

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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 ORIGINAL

APPEAL FROM CHARLESTON COUNTY  
Court of General Sessions

J. C. Nicholson, Circuit Court Judge

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RECEIVED

Appellate Case No. 2015-001576

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OCT 10 2016

S.C. SUPREME COURT

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

v.

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

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PETITIONER/RESPONDENT VENANCIO DIAZ PEREZ'S  
MOTION TO ARGUE AGAINST PRECEDENT

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Attorneys for Petitioner/Respondent  
Venancio Diaz Perez

Petitioner/Respondent Venancio Diaz Perez, pursuant to Rules 217 and 240, SCACR, moves<sup>1</sup> this Court for leave to argue against precedent in the upcoming oral argument, tentatively scheduled for November 30, 2016. Perez would show the following in support of his motion:

Since 2009, South Carolina sex crime defendants have operated under a regime that allowed virtually no limitation to the admissibility of propensity evidence. 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 Wallace 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 an overly permissive standard: counsel for Perez has been unable to find a single instance where a

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<sup>1</sup> Perez noted in his Principal Brief (p. 25, n. 18) that he would file this motion if this Court ordered Oral Argument.

South Carolina appellate court cites Wallace to reverse admission of a prior bad act of a sexual nature.<sup>2</sup>

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.

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<sup>2</sup> 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 Victorian-sounding “lustful disposition exception” did not exist<sup>3</sup> in South Carolina when Lyle set forth the exceptions to prior bad acts evidence, 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.

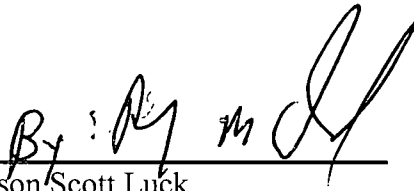
**Wherefore**, Perez asks this Court for leave to argue against the precedent of State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009), and any other precedent which holds

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<sup>3</sup> See State v. Wallace, 364 S.C. 130, 139, 611 S.E.2d 332, 337 (Ct. App. 2005). While the case of State v. Richey, 88 S.C. 239, 70 S.E. 729 (1911) allowed the admission of evidence of a defendant’s and minor accuser’s subsequent legal sexual relations, this was likely to allow the jury discretion to recommend a special verdict for mercy under the now-repealed “Carnal Knowledge of a Woman Child” statute. See State v. Whitener, 228 S.C. 244, 270-74, 89 S.E.2d 701, 714-16 (1955) (history of this statute).

that other sexual crimes with a “close degree of similarity” to the accused crime may be admissible under Rule 404(b), SCRE, as evidence of a common scheme or plan.

October 10, 2016

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Venancio Diaz Perez**

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IN THE SUPREME COURT

Appeal from Charleston County

Honorable J.C. Nicholson, Circuit Court Judge

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RESPONDENT/PETITIONER,

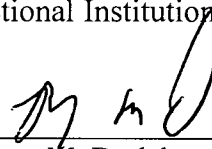
V.

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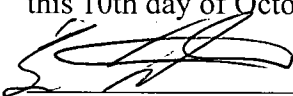
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petitioner/ Respondent motion to argue against precedent 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 Petitioner/ Respondent motion to argue against precedent have been served on Venancio Diaz Perez, #353944, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 10th day of October, 2016.

  
Robert M. Dudek  
Chief Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 10th day of October, 2016.

  
Notary Public for South Carolina

(L.S)

My Commission Expires: October 30, 2022.