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**THE STATE OF SOUTH CAROLINA
In the Supreme Court**

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**APPEAL FROM CHARLESTON COUNTY
Court of General Sessions**

AUG -8 2016

J. C. Nicholson, Circuit Court Judge

SC SUPREME COURT

Appellate Case No. 2015-001576

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

v.

Venancio Diaz PerezPetitioner/Respondent.

PRINCIPAL BRIEF OF PETITIONER/RESPONDENT VENANCIO DIAZ PEREZ.

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QUESTIONS PRESENTED

- I. Did the Court of Appeals err when it failed to reverse the trial court for conducting 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/Respondent Venancio Diaz Perez was arrested for Criminal Sexual Conduct with a Minor. (R. p. 12). 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). On November 8, 2010, he was formally indicted for Criminal Sexual Conduct with a Minor ("CSC")¹ and Lewd Act on a Minor ("Lewd Act").² (R. pp. 10, 16). The charges were tried together January 14-18, 2013, before Judge J.C. Nicholson in Charleston, South Carolina. (R. p. 18). The State was represented by Deborah Herring-Lash and Jennifer McCoy of the Charleston County Solicitor's Office, and Perez was represented

¹ S.C. Code § 16-3-655(A) (Supp. 2010).

² S.C. Code § 16-15-140 (Supp. 2010).

by the late Andrew Grimes and Christina Parnall 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 what he referred to as 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 Nature³ ("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 later described: "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.

On January 14, 2013, the trial court held a pretrial hearing on the admissibility of the testimony of Minor 2. Minor 2 was another child Perez's wife babysat, and the State sought to introduce Minor 2's accusations under Rule 404(b), SCRPC. (R. pp. 438-39, 552).⁴ 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 immigration status and her application for a U visa (her application was based on Minor 1's accusations against Perez).⁵ Trial commenced the same day, with Perez re-

³ State v. Fennell, 340 S.C. 266, 274, 531 S.E.2d 512, 516-17 (2000).

⁴ The State dismissed its case against Perez arising out of Minor 2's accusations. (R. p. 552).

⁵ See Section II, *infra*, for an explanation of U visas.

asserting his objections as the State presented the objectionable testimony of Minor 2; the trial court overruled these objections. (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 Mother 2's testimony, where she testified that she was given information on obtaining a U visa when she brought Minor 2 in for "questioning and exam".⁶ (R. pp. 263-65).

On January 16, 2013, the trial court excused juror number 102 for performing unauthorized research "on the visa kits or visa situation." (R. p. 368). The state concluded its case that day without presenting any physical evidence of Perez's guilt. Perez's defense, presented the same day, was to question the credibility of the accuser: "...our theory of defense is...this never happened...She's making it up for whatever reason..." (R. pp. 106, 127-28).

On January 17, 2013, the parties gave closing arguments and the trial court charged the jury. In his closing, Perez's counsel also noted the polished, yet inconsistent, nature of Minor 1's accusations. (R. pp. 479-80). Perez's counsel also argued that Mother 1 was using Minor 1 to obtain legal status in this country. (R. p. 485). One of the charges the trial court presented to the jury was the following:

The testimony of a victim may not be corroborated in prosecutions [of Criminal Sexual Conduct]. The victim is defined as the complaining witness.

⁶ See Section II.C for further discussion of this testimony.

(R. pp. 526). Perez objected to the inclusion of this charge, which the trial court overruled. (R. pp. 529-30).

On January 18, 2013, the jury arrived at a verdict. (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 in the following exchange:

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. (R. pp. 652-57).⁷ The Court of Appeals held that (1) the trial court did not err in admitting Minor 2's Lyle testimony; (2) the trial court violated the Confrontation Clause by excluding Mother 2's U visa testimony, but this error was harmless; and (3) the trial court violated the Due Process

⁷ Please note this is the version of the opinion re-filed on May 8, 2015, which redacts the name of one mother.

clause with its vindictive sentence. The Court of Appeals ordered that Perez be re-sentenced, though the opinion is silent as to which judge shall re-sentence him. (R. p. 656).

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, which the Court of Appeals denied by order dated June 23, 2015. (R. pp. 658-94).

Perez and the State filed Petitions for a Writ of *Certiorari* on July 23, 2015. This Court granted both petitions by order dated June 16, 2016.

