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THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. 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Withdrawn, Substituted, and Refiled May 8, 2015
Appellate Case No. 2015-001576

The State of South Carolina.....Respondent/Petitioner,

v.

Venancio Diaz Perez.....Petitioner/Respondent.

# PETITIONER/RESPONDENT VENANCIO DIAZ PEREZ'S REPLY TO THE STATE'S RETURN TO PEREZ'S PETITION FOR A WRIT OF *CERTIORAI*

Jason Scott Luck
jluck@seibelsfirm.com
SEIBELS LAW FIRM, P.A.
38 Broad Street, Suite 200
Charleston, SC 29401
843.722.6777 (phone)
843.722.6781 (telefax)
and
Robert M. Dudek
rdudek@sccid.sc.gov
S.C. Comm'n on Indigent Defense
1330 Lady St., Suite 401
Columbia, SC 29201
803.734.1330 (phone)
Attorneys for Petitioner/Respondent
Venancio Diaz Perez

## ARGUMENT IN REPLY

Petitioner/Respondent Venancio Diaz Perez submits the following Reply to the State's Return to Perez's Petition for a Writ of *Certiorari*:

### A. Reply to State's Argument I (responsive to Perez's Questions III & IV)

While acknowledging that the Court of Appeals does not have the power to change the law, the State nonetheless argues that Perez should have requested the Court of Appeals to reverse the Supreme Court in order to preserve Perez's argument to overturn Wallace. (Return p. 14). This course of action is futile and a waste of judicial and litigant resources. It is well-settled the law does not require a futile act. See Black's Law Dictionary 1730 (8th ed. 2004) (*Lex neminem cogit ad vana seu inutilia peragenda* - the law forces no one to do vain or useless things.); Staubes v. City of Folly Beach, 339 S.C. 406, 529 S.E.2d 543 (2000) (futile act not necessary to preserve error). Furthermore, the SCACR require that a party not engage in frivolous appeals, and requesting relief from the Court of Appeals that it by law cannot grant is frivolous. Rule 269, SCACR; see also Jean Hoefer Toal, et al., Appellate Practice in South Carolina 12 (2nd ed. 2002) ("The Court of Appeals is an error-correction court, whereas the Supreme Court is a law-giving court.").

Perez did preserve the issue of the inapplicability of Wallace to the fullest extent possible without running afoul of Rule 269, SCACR: in the Final Brief (R. pp. 566, 570, 577), the Final Reply Brief (R. pp. 640, 642), the Petition for Rehearing (R. pp. 678-79), and the Petition for Rehearing *En Banc* (R. pp. 691-92). Further Perez's trial counsel asserted that the trial court's ruling did not comply with Rule 404(b) (and thus Lyle,

which it incorporates [see below]): objecting when necessary (R. pp. 240, 249) and moving for a mistrial (R. p. 468).

While the State is correct that Lyle is an evidence case that pre-dates the Rules of Evidence, Lyle, unlike the cases cited by the State (Return p. 16), was explicitly incorporated into the rule. Rule 404, SCRE, Notes (2014) ("...the South Carolina rule [404(b)] limits the use of evidence of other crimes, wrongs, or acts to those enumerated in State v. Lyle..."). Lyle is part and parcel of Rule 404, it is alive and well, and the Court of Appeals and trial court were incorrect in not applying it.

**B. Reply to State's Argument II (responsive to Perez's Question II)**

In Argument II, the State does not show this Court how the Court of Appeals met its "heavy burden" of proving the excluded U visa testimony was "harmless beyond a reasonable doubt." See 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."). The Court of Appeals found that the exclusion of Mother 2's U visa evidence violated Perez's rights under the Confrontation Clause, and the State apparently agrees, because it did not challenge this ruling. See 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). What is properly before this Court is whether there was "no reasonable *possibility*" the exclusion of Mother 2's U visa evidence contributed to the verdict against Perez. See 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).

The state does not explicitly address harmless error in its response.[1] It does not offer any analysis under the Van Arsdall factors, and does not address Perez's analysis under these factors (Perez Pet. pp. 12, 15). See 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)). It does not address the case law Perez cites that shows that an error that impairs a defense theory creates a reasonable possibility that the error contributed to the verdict (Perez Pet. pp. 12-15). The State does not address the similarities of this case to U.S. v. Watson, 703 F. 3d 684 (4th Cir. 2013) and State v. Del Real-Galvez, 270 Or.App. 224, __ P.3d __, 2015 WL 1500246 (Or. Ct. App. filed April 1, 2015) (Perez Pet. pp. 13-15). See also State v. Valle, 298 P.3d 1237 (Or. Ct. App. 2013) (en banc) (reversing a conviction due to excluded U visa evidence). The State does not address Perez's argument that the Court of Appeals has usurped the jury's role as sole arbiter of credibility (Perez Pet. pp. 15-18).

