THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

APPEAL FROM DARLINGTON COUNTY
Court of General Sessions

J. Michael Baxley, Circuit Court Judge

Appellate Case No. 2017-002402

The State, ...Respondent,

v.

Damyon M. Cotton, ... Petitioner.

PETITIONER'S BRIEF

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STATEMENT OF ISSUE ON APPEAL

1. In light of *State v. Perez*, and in particular Justice Hearn's concurrence in that case, should this Court should overrule *State v. Wallace* and apply the common scheme or plan exception equally to sexual and nonsexual offenses alike?

2. Did the Court of Appeals err in affirming the trial court's admission of a prior alleged bad act involving a single, isolated incident with a female that was wholly unrelated and not the subject of the charged offense, under the common scheme exception to Rule 404(b), SCRE?

INTRODUCTION

Nearly 100 years ago this Court explained that "if the [trial] [c]ourt does not clearly perceive the connection between the extraneous criminal transaction and the crime charged, that is, its logical relevancy, the accused *should be given the benefit of the doubt and the evidence should be rejected.*" *State v. Lyle*, 125 S.C. 406, 417, 118 S.E. 803, 807 (1923) (emphasis added). Codified now at Rule 404(b), SCRE, the *Lyle* rule—unlike its federal analogue—is presumptively one of exclusion, not inclusion. *Compare* Rule 404(b), SCRE, Note 1 ("[U]nlike 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 [*Lyle*]."); *with U.S. v. Smith*, 441 F.3d 254, 262 (4th Cir. 2006) ("This court has recognized that Rule 404(b)[, FRE] is primarily a rule of *inclusion*, not *exclusion*." (emphasis in original)).

In the instant case, the Court of Appeals—like the trial court before it—flipped this presumption on its head. Presented with testimony of a single, uncharged, prior sexual assault—which differed in several significant respects from the charged offense—both courts gave the benefit of the doubt to the State. Once erroneously admitted, this bad act permanently tainted Petitioner's trial and assured his conviction. Of equal import, the opinion below conflicts with

decisions of this Court and with other panels of the Court of Appeals on a noteworthy issue—can a single prior bad act establish a common scheme or plan under *Lyle*? The opinion below say yes; the answer is plainly no.

For these reasons, and those set forth below, this Court should reverse the Court of Appeals and remand this case for a new trial.

STATEMENT OF THE CASE

I. Background

Petitioner Damyon M. Cotton was indicted for criminal sexual conduct in the first degree and kidnapping of Yasmin Cusack on July 18, 2013. (App. pp. 459-62). The case was called for trial on February 24, 2014, before the Honorable J. Michael Baxley. (App. p. 5). Judge Baxley took up the State's motion *in limine* seeking to admit evidence of an alleged prior bad act by Cotton. (App. pp. 7-93). In its memorandum in support of the motion, the State originally indicated that it planned to introduce evidence of three prior bad acts; however, it ultimately only presented one. (App. p. 8, ll. 12-14). During the *Lyle* hearing, the State presented testimony from the following witnesses: an alleged prior bad act witness ("Prior Victim"), Yasmin Cusack, and Cotton. (App. pp. 9-64).

After hearing testimony and counsels' arguments regarding the prior bad act, the trial court found the prior bad act was relevant, was established by clear and convincing evidence, and fell within the common scheme exception to Rule 404(b), SCRE. (App. p. 86, l. 14-p. 92, l. 14). The trial court also found that the probative value of the prior bad act outweighed its prejudicial nature under Rule 403, SCRE. (App. p. 92, l.15-p. 93, l. 17).

During trial, the State presented the testimony of Prior Victim. (App. p. 174, l. 24-p. 175, l. 2). Defense counsel renewed her objection to Prior Victim testifying. (App. p. 174, ll. 16-17).

The trial court overruled the objection. (App. p. 174, ll. 18-19). Ultimately, Cotton was found guilty of criminal sexual conduct in the first degree and kidnapping. (App. p. 439, l. 18-p. 440, l. 13). The trial court sentenced him to fifteen years. (App. p. 456, ll. 22-25).

