15 – p. 77, line 18; p. 79, lines 14-24.) Minor 2 did not scream out loud when this happened, but cried in silence. (JA p. 77, lines 19-23.)

Minor 2 testified that she did not say anything during her LCC about Petitioner/Respondent bribing her with anything or biting her. Petitioner/Respondent did not bite her on her breast. (JA p. 77, line 24 – p. 78, line 13.) Minor 2 testified that, in addition to the other things she already testified about, Petitioner/Respondent had touched her one day when she was helping him fix a doorknob. (JA p. 80, line 21 – p. 81, line 18.) Petitioner/Respondent did not do anything to her when she was playing games with another child. (JA p. 80, lines 17-20.)

Minor 2 testified a man and a woman showed her the photo line-up, but she did not remember their names. When they showed her the photos, they told her to find the man who had done something wrong to her. She could not remember how long it took or what she said when she identified the man. (JA p. 78, line 25 – p. 78, line 12.)

On redirect, Minor 2 testified that no one else was in the room when Petitioner/Respondent did these things to her. When she said 1:00, she meant when it was light outside. She understood a.m. to be nighttime and p.m. to be in the morning. (JA p. 81, line 25 – p. 82, line 10.)

In Camera Hearing – Argument and the Trial Court's Ruling

After Minor 1 and Minor 2 testified, the trial court asked the State for the time frame as

to when Angelica babysat the two girls. The State informed the court that Minor 1 began going to Angelica's in December 2009 until July 2010, and Minor 2 was at Angelica's from May 2010 to the beginning of July 2010. (JA p. 82, line 18 – p. 83, line 19.)

Defense counsel then told the trial court there were a lot of inconsistencies between Minor 2's testimony during the in camera hearing and what she had said previously, including that during the LCC interview, Minor 2 had said she believed she had been raped by Petitioner/Respondent, but during her in camera testimony she only said that he touched her front and back parts while she was on the bed. (JA p. 84, lines 4 – p. 86, line 10; p. 87, line 10 – p. 88, line 2.) The trial court noted that the State had agreed not to go into that, and the State said that it purposely did not ask Minor 2 about that. (JA p. 85, lines 15-19.) Defense counsel argued the evidence was not admissible under Rule 404 (b), SCRE, as evidence of a common scheme or plan because while the evidence may establish that Petitioner/Respondent engaged in inappropriate touching or sexual conduct with the two girls, he went about it differently in regard to each. (JA p. 88, line 4 – p. 89, line 3; p. 90, line 12 – p. 95, line 3.)

The State responded to the defense's argument by referring to a chart it had created to chart the similarities in the conduct against the two minors and actually discussing them. The similarities supported by the record included the following.

Factor	Minor 1 (Charged Crimes)	Minor 2 (Bad Act Evidence)
Age	8-9	8
Gender	Female	Female
Relationship of Petitioner/Respondent	Babysitter's Husband	Babysitter's Husband
Time	Various Times of Day	Various Times of Day
Place	Petitioner/Respondent's Home	Petitioner/Respondent's Home
Setting	• When Alone; • While Watching Movie, Helping Petitioner/Respondent, or Playing; • When Caretaker Not Present • When child separated from other children (or from other awake children) or when other children	• When Alone; • While Watching Movie, Helping Petitioner/Respondent, or Playing; • When Caretaker Not Present • When child separated from

	could not see her	other children (or from other awake children) or when other children could not see her
Sex Acts/ Type of Battery	• Fondling – touching "private" parts on and under clothes • Digital Penetration	• Fondling – touching "private" parts on and under clothes • Intercourse
Fondling	Over and Under Clothes	Over and Under Clothes
Care Giver	In care of Petitioner/Respondent's Wife when occurred	In care of Petitioner/Respondent's Wife when occurred
Timeframe	March 1, 2010 – July 10, 2010	May 1, 2010 – July 1, 2010
Friends	Friends with Petitioner/Respondent's Daughter	Friends with Petitioner/Respondent's Daughter
Coercion	Bribery Mentioned	Threatened with Knife; Threatened with Continuation of Bad Things

(*See* evidence summarized at pp. 4-10; JA p. 95, line 4 – p. 98, line 24; Court's Exhibit 1 at p. 558.)