ARGUMENT

It is well-settled that a criminal defendant is entitled to “a fair trial, not a perfect one.” E.g. Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986). Unfortunately, Venancio Diaz Perez’s trial was not fair and far from perfect. Subsequent to Perez’s rejection of a pre-trial plea deal he was subjected to multiple erroneous rulings in the State’s favor, culminating in sentencing designed to punish him for his desire for a jury trial. Serious, constitutional, reversible error occurred every day of trial but one.

The Court of Appeals did not grasp the enormity of the trial court’s errors. It found that the trial court violated Perez’s Confrontation Clause⁸ rights by limiting his cross-examination of Mother 2, and found the trial court further violated Perez’s Due

⁸ U.S. Const. amend. VI; U.S. Const. amend. XIV; S.C. Const. art. I, § 3.

Process⁹ rights by punishing him for not taking a guilty plea (offered by the trial judge, not the Solicitor). However, the Court of Appeals 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), SCRPC. 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.

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 identified two violations of Perez's rights: (1) he was not allowed to cross-examine Mother 2 on her U visa status, in violation of the

⁹ U.S. Const. art. III, § 2; U.S. Const. amend. VI; S.C. Const. art. I, § 14.

Confrontation Clause;¹⁰ and (2) his sentence was vindictive, in violation of Perez's rights to Due Process. The Court of Appeals erred in considering the cumulative effect of the errors it identified. When considered together, the errors the Court of Appeals identified make plain the underlying trial was so defective, from beginning to end, that it could not serve as a reliable mechanism for determining guilt or innocence.

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).

"Pursuant to the cumulative error doctrine, the cumulative effect of two or more individually harmless errors has the potential to prejudice a defendant to the same extent as a single reversible error." U.S. v. Basham, 561 F.3d 302, 330 (4th Cir. 2009) (internal quotations omitted). "To satisfy this requirement, such errors must so fatally infect the trial that they violated the trial's fundamental fairness." Id. (internal quotations omitted).

"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)).

¹⁰ The State apparently does not contest this holding of the Court of Appeals, as it was not addressed in its Petition for Rehearing or its Petition for a Writ of Certiorari. (R. pp. 658-67).

A. The cumulative effect of the two errors identified by the Court of Appeals demands reversal.

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. (R. pp. 654-55) The Court of Appeals, however, only reversed the trial court on sentencing. (R. p. 656). 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).¹¹ This conference took place before trial. (R. p. 660). Subsequent to Perez's rejection of the trial court's pretrial plea offer the trial court ruled to exclude any testimony regarding Mother 2's immigration status or her U visa application. (R. pp. 259-266). 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 the violation of the Confrontation Clause on day one of trial (after Perez asserted his desire to

¹¹ Though it appears that the trial court had formulated its opinion of the case by day one. (R. p. 89).

seek a jury trial) with the violation of the Due Process Clause at the end (also caused by his desire to seek a jury trial) calls into question the entire process. 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); accord State v. Rivera, 402 S.C. 225, 247, 741 S.E.2d 694, 705 (2013). 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 and remand for a new trial. See State v. Rivera, 402 S.C. 225, 247, 741 S.E.2d 694, 705 (2013).

B. Other errors not identified by the Court of Appeals contribute to the cumulative error.

As set forth above, the errors recognized by the Court of Appeals constitute sufficient cumulative error to warrant reversal. However, the trial court committed additional errors of varying severity after Perez asserted his right to a jury trial, all of which support a cumulative error analysis.

The trial court’s off-the-record plea negotiations on day one of trial were a 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.

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).

The trial court's ruling on day one to allow Minor 2 to testify as a Lyle witness (decided after Perez rejected the plea offer) was another error that led to a structurally unfair trial for Perez (See Section III).

Finally, the trial court charged the jury with the very charge found unconstitutional by this Court months ago in State v. Stukes, Op No. 27633 (S.C. May 4, 2016). (R. p. 526).¹² This error, in and of itself, warrants reversal.

The two constitutional violations the Court of Appeals identified are sufficient to mandate reversal of this case. However, when the above errors are considered, full reversal for a new trial becomes doubly necessary.

II. The Court of Appeals erred by holding the trial court's exclusion of Mother 2's U visa testimony, which evidenced her, and her daughter's, interest, bias, and lack of credibility was not "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 the alleged crimes. 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. The trial court did not allow a full investigation of bias and credibility, and thus reversal is appropriate.

¹² Perez would ask this Court to also consider this error, which in and of itself mandates reversal, under this writ of certiorari. See S.C. Const. art. V § 5; Wyse v. Wolfe, 129 S.C. 499, 123 S.E. 818 (1924) ("The writ of certiorari is a common-law remedy...to correct errors in law of inferior jurisdiction.").