The Notice of Appeal was filed with the Court of Appeals on February 27, 2014.[1] The Court of Appeals initially requested available dates from counsel for oral argument; however, the case was ultimately submitted to the Court of Appeals for consideration in March 2017 without oral argument. The Court issued an opinion on September 6, 2017, affirming the trial court's admission of the prior bad act under the common scheme exception to Rule 404(b), SCRE. (App. pp. 588-90).

The Court of Appeals denied Petitioner's timely Petition for Rehearing. Petitioner timely filed its Petition for Writ of Certiorari, and on April 19, 2018, this Court granted the Petition. This appeal followed.

II. Pre-trial and Trial Testimony

A. Alleged Prior Victim's Testimony

Prior Victim explained that she met Cotton through Facebook. (App. p. 24, l. 24-p. 25, l. 1, p. 187, ll. 15-17). According to Prior Victim, she posted a status update on Facebook asking anyone if they wanted to "chill."[2] (App. p. 25, ll. 7-8, p. 175, ll. 20-24). Cotton liked this status

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[1] This case was part of the 2014-2015 Appellate Practice Project.

[2] "Chill" is defined in the Urban Dictionary as "a code word for sex." *See Chill*, Urban Dictionary (July 2, 2006), http://www.urbandictionary.com/define.php?term=Chill. Time Magazine rated Urban Dictionary as one of its "50 Best Websites" in 2008, and described it as follows: "To stay hip, visit Urban Dictionary, which has millions of user-submitted words and definitions. Visitors can vote on the best entries . . . ." Anita Hamilton, Urban Dictionary - 50 Best Websites 2008, Time (Jun. 17, 2008), http://www.time.com/time/specials/2007/article/0,28804,1809858_1809955_1811527,00.html. As of November 17, 2017, the cited definition had 289 "up" votes and 142 "down" votes.

update, and they began messaging. (App. p. 25, ll. 7-9, p. 34, ll. 19-20, p. 175, ll. 20-24). Subsequently, Cotton picked Prior Victim up from her friend's house.[3] (App. p. 25, ll. 14-15, p. 175, ll. 20-24). Cotton's brother was sitting in the front passenger seat of Cotton's car, so Prior Victim got into the back seat behind Cotton's brother. (App. p. 25, ll. 21-23, p. 175, l.25-p.176, l. 8). Prior Victim agreed to ride with Cotton to Hartsville to take his brother home. (App. p. 25, ll. 14-21, p. 129, l.25-p. 176, l. 2). After Cotton dropped his brother off in Hartsville, Prior Victim stated that Cotton began touching her. (App. p. 25, ll. 21-24, p. 176, ll. 2-5). At that time, he was in the driver seat, and she was still located in the backseat behind the front passenger side of the car. (App. p. 25, l. 21-p. 26, l. 4, p. 176, ll. 7-8).

Prior Victim asked Cotton whether he had a phone charger because her phone was dead. (App. p. 26, ll. 6-7, p. 177, ll. 17-19). According to Prior Victim, he then drove to one of his friend's house where he told her she could obtain a phone charger. (App. p. 26, ll. 6-9, p. 177, ll. 17-22). Prior Victim stated Cotton went into the house; however, when he came out, he did not have a phone charger. (App. p. 26, ll. 6-10, p. 177, ll. 20-22).

After leaving his friend's house, Prior Victim stated that they drove to and pulled into a driveway with a trailer and a shed in the back. (App. p. 26, ll. 15-18, p. 177, ll. 23-25). Here, Prior Victim testified that she got out of the back seat and moved to the front passenger seat. (App. p. 27, ll. 22-23). According to Prior Victim, Cotton told her that she could charge her phone in the shed, but she declined the offer. (App. p. 26, ll. 17-20, p. 177, l. 24-p.178, l. 1).