Defense counsel discussed the five factors set out in the *Wallace* case that he maintained the trial court had to consider to decide the admissibility of other bad acts evidence. The defense conceded that three of the five factors – age of the victims, the relationship between the victims and perpetrator, and location of the abuse – weigh in favor of the State, but argued that neither the use of coercion or threats nor the manner of occurrence was the same. (JA p. 99, line 13 – p. 101, line 13.) The State countered that the means by which Petitioner/Respondent gained access was essentially the same – he took advantage of the fact that they were in his home and manipulated them as necessary to accomplish the acts – and that a lot of the touching was the same even though the penetration was different. (JA p. 101, line 25 – p. 105, line 15.)

The trial court ruled that the proffered evidence, excluding any evidence of actual intercourse with Minor 2, would be admissible. The trial court found that, as required by *State v. Wallace*, 384 S.C. 428, 683 S.E.2d 275 (2009), and as set out by the prosecution in their chart marked as Court's Exhibit 1, there was a close similarity between the bad acts against the two girls, the ages of the victims, the relationship between the victim and the perpetrator, the location where the abuse occurred, and the manner in which the abuse occurred such as the type

of sexual battery (even if the coercion and threats were not necessarily similar). (JA p. 113, line 17 – p. 115, line 25.)

On appeal, the Court of Appeals upheld the trial court's ruling as follows.

> Highlighting the differences among the two victims' testimony, Perez argues the trial court erred in admitting evidence of any alleged prior bad acts he committed against Minor 2 because there was no evidence demonstrating a common scheme or plan pursuant to Rule 404(b), SCRE. We disagree.
>
> > 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).
>
> *State v. Wallace*, 384 S.C. 428, 433, 683 S.E.2d 275, 277-78 (2009) (internal citation omitted).
>
> We find the trial court did not err as to this issue. Contrary to Perez's arguments, the evidence demonstrates Perez's conduct with both minors was substantially similar in nature. Here, as in *Wallace*, the similarities between the acts includes Perez's relationship to the victims (their babysitter's husband), abuse beginning at about the same age, abuse occurring at the babysitter's home, and abuse occurring while the victims played and Perez's wife attended to other children. *Id.* at 434, 683 S.E.2d at 278. Consequently, the similarities outweigh any dissimilarities; therefore, Minor 2's testimony was properly admitted. Moreover, the trial court redacted dissimilar details of sexual conduct—Minor 2's testimony regarding intercourse with Perez—to avoid unfair prejudice to Perez. Accordingly, the probative value of Minor 2's testimony as redacted substantially outweighs the danger of unfair prejudice. Rule 403, SCRE.

State v. Perez, Op. No. 2015-UP-217 at 2 (S.C. Ct. App. May 8, 2015).

ARGUMENT

A. Petitioner/Respondent Has Failed to Properly Preserve or Present These Issues to This Court for Appellate Review.

In his Petition, Perez argues that the Court of Appeals erred in affirming the admission of the other bad acts evidence because: (1) the Court did not cite to *State v. Lyle*, 125 S.C. 406, 118 S.E.803 (1923), (2) the Court relied only upon *State v. Wallace*, *supra*, which Perez argues was

wrongly decided and should be overturned, and (3) the facts before the trial court did not fit any exceptions to the prohibition of prior bad act evidence as set forth in *State v. Lyle*, *supra*, and Rule 404(b).

The State first notes that Petitioner/Respondent has not preserved the issue of whether Wallace is wrongly decided or that the Court of Appeals had to cite to and utilize *State v. Lyle*, *supra* in analyzing the issue.

> "It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." *Wilder Corp. v. Wilke,* 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). "There are four basic requirements to preserving issues at trial for appellate review. The issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity." Jean Hoefer Toal et al., *Appellate Practice in South Carolina* 57 (2d ed.2002).