The source of bias in this matter arises from the circumstances surrounding Mother 1's and Mother 2's U visa applications, which they procured with the assistance of the state on the basis of their daughters' accusations against Perez. A U visa ("U nonimmigrant status") legalizes the status of an undocumented immigrant who has "...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). In the event that the person providing "helpful" testimony is under 18, a parent, guardian, or next friend may claim this protected status. 8 C.F.R. § 214.14(b)(2). 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). Consequently, the qualifying agency can, at any time, withdraw its certification that the visa holder is "helpful" and revoke the visa holder's ability to remain in this country legally. 8 C.F.R. § 214.14(h)(2).

A U visa grants many benefits. It cancels all orders of exclusion, deportation, or removal against the holder by operation of law. 8 C.F.R. § 214.14(c)(5)(i). It authorizes the holder to work legally in the United States. 8 C.F.R. § 214.14(c)(7). Most importantly, as long as the holder of a U visa does not "unreasonably refuse" to assist law enforcement, a U visa holder is entitled to petition for permanent residence (a "green card") after three years. 8 C.F.R. § 245.24; 8 U.S.C. § 1255(m). Permanent residents may eventually apply for naturalization. 8 U.S.C. § 1427.

The potential for bias and coercion in the U visa process cannot be understated. A U visa provides immediate relief from deportation and a path to permanent residency (and ultimately citizenship). An opportunity to end constant, grinding threat of

deportation could tempt even the most upright of undocumented immigrants to lie, or coerce others to lie. As one commentator notes: “The U visa...gives witnesses a potentially powerful motive to make false or exaggerated reports.” Michael Kagan, *Immigrant Victims, Immigrant Accusers*, 48 U. Mich. J.L. Reform 915, 945 (2015). Even worse is that U visa applicant’s application exists at the pleasure of the qualifying agency (*i.e.* law enforcement). This qualifying agency holds absolute power over the holder’s immigration status. The inherent risk of abuse and coercion in this relationship should be self evident, as Lord Acton correctly noted: “Power tends to corrupt, and absolute power corrupts absolutely.”

The Court of Appeals correctly held that the Confrontation Clause allows a criminal defendant to examine a witness as to his or her U visa status and the circumstances pertaining to it. (R. pp. 654-55). The State does not challenge this ruling, and it 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). Inexplicably, the Court of Appeals held that the exclusion of testimony related to Mother 2’s U visa was “harmless beyond a reasonable doubt”. (R. p. 655). Mother 2’s credibility, or lack thereof, (and by proxy the credibility of Minor 2) is an integral part of Perez’s defense in this action. Case law from around the country is clear that excluded evidence which would impair a defense theory is not harmless beyond a reasonable doubt. Further, the Court of Appeals’ holding usurps the jury’s role as the sole arbiter of credibility. The Court of Appeals’ error mandates reversal and remand for a new trial.

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.”).¹³

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 Van Arsdall at 684. These “Van Arsdall 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

¹³ 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).

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.).

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

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

Id. at 699. The Oregon Court of Appeals has had repeated opportunities to examine the importance of U visas, and it has repeatedly held that the exclusion of U visa testimony is not harmless error. In State v. Del Real-Galvez, 346 P.3d 1289 (Or. Ct. App. 2015), 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. at 1294. 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) (holding exclusion of U visa testimony was reversible error); State v. Hernandez, 344 P.3d 538 (Or. Ct. App. 2015) (same).

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 called into question the credibility of the accuser(s). The trial court even recognized the significance of U visa applications to Perez’s defense: “And his argument was that’s the reason they prosecuted the case, but they didn’t know about it then [sic] after the case started -- but that could be a reason they proceeded with the case.” (R. p. 111). The trial court’s refusal to allow Perez to cross-examine Mother 2 on her residency status and U visa application 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 visa applications.

Both Mother 1 and Mother 2 will 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 by law enforcement. Any attempt by one of the minors to recant or revise her testimony could lead to the solicitor’s office withdrawing its certification that she was “helpful”, subjecting her mother to potential deportation. A jury may reasonably infer that one or

both of the mothers have pressured their children to provide testimony in order to maintain their family unit.¹⁴ 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).

Perez was able to advance only half of this argument, only 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.