Prior Victim testified that Cotton then asked her to perform oral sex. (App. p. 26, ll. 20-21, p. 178, ll. 8-17). Prior Victim responded, "no, like I told you before, I didn't want to do nothing

[3] This occurred in June 2012. (App. p. 25, ll. 2-7). She was 15 at the time. (App. p. 24, ll. 22-23, p. 171, ll. 5-6).

like that." (App. p. 27, ll. 5-7, p. 178, ll. 8-13). Prior Victim testified that prior to their meeting, she messaged Cotton on Facebook and told him she "didn't want to do nothing like that 'cause, I mean, I just wanted to go ahead and make that clear." (App. p. 34, ll. 21-23). Prior Victim stated that Cotton then got of the car and came around to the passenger side door and began hitting her, at which time she told Cotton that she would perform oral sex. (App. p. 28, ll. 8-17, p. 178, l. 13-p.179, l. 4). Cotton got back into the car, and Prior Victim performed oral sex.[4] (App. p. 28, ll. 16-17).

Afterwards, Cotton drove to a different driveway surrounded by trees. (App. p. 28, ll. 17-20, p. 179, ll. 5-10). Here, Cotton allegedly told Prior Victim to remove her pants and get out of the car. (App. p. 28, l. 20-21, p. 30, ll. 3-4, p. 179, ll. 20-22). Prior Victim took off her pants and got out of the car. (App. p. 29, ll. 1-2, p. 179, ll. 20-22). Prior Victim testified that Cotton picked her up and put her on the hood of the car. (App. p. 30, ll. 9-12, p. 179, ll. 22-24). They then had vaginal and anal sexual intercourse with a condom. (App. p. 29, ll. 2-3, 19, p. 179, l. 23-p.180, l. 4). Prior Victim testified during intercourse Cotton asked her if she thought it was rape; if she wanted to have his kids; and for her to call him names such as "daddy." (App. pp. 30, ll. 14-16, p. 180, ll. 6-18). According to Prior Victim, she told Cotton that she was on her period in an attempt to get him to stop. (App. p. 29, ll. 21-23, p. 179, ll. 18-20). This occurred around 9:00 p.m. (App. p. 29, l. 5, p. 184, ll. 1-4).

Prior Victim stated that she went to McLeod hospital after she got home. (App. p. 31, l. 6-9, p. 184, ll. 9-11). The hospital performed a sexual assault kit, which included testing for sexually

[4] Prior Victim's testimony at trial suggests that she performed oral sex while Cotton was driving. (App. p. 179, ll. 2-4).

transmitted diseases. (App. p. 35, ll. 19-23, p. 184, ll. 10-11). Prior Victim testified that the STD test indicated that she had Chlamydia. (App. p. 40, ll. 10-12).

B. Cusack's Testimony

During the *Lyle* hearing, Cusack testified that she met Cotton through a friend and explained that their first communication was on the telephone through a chat line service.[5] (App. p. 10, ll. 16-p. 11, l. 4). Cusack stated that she exchanged numbers with Cotton over the chat line, and they began calling each other after that.[6] (App. p. 11, ll. 7-15, p. 163, ll. 8-12). Cusack was 18 at the time. (App. p. 20, ll. 10-12, p. 166, l. 16).

During the *Lyle* hearing, Cusack testified that she and Cotton only met in person on one occasion. (App. p. 17, ll. 19-21, p. 22, ll. 23-25). Conversely, at trial Cusack testified that she had met Cotton on two different occasions. (App. p. 132, l. 25-p. 133, l. 6). She stated that she met him at her friend Tanzy's house, approximately two weeks before February 1, 2013, which was the date on which she claimed to have a second in-person meeting with Cotton. (App. p. 94, l. 25-p. 95, l. 6, p. 96, ll. 5-8).

According to Cusack, she and Cotton made plans to go see a movie on the night of February 1, 2013. (App. p. 11, ll. 17-20, p. 12, ll. 1-11, p. 163, ll. 13-18). Prior to the movie outing, Cusack testified that she called Cotton to ask him what he wanted for Valentine's Day. (App. p. 11, ll. 10-

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[5] During the pre-trial hearing on cross-examination, Cusack testified that she first met Cotton through a chat line and then ended up meeting him through a friend of hers named Tanzy. (App. p. 21, ll. 24-25). At trial, Cusack testified that she knew Cotton "[b]asically like through a friend." (App. p. 136, ll. 8-9).