State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912-913 (Ct. App. 2004); see also *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.,* 372 S.C. 295, 301-302, 641 S.E.2d 903, 907 (2007). Inasmuch as at the defense did not make this argument at trial and, in fact, based its trial argument on its claim that the defense failed to satisfy all of the factors set out in *State v. Wallace, supra*, this issue and argument was not preserved for appeal. Moreover, other than mentioning in a footnote in the Final Brief of Appellant that Perez did not believe *Wallace* is consistent with *Lyle*, Petitioner/Respondent did not argue before the Court of Appeals that the trial court erred in analyzing the admission of the challenged evidence under *State v. Wallace*, *supra*, or that *Wallace* is not – by virtue of being an alleged improper modification of Rule 404(b) since the change the defense alleges it makes was not submitted to the General Assembly – good law. This issue has not been properly preserved for review by this Court.[2]

[2] The State is aware that Perez, in footnote 5 of his brief before the Court of Appeals, essentially asserts that the Court of Appeals cannot overrule a Supreme Court opinion. That is true, but that does not remove the obligation of an appellant to comply with the rules of issue preservation.

Moreover, while Perez states in his Petition that "[t]he facts before the trial court did not fit the exceptions as set forth in Lyle (and therefore 404(n))", he fails to include any factual argument in support of the statement. The trial court provided a factual basis for its ruling, as did the Court of Appeals. The long established rules of appellate practice require that, in order for an appellant to obtain appellate review of a preserved issue, it must be argued. Rule 208(b), SCACR; *Woodson v. DLI Properties, LLC*, 406 S.C. 517, 529, 753 S.E.2d 428, 434 at n. 11 (2014). In his petition, Perez does not attempt to explain how the Court of Appeals erred in its finding of similarities between the acts against both minors. He simply states that the facts did not support the admission of the evidence and the Court of Appeals must be reversed. Through his failure to demonstrate to this Court why the Court of Appeals erred in finding the evidence supported the trial court's ruling, he has abandoned the issue. *Id.*

B. The Court of Appeals Did Not Err in Relying upon *State v. Wallace, supra,* in its Analysis

In its opinion, the Court of Appeals cited to this Court's opinion in *State v. Wallace*, *supra*, for the test to use in deciding whether other bad acts evidence is admissible under the common scheme or plan exception. This Court's opinion in *Wallace* is good law – it has not been reversed, overruled or set aside. Moreover, there is no support for Perez's assertion that Wallace was wrongly decided. The analysis utilized and set out in *Wallace* – the analysis of the similarities and dissimilarities between the charged crime and other bad acts to determine if there is a close degree of similarity and a determination as to whether the similarities outweigh the dissimilarities – is not new.[3] The analysis used by this Court in in *Wallace* is the same that has been used for over 35 years by the Courts in our state. See, *e.g.*, *State v. Rivers*, 273 S.C. 75, 78, 254 S.E.2d 299, 300 (1979) (because the admission of unconnected sexual conduct establishes a defendant's

[3] It is for this reason that Perez's argument that the Court's opinion in *Wallace* was the functional amendment of Rule 404(b) without the Court having followed the proper procedure must fail. This analysis has been around since this Court, in *State v. Lyle*, *supra*, provided for the common scheme or plan exception.

character or propensity to engage in the alleged sexual conduct, evidence of a defendant's sexual conduct with another is admissible under the common scheme or plan exception only if there is there is close similarity of the charged offense and the other conduct such that it enhances the probative value of the evidence so as to overrule the prejudicial effect). See also *State v. Hallman,* 298 S.C. 172, 379 S.E.2d 115 (1989); *State v. McClellan*, 283 S.C. 389, 323 S.E.2d 772 (1984). There was no error in the Court of Appeals' use of *Wallace* in its analysis of the issue in Perez's case.

Moreover, inasmuch as the South Carolina Rules of Evidence, which became effective September 3, 1995 (Rule 1103, SCRE), govern the admission of evidence in the courts of this state, it was not necessary for either the trial court or the Court of Appeals to cite to or rely upon the common law – including *State v. Lyle*, *supra* – as it existed prior to the enactment of the rules. While it may be helpful to counsel and the courts to look to *State v. Lyle*, *supra*, and its progeny, when determining whether evidence is admissible under Rule 404(b), *see State v. Burroughs*, 328 S.C. 489, 492 S.E.2d 408, 412-413 (Ct. App. 1997) (it is useful to look at *res gestae* cases when determining whether statement is admissible as excited utterance under Rule 803 (2), SCRE).