What the State does present in response to Perez's petition is a straw man. First, it disputes the relevancy of the excluded testimony, an issue not raised by the State at trial, not considered by the Court of Appeals, and not appealed by the State. South Carolina law is very clear on the relevance of bias evidence: "**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." State v. McEachern, 399 S.C. 125, 141, 731 S.E.2d 604 (Ct. App. 2012) (citations and quotations omitted, emphasis added). Further, State v. Brown, 303

[1] This is possibly because it has abandoned this argument. 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).

S.C. 169, 399 S.E.2d 593 (1991), cited by the State for irrelevance by introduction of confusion (Resp. p. 21), does not speak to this issue. Instead, the Brown court reversed a conviction on the ground that a witness's testimony regarding bias (*i.e.* her guilty plea that prevented significant prison time) was improperly excluded. Id. 303 S.C. at 171-72.

The existence of a U visa is powerful evidence of bias:

> 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.

Del Real-Galvez, 270 Or.App. at 231. Further:

> [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.

Valle at 1233-34 (emphasis added). The Valle court also did not require any establishment of a *quid pro quo* arrangement of testimony for visa in order to establish foundation to bring up the U visa. Id. at 1245. 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 appeal. Id. at 1239. The existence of a U visa is extremely relevant testimony, and any argument that it is not, to the extent the State even preserved this argument, is misplaced.

To the extent the State is attempting to assert that the Court of Appeals did not apply a Rule 403, SCRE, argument, this position is also misplaced. This argument was not made before the Court of Appeals and was not contained in any Petition for

Rehearing or Petition for *Certiorari*. To the extent it is even error, it was not preserved, and it is not before this Court.

**C. Reply to State's Argument III (responsive to Perez's Question V)**

The State does not cite any case law in support of its contention that Perez should be sentenced before a new judge. On the contrary, it brings to this Court's attention Fudge v. State, 45 So.3d 982 (Fla.Ct.App. 2010), which remanded the case to a different judge for resentencing. See also 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).

**D. Reply to State's Argument IV (responsive to Perez's Question I)**

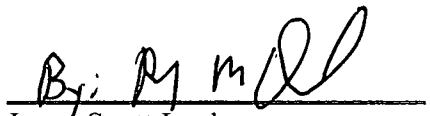
The State does not squarely address or even distinguish any of the case law cited by Perez in his argument that cumulative error has rendered the trial structurally unsound (Perez Pet. pp. 7-10). It does not provide an adequate explanation as to how the constitutional errors in this trial (one of which is undisputed) are not indicative of (or merely create the appearance of) a structural unfairness in Perez's trial, especially in light of the statements the trial court made during sentencing. (R. pp. 554-56).

## Conclusion

The State has not adequately responded to Perez's two strongest arguments: (1) that the trial was structurally unfair and (2) that there is a *reasonable possibility* that the exclusion of Mother 2's U visa testimony contributed to the verdict against Perez. Perez would ask this Court to expeditiously grant his Petition, deny the State's Petition, reverse the Court of Appeals, and remand this case for a new trial. See Cox v. Fleetwood Homes of Ga., Inc., 334 S.C. 55, 512 S.E.2d 498 (1999) (reversing the Court of Appeals without

requiring further briefing). In the alternative, Perez asks this Court to grant a writ of *certiorari* as to all of Perez's requested issues, and as to none of the State's.

September 3, 2015

By: 

Jason Scott Luck
jluck@seibelsfirm.com
SEIBELS LAW FIRM, P.A.
38 Broad Street, Suite 200
Charleston, SC 29401
843.722.6777 (phone)
843.722.6781 (telefax)

and

Robert M. Dudek
rdudek@sccid.sc.gov
S.C. Commission on Indigent Defense
1330 Lady St., Suite 401
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10-GS-10-07730, 07731

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THE STATE,

RESPONDENT,

V.

VENANCIO DIAZ PEREZ,

APPELLANT

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CERTIFICATE OF SERVICE

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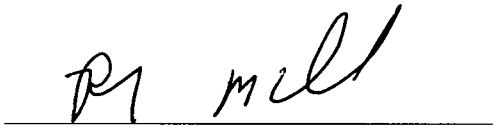
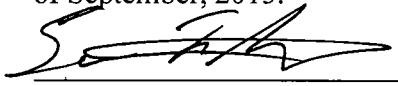
I certify that a true copy of the reply to the State's return to petition for writ of certiorari, in this case has been served on Amie L. Clifford, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, Mr. Venancio Diaz Perez #353944, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, and the S.C. Court of Appeals this 3rd day of September, 2015.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 3rd day
of September, 2015.



(L.S.)

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