[6] Cusack told Investigators Scott Gauger and Brandon Peavy that she met Cotton through a friend. (App. p. 208, ll. 15-19, p. 213, ll. 22-25). She never mentioned anything to Investigators Gauger or Peavy about meeting Cotton through a chat line. (App. p. 208, ll. 20-23, p. 231, ll. 10-12). Additionally, this was the first time that defense counsel heard the theory that Cusack and Cotton met on a chat line. (App. p. 81, l. 25-p. 82, l. 8). The discovery materials indicated that Cusack and Cotton met through Cusack's friend named Tanzy. (App. p. 82, ll. 2-4).

14, p. 126, ll. 13-15, p. 155, ll. 2-3). Cusack stated that Cotton picked her up from her house around 6:40 p.m. that night to go to the movies. (App. p. 12, ll. 9-14, 24-p. 13, l. 1, p. 22, ll. 3-7, p. 151, ll. 10-14).

Prior to trial, Cusack alleged that when they arrived at the movie theater Cotton forced her to perform oral sex. (App. p. 13, ll. 2-8). Conversely, at trial Cusack testified that she did not perform oral sex while in the movie theater parking lot. (App. p. 125, l. 24-p. 126, l. 8). In her written statement that she gave to law enforcement on the night of the incident, Cusack also did not report that oral sex occurred at this location; however, she claimed that Cotton "forced [her] to have sex with him in the [movie theater] parking lot." (App. p. 506).

After leaving the movie theater, Cusack testified they went to K-Mart to go Valentine's Day shopping.[7] (App. p. 13, ll. 9-14, p. 126, ll. 13-15). During the *Lyle* hearing, Cusack testified Cotton gave her fifteen dollars and asked her to perform oral sex in the K-Mart parking lot, to which she told him no.[8] (App. p. 13, ll. 15-20). Cusack then asked Cotton whether he was going to accompany her inside K-mart. (App. p. 13, ll. 15-22, p. 126, l. 22-p. 127, l. 9). He told her no, at which point she threw the money back at him and told him to take her home.[9] (App. p. 13, ll. 15-22, p. 126, l. 22-p. 127, l. 9).

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[7] Cusack testified she believed Cotton was going to give her a Valentine's Day gift and that she planned to give him one as well. (App. p. 13, ll. 11-15, p. 126, ll. 14-21, p. 154, l. 20-p. 155, l. 3).

[8] On cross-examination prior to trial, Cusack claimed that Cotton forced her to perform oral sex in the K-mart parking lot. (App. p. 22, ll. 11-14). At trial, Cusack testified she did not perform oral sex at this location. (App. p. 126, l. 24-p. 127, l. 3). In the statement that she gave law enforcement that night, Cusack did not report that oral sex occurred in the K-mart parking lot. (App. p. 506).

[9] In her written statement, Cusack stated that Cotton told her "if [she] suck his dick he'll take me Valentine shopping. Then we went to K-mart and he hand me $ 15 dollars. I ask him was he going in the store with me[;] he said no[,] he don't feel like it." (App. p. 167, ll. 3-7, p. 506).

Cusack claimed that after leaving K-mart, she and Cotton drove to Turnpike Road. (App. p. 13, l. 25-p. 14, l. 3, p. 155, ll. 14-18). When they arrived at a wooded area on Turnpike Road, Cusack stated that Cotton took her phone and told her "[you] been telling [me] a long time that [you] was gonna give [me] some and so now is the time." (App. p. 14, ll. 16-21, p. 127, l. 25-p. 128, l. 12). Cusack stated, during the *Lyle* hearing, that Cotton then forced her to perform oral sex.[10] (App. pp.15, ll. 9-11; 23-24).