C. The Trial Court Properly Upheld the Admission of the Other Bad Acts Evidence because It Fell under the Common Scheme or Plan Exception in Rule 404(b)

As summarized above, the evidence presented to the trial court during the *in camera* hearing established that the similarities in the age of the victims when the abuse occurred, the relationship between the victims and Petitioner/Respondent, the location and setting of the abuse; and the types of sexual abuse far outweighed any dissimilarities. The trial court properly admitted the bad act evidence.[4] *State v. Scott*, 405 S.C. 489, 748 SE.2d 236 (Ct. App. 2013) (both

[4] The last step in the analysis on the admissibility of bad act evidence is under Rule 403, SCRE – whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. Here, while Petitioner/Respondent argued before the trial court that the evidence

victims around eight years old when abuse started, abuse occurred when Scott was only adult present, abuse occurred when child spent night at Scott's residence, abuse occurred when one child separated from others for extended period, and abuse occurred at bath time); *State v. Atieh*, 397 S.C. 641, 725 S.E.2d 730 (Ct. App. 2012) (similarities, which far outweighed the differences, included both victim were female, they were aged 16 and 17-18 when the inappropriate touching occurred, both victims were employees of Atieh, the touching all took place at the restaurant primarily around the sink or cooler, no direction coercion or threat, touching for both included similar conduct); *State v. Wallace, supra* (similarities between acts include perpetrator's relationship to victims, abuse beginning at about same age, abuse occurring in family home when mother was absent, and admonishment not to tell because no one would believe them); *State v. Blanton*, 316 S.C. 31, 446 S.E.2d 438 (Ct. App. 1994) (all victims were female, all were approximately same age, each subjected to requests for same type of sex acts, all acts occurred either in Blanton's house or his vehicle, and Blanton took advantage of relationship each victim for sexual gratification); *State v. Hallman,* 298 S.C. 172, 379 S.E.2d 115 (1989) (all victims were foster children of similar age and types of sexual batteries were similar); *State v. McClellan, supra* (both victims were McClellan's daughters, were same age at time of initial abuse, and McClellan gave same explanation for actions).

II.

The Court of Appeals did not err in finding that any error in the exclusion of evidence of the U-visa status of Minor 2's mother was harmless beyond a reasonable doubt because Petitioner/Respondent failed to lay a proper foundation for the admission of such evidence rendering it irrelevant, it would have caused confusion, and any probative value would have been substantially outweighed by the danger of unfair

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failed to survive this test, he has not challenged the trial court's adverse ruling on appeal. The trial court's ruling that the bad act evidence survived the Rule 403 analysis is thus the law of the case on that point. See *Kinard v. Richardson*, *supra*; *State v. Fripp*, *supra.* In addition, the limiting instruction given by the trial court minimized the possibility of any undue prejudice to Petitioner/Respondent. (R. p. 249, lines 1-15.)

prejudice. (Questions II)

BACKGROUND

During the *in camera* hearing on motions held at the beginning of the trial, the defense told the trial court that they had a motion to be allowed to question the victim's mother about her application for a U visa and the prosecution's involvement in that process. (JA p. 109, line 8 p. 110, line 2.) Based upon the State's representation that the victim's mother had applied for the U-visa, the trial court granted the motion. (JA p. 110, line 3 – p. 112, line 3.)

Thereafter during the trial, Minor 1's mother testified that, at some point after the crime had been reported and Minor 1 had been interviewed, she went to tell the North Charleston Police Department victim advocate that they were planning on moving from the area. At that time, the advocate told her about U visas, which were available for victims of crime. (JA p. 212, line 19 – p. 213, line 11.) Minor 1's mother, who had previously not known about U visas, testified that she did not want to think that she would be gaining anything as a result of what had happened to Minor 1. (JA p. 213, lines 12-18.) However, Minna took her to see a lawyer, and the lawyer explained about how U visas worked and why U visas were allowed. (JA p. 213, lines 19-24.). When asked if she ended up going through with a U visa, Minor 1's mother testified, "Yes. We did it. We filed an application later on." (JA p. 213, line 24 – p. 214, line 1.)