Watson also contains many similarities to this case. First, there is no physical evidence of the alleged crimes. Second, the excluded evidence (and 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, where a mother had applied for a U visa on the basis of her daughter's accusations of sexual crimes.

Finally, application of the Van Arsdall factors show 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

¹⁴ A jury may also reasonably infer that law enforcement, using the significant leverage that a U visa application provides, can coerce a witness into giving testimony favorable to the State.

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 application,¹⁵ 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".

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). However, issues of credibility are exclusively the province of the jury, and Court of Appeals committed reversible error by ruling on them, instead of allowing a jury to weigh credibility 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

¹⁵ Compare this with the existence of Mother 1's U visa application, which other witnesses mentioned in their testimony. (R. pp. 296-98, 300-302).

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...”).¹⁶ 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.

The Oregon Court of Appeals also 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.

¹⁶ 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)).

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 Valle court also did not require the defendant to allege an explicit *quid pro quo* arrangement (*i.e.* testimony for visa) in order to examine the witness on the U visa.

By 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 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). 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 alleging 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 who “they” were, the transcript states that Mother 2 was provided information on her U visa in conjunction with her police report by the State or its agent. The remainder of Mother 2’s proffered cross-examination, 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 above) (R. p. 264 ll. 14-18), and whether she had applied for government benefits (“no”) (R. p. 264 ll. 19-21).

Mother 2’s proffered testimony, regardless of her answers, would have been invaluable to Perez’s defense, and thus it should have been admitted. In a similar scenario to this case, the Oregon Court of Appeals held:

Here, regardless of whether Carranza [the accuser] answered “yes” or “no” when asked whether she intended to apply for a U visa, defendant could have used her answer for his benefit. As the state itself observes, if Carranza testified that she intended to apply for a U visa, defendant could have argued that her testimony was evidence of a motive to fabricate the allegations against defendant; on the other hand, if Carranza testified that she did not intend to apply for a U visa, defendant could have argued that her testimony was not credible, given her immigration status and expressed desire to stay in the country. Thus, although defendant did not make an offer of proof, we can ascertain the effect of the trial court’s ruling. It deprived defendant of evidence upon which he could argue either that Carranza had a personal interest in the outcome of the case that the

jury should consider when assessing her credibility or that she was not being forthright in her testimony.

Hernandez, 344 P.3d at 542. Had the trial court allowed him to completely cross-examine Mother 2 Perez could have advanced a theory that Mother 2 coerced her daughter to lie in order to obtain a U visa. If Mother 2 testified that she knew of U visas prior to making her report to the police, this testimony would have directly supported this theory. If Mother 2 testified that she did not know of U visas prior to making her report to the police, Perez could have made the argument that her testimony was not credible in light of her immigration status. Just as in Hernandez, her testimony must be considered, regardless of her response.

Mother 2's testimony is also contradictory. While Mother 2 testified that no "victim advocate or helper" assisted her in obtaining a U visa, she also testified she received information on them from the State or its agent. This is a contradiction that a jury must sort out. It is of no moment that some of Mother 2's other responses appear *on paper* to not support Perez's defense theory. 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).¹⁷ 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 and see the witness deliver the testimony. Additionally, if there

¹⁷ available at <https://www.psychologytoday.com/blog/beyond-words/201109/is-nonverbal-communication-numbers-game> (last visited May 11, 2015).

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). Finally, "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).

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), SCRPC.

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, thus allowing the admission of the testimony of Minor 2. (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 404(b):

RULE 404
CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE
CONDUCT; EXCEPTION; OTHER CRIMES

...

(b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent.

Note:

...

Rule 404(b) differs in two respects from the federal rule. First, unlike the

federal rule which does not limit the purposes for which evidence of other crimes may be admitted, **the South Carolina rule limits the use of evidence of other crimes, wrongs, or acts to those enumerated in State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923)...**

Rule 404, SCRE (emphasis added). The trial court offers no explanation how the testimony of Minor 2 fits any of the exceptions 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). 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 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). This Victorian-sounding “lustful disposition exception” was not a part of the law of South Carolina at the time of the Lyle decision in 1923. See State v. Wallace, 364 S.C. 130, 139, 611 S.E.2d 332, 337 (Ct. App. 2005).

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.