Cusack explained that Cotton then began to try to take her pants off while he was in the car, but unable to, he got out of the car and went around to the passenger side door and removed her from the car. (App. p. 15, l. 24-p. 16, ll. 1, 22-p. 17, l. 8, p. 128, ll. 14-17). Cusack claimed that Cotton then began undressing her outside of the car and told her "it was the time . . . to . . . give him some 'cause like we were talking on the phone about it." (App. p. 17, l. 7-18, p. 128, l. 21-p. 129, l. 3). Cusack stated that she told Cotton she was pregnant and that she had herpes to try to get him to stop. (App. p. 17, l. 24-p. 18, l. 4, p. 129, l. 13). According to Cusack, Cotton then put on a condom and they had vaginal intercourse.[11] (App. p. 18, ll. 6-7, p. 129, ll. 15-18). Afterwards, Cusack testified that Cotton threw the condom in the woods, handed her clothes to her, and then took her home. (A. p. 18, l. 16-p. 19, l. 5, p. 129, ll. 18-20). Cusack stated on the way home, Cotton apologized, told her that he loved her, and to call him when she got inside her house. (App. p. 18, ll. 21-25, p. 130, ll. 11-14).

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[10] Cusack later testified in the pre-trial hearing that only vaginal sex occurred on Turnpike Road. (App. p. 19, l. 19-p. 20, l. 1).

[11] At trial, Cusack's testimony conflicted yet again. There, she testified that Cotton dragged her out of the car and attempted to get her to perform oral sex; however, she refused. (App. p. 129, ll. 5-6). She stated he then restrained her and they engaged in vaginal intercourse. (App. p. 129, ll. 5-18).

Cusack claimed that Cotton threatened her with a gun during the alleged sexual assault.[12] (App. p. 20, ll. 13-16, p. 130, ll. 15-17). However, she stated that she never saw Cotton with a gun nor did he ever present one to her. (App. p. 20, ll. 20-21, p. 157, ll. 7-10). Cusack stated that Cotton dropped her off at her house around 8:00 p.m. (App. p. 19, ll. 3-5, p. 162, ll. 24-25).

After Cusack got home, she and her mother went to McLeod hospital. (App. p. 19, ll. 16-18, 131, ll. 10-17). Here, a sexual assault kit was performed. (App. pp. 239, ll. 14-16; 471-77). During the examination, Cusack reported to the ER nurse that she had genital herpes. (App. pp. 241, ll. 14-17; 471-77).

C. Cotton's Testimony

Cotton was twenty-one years old at the time of trial. (App. p. 44, ll. 16-17, p. 341, ll. 9-10). Cotton testified that he met Cusack through one of his friends around October 2012. (App. p. 45, ll. 9-12, p. 348, ll. 6-8). He explained that they first began communicating over the phone. (App. p. 45, ll. 10-12). When Cotton first spoke to Cusack, she lied to him and gave him a false name. (App. p. 46, ll. 1-5, p. 348, ll. 11-14). According to Cusack, her name was Crystal Johnson. (App. p. 46, ll. 4-5, p. 348, ll. 11-14). He did not learn of her true identity until he was served with a warrant for the subject charges. (App. p. 49, l. 22-p. 50, l. 2, p. 351, ll. 2-6).

He and Cusack had a romantic relationship that lasted for approximately three to four months. (App. p. 45, ll. 14-15, p. 58, ll. 10-13, p. 59, ll. 4-5, p. 353, ll. 22-25). During this time, he and Cusack had one in-person meeting sometime around January 2013. (App. pp. 59-60). Cotton testified that he drove to what he believed was Cusack's aunt's house and spent time with her there. (App. pp. 59-60, p. 354, l. 16-p. 355, l. 15).

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[12] At trial, Investigator Gauger testified that Cusack never reported that Cotton threatened her with a gun. (App. p. 207, ll. 7-18).

Cotton denied Cusack's allegations. (App. p. 50, p. 347, l. 21-p. 348, l. 5). Specifically, Cotton testified that he did not pick up Cusack for a movie outing on February 1, 2013. (App. p. 50, p. 352, ll. 19-21). In fact, Cotton explained that he was at his friend Calvin's house playing video games and that his car was inoperable on this date. (App. p. 50, p. 351, l. 19-p. 353, l. 4).

Cotton testified that he and Cusack got into a confrontation, which resulted in the end of their relationship. (App. p. 349, ll. 3-14). Cotton explained that Cusack seemed upset about how their relationship ended. (App. p. 349, ll. 13-17). The last communication Cotton had with Cusack occurred on the night of February 1, 2013. (App. p. 48, l. 22-p. 49, l. 5). He received a text from her stating, ***"if you want to play games I can play games just as well."*** (App. p. 48, l. 25-p. 49, l. 2, p. 351, ll. 13-14).