On cross-examination, Minor 1's mother was cross-examined about her entry into the United States and U visas. She testified that she illegally entered the United States in 2000 and, without a U visa, she was subject to deportation. She testified that, with a U visa, she is allowed to stay in the United States. She is also allowed to receive and does receive food stamps. (JA p. 220, line 8 – p. 222, line 3; p. 227, line 17 - p. 228, line 13.)

The State also presented the testimony of the mother of Minor 2. (JA p. 251, lines 18-23.) At the time of the trial, Minor 2 was about to be 11 years old. (JA p. 251, line 24 – p. 252, line 2.) After the defense cross-examined her about what had happened to Minor 2, she was

asked if she had legal status to be in the United States. She replied she did not. (JA p. 259, lines 23-25.) At that point, the trial court *sua sponte* called the attorneys up to the bench during which precluded the defense from questioning the Minor 2's mother any further about her immigration status on the ground that it was irrelevant. (JA p. 260, lines 3-20.)

After Minor 2's mother left the stand, the jury was excused so that the defense could make a proffer of their cross-examination of her on the U visa and her immigration status. (RJA p. 261, line 4 – p. 263, line 6.) At that time, she testified that she did not have legal status and was at risk for deportation or removal. She testified that, having been told recently by someone where Minor 2 was examined, she knew what a U-visa was. She testified that no one in the Solicitor's Office told her, but that it was in some of the information sheets she received when Minor 2 was interviewed. She testified she had applied for the U-visa. The Court reiterated its position that the testimony was irrelevant under Rules 403 and 611, SCRE, as well as *State v. Jennings*, 322 S.C. 360, 474 S.E.2d 812 (1996). (JA p. 263, line 9 – p. 265, line 18.)

On appeal, the Court of Appeals found the trial court erred in restricting the cross-examination of Minor2's mother, but found the error to be harmless.

> Here, the trial court erred in declining to allow cross-examination regarding Mother 2's immigration status and U visa application. Despite the trial court's finding otherwise, there is no question Mother 2's veracity and potential bias was an important issue. Any evidence showing Mother 2 applied for or obtained the visa because her daughter was a victim of abuse and they both assisted with the prosecution was relevant impeachment evidence. Mother 2's immigration status and possible visa application was relevant to any theory that the victims falsely alleged these crimes in an attempt to gain citizenship for their parents. Further, even accepting Minor 2's testimony as true, Mother 2's U visa testimony was relevant to establish bias by demonstrating Mother 2 agreed to participate in the investigation or encouraged Minor 2 to participate in order to obtain the visa.
>
> However, we find the error was harmless beyond a reasonable doubt. Perez proffered no evidence Mother 2 knew about U visas before she reported Perez's acts against Minor 2. Without such evidence, Mother 2's undocumented status made it less likely she would falsely report a crime because this would bring her to the

> State's attention and possibly lead to her deportation. Moreover, nothing in Mother 2's proffered testimony suggests the State's recommendation that Mother 2 obtain a U visa was quid pro quo for her or Minor 2's testimony. Mother 2 denied someone from the solicitor's office put her in contact with an attorney to assist with the application. She also denied "a victim advocate or helper" put her in touch with an immigration attorney. She simply stated she found out about the attorney assisting with the application "[w]hen we went for [Minor 2] to have her questioning and exam[,] they gave us several information sheets and that was one of them." Also, unlike Minor 1's mother, Mother 2 denied having applied for other governmental benefits such as food stamps since she applied for the U visa. Therefore, Mother 2's proffered testimony does not suggest "[Mother 2] was receiving assistance from the State in exchange for her daughter's testimony," or that her "testimony against Perez was 'bought and paid for' by the State via U [v]isas" as Perez argues. *See Mizzell*, 349 S.C. at 334, 563 S.E.2d at 319 ("In determining whether an error is harmless, the reviewing court must review the entire record to determine what effect the error had on the verdict." (quotation marks and citation omitted)).

State v. Perez at pp. 3-4.

