

 ORIGINAL

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM CHARLESTON COUNTY  
Court of General Sessions

J. C. Nicholson, Circuit Court Judge

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Appellate Case No. 2015-001576

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**RECEIVED**

SEP 19 2016

S.C. SUPREME COURT

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

v.

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

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REPLY BRIEF OF PETITIONER/RESPONDENT VENANCIO DIAZ PEREZ

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## REPLY

The State does not respond to several of Perez's salient points, preferring to present other, irrelevant arguments to misdirect the Court. While Perez obviously contests all arguments of the State, the following demand particular treatment.

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

The State does not address Perez's argument that Wallace's "close degree of similarity" analysis cannot square with Rule 403, SCRE's "strikingly similar" analysis. (Perez brief p. 26). It also does not address Perez's argument that Wallace has circumvented the process for creating new rules of evidence. (Perez brief p. 26).

The State's quotation of State v. Richey, 88 S.C. 239, 70 S.E. 729 (1911) is inappropriate. (State's Resp. Brief p. 25). The text the State quotes is not the opinion of the court; it is an annotation from Lawyers Reports Annotated. The defendant in Richey had engaged in sexual intercourse with a female while she was under 14 (and thus illegal) and after she was 14 (which was legal at the time). The Richey court allowed the admission of the defendant and minor's later legal intercourse to prove "mutual disposition". 70 S.E. at 730. The Richey court cites in support of this holding cases from other jurisdictions which deal primarily with adultery, seduction, and adulterous disposition. Id. The reason the parties' "mutual disposition" may be relevant in 1911, but not now, lies with the crime charged. Richey was an appeal of a conviction for "Carnal Knowledge of a Woman Child", a statutory crime that has since been abolished. See State v. Whitener, 228 S.C. 244, 270-74, 89 S.E.2d 701, 714-16 (1955) (history of this statute). If a jury found a defendant guilty of "Carnal Knowledge of a Woman Child", the jury

could also issue a special verdict recommending mercy, reducing the sentence to no more than fourteen years. Id. Therefore, evidence of further legal consensual relations provide an opportunity to reduce punishment in a “Romeo and Juliet” or “May-December” relationship scenario. This type of evidence is not appropriate in modern Criminal Sexual Conduct prosecutions, and thus the holding of Richey is limited to prosecutions for “Carnal Knowledge of a Woman Child”.

## **II. Reply to State’s Argument II (responsive to Perez argument 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.<sup>1</sup> It does not offer any analysis under the Van Arsdall factors, and does not address Perez's analysis under these factors. 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. 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, 346 P.3d 1289 (Or. Ct. App. 2015). 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.

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 S.C. 169, 399 S.E.2d 593 (1991), cited by the State for irrelevance by introduction of

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<sup>1</sup> 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. (State's Resp. Brief p. 44). 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).

confusion, 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 is not before this Court.

### **III. Reply to State's Argument III (responsive to Perez argument I).**

The State argues that Perez's cumulative error argument was not preserved. Perez's cumulative error argument is premised on the Court of Appeals' finding of two constitutional violations that did not warrant a full reversal; Perez could not advance this argument until the Court of Appeals made these holdings. Further, State v. Stukes, Op No. 27633 (S.C. Sup.Ct. filed May 4, 2016), was not even the law of South Carolina until roughly four months ago.

The objection to Perez's sentence also fairly encompassed a cumulative error argument. Perez's objection to the sentence clearly agitated the trial court, and any further objection would have been futile and could have actually harmed Perez. See State v. Higgenbottom, 337 S.C. 637, 640–41, 525 S.E.2d 250, 251 (Ct. App. 1999) (futility exception), *rev'd on other grounds*, 344 S.C. 11, 542 S.E.2d 718 (2001). Further, requiring Perez to enumerate every minute element of his objection exalts form over substance and signals a return to a "...primitive stage of formalism, when the precise word was the sovereign talisman and every slip was fatal." Wood v Duff-Gordon, 222 N.Y. 88, 91, 118 N.E. 214 (N.Y. 1917) (Cardozo, J.) see also Toole v. Toole, 260 S.C. 235, 240, 195 S.E.2d 389, 390-91 (1973) ("an exercise in semantics without any significance of substance").

### **IV. Reply to State's Argument IV (responsive to Perez argument III).**

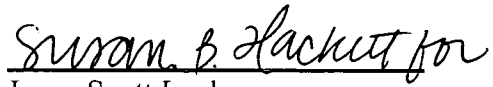
The State argues that Perez must be sentenced before the same trial judge; Perez disagrees. It should be self-evident that if the Court of Appeals has found that the sentencing judge has been vindictive to a criminal defendant he cannot be fair and impartial. The Court of Appeals found that the trial court was vindictive. Whether the

trial judge could be fair and impartial on remand is irrelevant, as the Court of Appeals' ruling creates a situation where his impartiality could reasonably be questioned. See Rule 3E(1), CJC, Rule 501, SCACR. Further, remand to a new sentencing judge is performed in other jurisdictions. See 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).

### CONCLUSION

For the argument set forth above, Perez asks this Court to reverse the Court of Appeals and remand this case for a new trial. If this Court only remands for a new sentence, Perez asks it be before a different judge.

September 19, 2016.



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PETITIONER/RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Reply 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 Reply 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 19th day of September, 2016.

  
Robert M. Dudek  
Chief Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 19th day of September, 2016.

 (L.S)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.