In regard to the alleged Prior Victim, Cotton testified that he first began communicating with her ***after she messaged him*** on Facebook asking for help. (App. p. 51, ll. 19-21, p. 342, l. 21-p. 343, l. 4). Cotton told her he could. (App. p. 51, ll. 22-24, p. 343, ll. 15-20). Subsequently, he met her at a Sav-way store. (App. p. 52, ll. 13-14, p. 344, ll. 2-4). Cotton's brother was in the car when he met Prior Victim. (App. p. 52, ll. 3-14, p. 344, ll. 4-6). Prior Victim asked Cotton whether he would give her a ride somewhere, and Cotton told her that he did not mind. (App. p. 52, ll. 15-16, p. 344, ll. 18-22). Cotton drove her to a house where she picked up a large bag of clothes. (App. p. 52, ll. 17-20, p. 344, ll. 2-7). As Prior Victim opened the door of the car while also holding the large bag of clothes, she accidentally hit her eye on the corner of the door. (App. p. 52, ll. 20-22, p. 344, ll. 2-8). After they dropped off Cotton's brother, Prior Victim asked Cotton whether he would take her to a friend's house because she was having trouble at home. (App. p. 53, ll. 5-12, p. 344, ll. 18-21). Cotton then dropped Prior Victim off at her friend's house. (App.

p. 53, l. 17-p. 50, l. 2). Cotton testified that he never touched Prior Victim inappropriately during the car ride. (App. p. 54, p. 342, ll. 6-19).

ARGUMENTS

I. This case presents the ideal vehicle for overruling *State v. Wallace.*

This Court can—and should—reverse the lower courts based on current Rule 404(b) precedent. However, while Petitioner's merits brief was pending, this Court decided *State v. Perez*, Op. No. 27810 (S.C. Sup. Ct. filed June 6, 2018) (Shearouse Adv. Sh. No. 23 at 9). Concurring in result, Justice Hearn, joined by Chief Justice Beatty, called for this Court to overrule *State v. Wallace*, 384 S.C. 428, 683 S.E.2d 775 (2009), arguing the *Wallace* rule "has so expanded the admissibility of any prior bad acts in sexual offense cases that the exception has swallowed the rule." *Id.* at 18. Petitioner agrees and, for at least three reasons, this case presents the ideal vehicle for doing so.

First, both the trial court and the Court of Appeals relied significantly on *Wallace*. ***Second***, this case highlights the concerns raised by Justice Hearn. In this case, the lower courts admitted evidence of a single, uncharged, dissimilar, prior sexual assault. It is beyond reasonable dispute that the lower courts viewed this evidence through the *Wallace* lens and that if, for example, this were a drug case, a previous, uncharged attempt by Petitioner to sell drugs would not have been admitted. Indeed, it defies logic to suggest the State would have even sought to admit such evidence. Bottom line, the evidence at issue here was proffered and admitted *only* because it involved sex. *See Perez*, at 20 ("Just as mere similarities between the prior bad act and the crime charged would be insufficient in the case of all other crimes, it should likewise be insufficient when sexual misconduct is involved."). ***Finally***, this case, unlike *Perez*, cleanly presents the *Wallace* issue—i.e. this Court must either affirm or reverse the lower courts based solely on a Rule

404(b) analysis. *Compare Perez*, at 17 ("For these reasons, we find the Confrontation Clause was not harmless. Based on our disposition of this issue, we decline to reach the remaining issues on appeal. (citing *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999))).

II. This Court should overrule *State v. Wallace* and apply the common scheme or plan exception equally to sexual and nonsexual offenses alike.