ARGUMENT

Evidence must be relevant to be admissible. Rule 401, SCRE. The requirement of relevance means that the evidence must tend to make any fact of consequence more or less probable than it would be without the evidence. *Id.*

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

(Citations omitted; emphasis in original.) *State v. McEachern*, 399 S.C. 125, 140-141, 731 S.E.2d 604, 611-612 (Ct. App. 2012). However, evidence that is relevant is still subject to exclusion if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the

issues, or misleading the jury. Rule 403, SCRE.

The jury was told, through the testimony of both Minor 1's mother and a victim advocate, that U visas are available for illegal immigrants who are victims of crime. Petitioner/Respondent was fully allowed to cross-examine the mother of Minor 1, the victim in this case, about her application for a U visa. The jury was not told of any charges related to Minor 2. Thus, the questions pertaining to Minor 2's mother's immigration status and her application for a U visa were irrelevant, and would actually have introduced confusion into the trial.[5]

Moreover, while the right of a criminal defendant to cross-examine the witnesses against him includes the opportunity to show a witness is biased, *Pennsylvania v. Ritchie,* 480 U.S. 39 (1987), the right is not absolute. A defendant must make a plausible showing of alleged bias, with a factual basis for support. *See Commonwealth v. Sealy*, 467 Mass. 617, 6 N.E.3d 1052 (2014). Here – as in *State v. Buccheri-Bianca*, 233 Ariz. 324, 312 P.3d 123 (2013) – nothing in the record shows that Minor 2 or her mother "knew about U–Visas" when the abuse was first reported. In fact, the testimony establishes that Minor 2's mother did not know until sometime after Minor 2 was forensically interviewed and know only after reviewing papers she had been given at the time. She testified at the trial, which was about three years after the conduct, that she had only recently found out about U-visas and applied for one. Although an alien cannot be eligible for a U–Visa unless the underlying crime has first been reported, the great length of time here, as in *Buccheri-Bianca, supra*, between when the molestation was first reported and the time she filed her application supports the court's conclusion that the possibility of obtaining a U–Visa was not relevant to the accusation.

In addition, the Court of Appeals omitted to engage in a Rule 403 analysis. In light of public debate and sentiment about illegal immigrants, the probative value of any evidence of

[5] And for this reason, this limitation of cross-examination did not unfairly prejudice Appellant and does not constitute reversible error. See *State v. Brown*, 303 S.C. 169, 399 S.E.2d 593 (1991).

such would have been substantially outweighed by the danger of unfair prejudice. The State, like a defendant, is entitled to a fair trial.

> The law, as we have seen, is sedulous in maintaining for a defendant charged with crime whatever forms of procedure are of the essence of an opportunity to defend. Privileges so fundamental as to be inherent in every concept of a fair trial that could be acceptable to the thought of reasonable men will be kept inviolate and inviolable, however crushing may be the pressure of incriminating proof. **But justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true.**

(Emphasis added.) *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934).

III.

The Court of Appeals did not abuse its discretion in remanding this case to the trial court for resentencing inasmuch as there is no precedent requiring that a new trial judge conduct any resentencing and the Court was clear in its direction that the trial judge is not to consider Petitioner/Respondent's exercise of his right to a jury trial. (Questions II)

Prior to the trial of this case (and prior to hearing the witnesses testify), the parties discussed a guilty plea with the trial court. During that discussion, the trial court told counsel that if he were to try Respondent without a jury, he would find him guilty of lewd act and ABHAN. The trial court also indicated to counsel that if Respondent were to plead guilty on the indictment for lewd act (with the other charge being dismissed), the trial court would impose a sentence in the 10-15 year range. (JA p. 554, line 16 – p. 555, line 22.)

At the conclusion of his jury trial at which the victim and others testified, Respondent was found guilty of lewd act on a minor and ABHAN, as a lesser-included offense on the indictment for CSC with a minor first degree. (JA p. 535, line 2 – p. 536, line 12; p. 537, lines 11-19.) These offenses of conviction carried, respectfully, sentences of up to 15 years and up to 10 years, meaning that Respondent faced a possible maximum of 25 years if sentenced

consecutively. The trial court sentenced Respondent to a 15-year term of incarceration on the lewd act conviction and a consecutive 10-year sentence on the ABHAN conviction for a total, cumulative sentence of 25 years. The trial court also ordered that Respondent be placed on the Central Registry of Child Abuse and Neglect for the lewd act conviction. (JA p. 553, line 6 – p. 554, line 5.) Thereafter, Perez challenged the sentence as vindictive, which the trial court denied.