Since 2009, South Carolina sex crime defendants have operated under a regime that allowed virtually no limitation to the admissibility of propensity evidence. State v. Wallace and its progeny have rendered Rule 404(b) virtually meaningless by expanding the “common scheme or plan” exception to the point where the exception swallows the rule. Further, the creation of this “lustful disposition exception”, which was never properly promulgated, creates an irreconcilable conflict with the prejudice analysis of Rule 403. It is time for this Court to revisit Wallace¹⁸ and overturn this impermissible and illegal expansion of Rule 404(b) that contravenes at least three centuries of Anglo-American Common Law. See e.g. Hampden’s Trial, 9 How. St. Tr. 1053, 1103 (K.B. 1684) (“...a person was indicted of forgery, [but] we would not let them give evidence of any other forgeries, but that for which he was indicted...”).

According to Wallace other sex crimes, or accusations of other sex crimes, are admissible as “prior bad acts” under the following circumstances:

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). This is a permissive standard: counsel for Perez has been unable to find a single instance where a South Carolina appellate court cites Wallace to reverse admission of a prior bad act of a sexual

¹⁸ Once oral argument is scheduled, Perez will move this court, pursuant to Rule 217, SCACR, to argue against precedent.

nature.¹⁹

Wallace's requirement for a "close degree of similarity" conflicts with Rule 403, SCRE, which prohibits the admission of "strikingly similar" crimes due to the creation of prejudice. 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."). The "lustful disposition exception" of Wallace and the prejudice analysis of Rule 403 cannot co-exist.

This irreconcilable conflict can be resolved by overturning Wallace, which circumvented the statutory process for amending the South Carolina Rules of Evidence and is thus void. Justice (now Chief Justice) Pleicones noted this lack of authority in his Wallace dissent:

...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.

¹⁹ Counsel for Perez has located one case where the Court of Appeals cited the then-fresh Wallace to affirm the exclusion of prior bad acts evidence of a sexual nature proffered by the *defendant*, not the state. State v. Cope, 385 S.C. 274, 286, 684 S.E.2d 177, 183 (Ct. App. 2009).

Wallace at 435-36, 683 S.E.2d at 279 (Pleicones, J., dissenting). The United States Congress, in a tacit admission that Rule 404 of the Federal Rules of Evidence does not contain a “lustful disposition exception”, had to utilize the legislative process to introduce such an exception. 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”).

Because the “lustful disposition exception” did not exist in South Carolina when Lyle set forth the exceptions to prior bad acts evidence (see Section III), the only manner in which such an exception may be created 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. The “lustful disposition exception” of Wallace was not promulgated according to this statute; it is therefore void. Wallace and its misguided children are 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 in sentencing:

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.

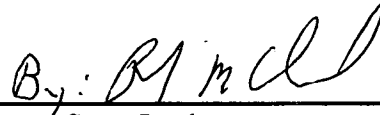
(R. p. 656). If the sentencing process is as tainted as the Court of Appeals sets forth, any resentencing must take place before a new judge. Ordering such a change is consistent with other jurisdictions. See e.g. Lindsay v. U.S., 84 A.3d 50 (D.C. 2014) (remanding for sentencing before a new judge after 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 affirms the Court of Appeals 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,²⁰ however, does not provide courts *carte blanche* to ignore the rights provided by our Constitution that apply equally to all persons, no matter what crime they stand accused of. As set forth above, Perez's trial was fundamentally unsound from day one and suffers from multiple reversible errors. Perez asks this Court to reverse the Court of Appeals and remand this case back to the Circuit Court for a new, fair trial.

²⁰ 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.

Dated: 8 August 2016

By: 

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STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Charleston County

Honorable J.C. Nicholson, Circuit Court Judge

STATE OF SOUTH CAROLINA,

RESPONDENT/PETITIONER,

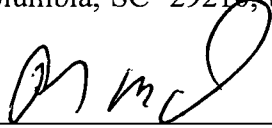
V.

VENANCIO DIAZ PEREZ,

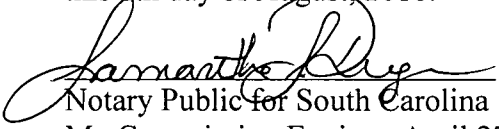
PETITIONER/RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of Petitioner/ Respondent in the above referenced case has been served upon Amie L. Clifford, Esquire, at the S.C. Commission on Prosecution Coordination, PO Box 5010, Columbia, SC 29250-5010; and a copy of the Brief of Petitioner/Respondent have been served on Venancio Diaz Perez, #353944, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 8th day of August, 2016.


Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 8th day of August, 2016.

 (L.S)
Notary Public for South Carolina
My Commission Expires: April 27, 2026.