On the merits, this Court should overrule *Wallace* for the reasons Justice Hearn articulated in *Perez*. In *Wallace*, this Court held, "[a] close degree of similarity establishes the required connection between the two acts and no further 'connection' must be shown for admissibility." *Wallace*, 384 S.C. at 434, 638 S.E.2d at 278. In sexual offense cases, therefore, the decision to admit prior bad act evidence for the purpose of proving common scheme or plan hinges on whether "the similarities outweigh the dissimilarities." *Id.* at 433, 638 S.E.2d at 278. As Justice Hearn argued in her concurrence, the broadening of the common scheme or plan exception to the extent that mere similarities alone are sufficient to admit prior bad act evidence diminishes the exclusionary effect for which Rule 404(b) was established. *See Perez*, at 19. Indeed, a broad definition contradicts the principle enunciated in *Lyle* that if the connection does not constitute "a continuous transaction" or is "not competent on the question of intent, it follows that it [is] not admissible merely to show plan or system." *Lyle*, 125 S.C. at 427, 118 S.E. at 811.

This Court has previously recognized the dangers of expanding the evidentiary exception and the potential prejudicial issues of admitting prior bad acts under a broad common scheme or plan exception in *State v. Nelson*, *State v. Gore*, and *State v. Brooks*. In *Nelson*, the court refused to adopt an expanded version of the rule applied in other jurisdictions which allowed the admission of prior sexual acts to prove a defendant's "lustful disposition." *State v. Nelson*, 331 S.C. 1, 14 n.16, 501 S.E.2d 716, 723 n.16 (1998). In rejecting this rule, the court recognized that admission

of evidence proving the defendant previously committed the same crime runs the risk of allowing "impermissible character evidence before the jury." *Id.* at 14, 501 S.E.2d at 723. Other jurisdictions have also recognized this danger that "[a] broad definition of 'common scheme or plan allows the state to raise the inference of guilt based on 'a disposition toward criminality.'" *State v. Ives*, 927 P.2d 762, 768 (Ariz. 1996). Regarding potential prejudicial issues, the court acknowledged in *Gore* that "when, as here, the previous alleged bad act is strikingly similar to the one for which the appellant is being tried, the danger of prejudice is enhanced." *State v. Gore*, 283 S.C. 118, 121, 322 S.E.2d 12, 13 (1984). Moreover, in *Brooks*, the court further noted that "[w]hether the improper introduction of [the] evidence is harmless requires us to look at the other evidence admitted at trial to determine whether the defendant's 'guilt is conclusively proven by competent evidence, such that no other rational conclusion could be reached.'" *State v. Brooks*, 341 S.C. 57, 62, 533 S.E.2d 325, 328 (2000).

In addition, this Court established in *State v. Fletcher* that for a bad act to be admissible, it "must logically relate to the crime with which the defendant has been charged." *State v. Fletcher*, 379 S.C. 17, 23, 664 S.E.2d 480, 483 (2008). Justice Hearn acknowledged in *Perez* that mere similarities are not enough to establish the necessary logical connection between the crime charged and the prior bad acts because "[s]imilarity is not the type of connection such that proof of one is proof of the other". *Perez*, at 19. Therefore, this Court should restore the exception "to its original purpose as articulated in *Lyle* whereby proof of a common plan or system requires 'the establishment of such a visible connection between the extraneous crimes and the crime charged as will make evidence of one logically intended to prove the other as charged.'" *Perez*, at 18 (quoting *Lyle*, 125 S.C. at 427, 118 S.E. at 811 (1923)). Because similarity does not provide the "visible connection" necessary to allow prior bad acts into evidence in sexual offense cases under

the common scheme or plan exception, this Court should overrule *Wallace* and rely on the original principle set forth in *Lyle*.

Here, the trial court relied on *Wallace* in finding that the prior bad act evidence was admissible. (App. p. 89, l. 21-p.91, l. 21). Specifically, in following the factors set forth by *Wallace*, the trial court found that the age of the victims was similar; the relationship between the victims and Cotton was similar; the locations where the alleged abuse occurred was similar; the use of coercion or threats was similar; and the manner or the occurrences, the types of sexual battery, was similar. (App. p. 89, l. 21-p.91, l. 21). The trial court concluded that while "there are some minor dissimilarities between these incidents, in the overall scheme of things the Court finds these incidents are very similar and are the type of incidents that are anticipated in the common scheme or plan exception that would admit this evidence." (App. p. 91, ll. 16-21). These "similarities alone do not necessarily establish a logical connection between the crime charged and the prior bad act[] such that the existence of one tends to prove the existence of the other." *Perez*, at 19.