The Court of Appeals, without setting forth the facts upon which it relied, agreed with Perez.

> 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. The trial court's comments justifying the increased sentence do not convince us that the sentence was imposed free of an underlying punishment for Perez going to trial. Accordingly, we remand for resentencing.

State v. Perez, Op. No. 2015-UP-217 at 5. The Honorable John Few, Chief Judge, disagreeing with the majority's analysis of and conclusion on the sentencing issue, filed a concurring opinion in which he essentially dissented from the majority's analysis and holding on the sentencing issue.[6] Chief Judge Few found it was unclear whether the judge imposed an improper sentence and he would remand for the trial judge to clarify the basis upon which he sentenced Perez. *Id.*, at 6-7.

Petitioner/Respondent has petitioned this Court to modify the decision of the Court of Appeals to the extent it remands the case to the same judge for resentencing.

While research has not disclosed a case on point in South Carolina, there are cases from other jurisdictions in which appellate courts have determined that, when a sentence is found to be the result of vindictiveness, the case should be remanded to a different judge for

[6] As previously noted, the State has filed a Petition for Writ of *Certiorari* on the sentencing issue in which it argues the appellate record did not support the Court of Appeals' finding of vindictiveness and a potentially improper basis for sentencing.

resentencing. *See, e.g., Fudge v. State*, 45 So. 2d 982 (Fla Ct. App. 2010). However, in the absence of any such requirement and in the absence of any actual showing of why the trial judge could not fairly resentence Petitioner/Respondent, the Court of Appeals did not err in remanding this case to the same trial judge for resentencing.

IV.

The Court of Appeals did not err in failing to reverse Petitioner/Respondent's convictions because he did not receive a structurally unsound trial. (Question I)

As demonstrated above, the Court of Appeals did not err in upholding the trial court's admission of evidence of other bad act evidence and in finding no prejudice to Petitioner/Respondent as the result of the restriction on his cross-examination of Minor 2's mother. Therefore, these evidentiary rulings did not deprive him of a constitutionally fair trial and the Court of Appeals properly upheld his convictions.

CONCLUSION

For the reasons stated, the State asks this Court to deny Petitioner/Respondent's Petition for a Writ of *Certiorari*; if it is inclined to grant it, to grant it only for the purpose of reversing that portion of the Court of Appeals' opinion in which it found the trial court erred in excluding evidence of the U-visa status of Minor 2's mother and issuing an opinion holding that prior to the admission of the immigration or U-visa status of a party or witness, the offering party must lay a proper foundation rendering the evidence relevant, and, even if the trial court finds such evidence relevant, it must determine whether it will cause confusion and whether the probative value would have been substantially outweighed by the danger of unfair prejudice; and for any other and further relief as this Court deems appropriate.

Respectfully submitted,

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August 24, 2015

Columbia, South Carolina

THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM CHARLESTON COUNTY

Court of General Sessions
J.C. Nicholson, Circuit Court Judge

RECEIVED

AUG 27 2015

S.C. SUPREME COURT

Appellate Case No. 2015-001576

The State of South Carolina,

Respondent/Petitioner,

v.

Venancio Diaz Perez,

Petitioner/Respondent.

PROOF OF SERVICE

I certify that I have today served a copy of the State's Return to Petition for a Writ of Certiorari on Petitioner/Respondent, Venancio Diaz Perez, by depositing such in the United States Mail, first class postage prepaid, addressed to his attorney of record, Jason Scott Luck, Esquire, Seibels Law Firm, P.A. 38 Broad Street, Suite 200, Charleston, South Carolina 29401, and by depositing one copy of each in the United States Mail, first class postage prepaid, addressed to his co-counsel, Robert M. Dudek, Chief Appellate Defender, S.C. Commission on Indigent Defense, Division of Appellate Defense, Post Office Box 11589, Columbia, South Carolina 29211.

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August 24, 2015
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