In short, this case presents this Court the opportunity to correct *Wallace's* ill-considered double-standard regarding propensity evidence in cases involving sex on the one hand and everything else on the other. It should do so.

III. Even if this Court does not overrule *State v. Wallace*, the Court of Appeals still erred in affirming the trial court's admission of prior bad act evidence under the common scheme exception to Rule 404(b), SCRE.

The Court of Appeals erred in affirming the trial court's admission of the prior bad act for at least three separate and independent reasons. ***First***, in nearly all sex crime cases where prior bad acts were admitted, the prior bad acts demonstrated continuous illicit conduct with the same victim or related victims. No continued illicit conduct occurred here. Instead, this case involved

a single isolated prior bad act with a different and unrelated victim. ***Second***, Prior Victim and Cusack's testimony are linked only by very general similarities common to most—if not all—sexual assaults. ***Finally***, and perhaps most importantly, the differences between Prior Victim and Cusack's testimony far outweigh their similarities.

A. Nearly all sex crime cases where prior bad acts have been admitted involve continuous illicit conduct with the same victim or related victims.

During the pre-trial hearing, the State relied on several cases which have applied the common scheme or plan exception in sex crime cases. (App. pp. 65-68; 75-80). *See State v. Atieh*, 397 S.C. 641, 725 S.E.2d 730 (Ct. App. 2012); *State v. Wallace*, 384 S.C. 428, 683 S.E.2d (2009); *State v.* Clasby, 385 S.C. 148, 682 S.E.2d 892 (2009); *State v. Kirton*, 381 S.C. 7, 671 S.E.2d 107; *State v. McClellan*, 283 S.C. 389, 323 S.E.2d 772 (1984); *State v. Hallman*, 298 S.C. 172, 379 S.E.2d 115 (1989); *State v. Henry*, 313 S.C. 106, 432 S.E.2d 489 (Ct. App. 1993); *State v. Blanton*, 316 S.C. 31, 446 S.E.2d 438 (Ct. App. 1994); *State v. Wingo*, 304 S.C. 173, 403 S.E.2d 322 (Ct. App. 1991); *State v. Hubner*, 384 S.C. 436, 683 S.E.2d 279 (2009); *State v. Adams,* 332 S.C. 139, 504 S.E.2d 124 (Ct. App. 1998). For several reasons, all of these cases are inapposite to—and do not support admission of—Prior Victim's testimony.

As an initial matter, all of the cases relied on by the State and the trial court involved admission of prior bad act evidence in cases where sex crimes were committed against children. Here, Cusack was an adult who could and did speak for herself, thus, lessening the need for prior bad act testimony. Prior bad act testimony is needed in child sexual abuse cases because children often have difficulties in communicating such information. This fact is also significant because most of these cases involve child molesters whose behavior is often repetitive and thus lends itself to easily establishing a pattern.

i. Continuous Illicit Conduct

In nearly all sex crime cases involving prior bad act evidence, the prior acts involve a ***continuing course*** of illicit conduct, often with the same or related victims, such as daughters or stepdaughters, rather than a ***single isolated prior*** act with a different and wholly unrelated alleged victim as in this case. *See e.g.*, *Wallace*, 384 S.C. at 431-32, 683 S.E.2d at 276-77 (involving the sexual abuse of victim's sister, who the defendant sexually abused from the time she was in seventh grade until she moved out of defendant's residence after graduating high school); *Clasby*, 385 S.C. 148, 682 S.E.2d 892 (involving four incidents of prior uncharged sexual misconduct committed by defendant on the victim); *Kirton*, 381 S.C. at 28, 671 S.E.2d at 117 (involving prior sexual acts that happened several times a month for six to seven years on the same victim); *McClellan*, 283 S.C. at 391, 323 S.E.2d at 773 (involving the repeated sexual abuse of defendant's three daughters); *Hallman*, 298 S.C. at 173-75, 379 S.E.2d at 116-17 (involving the habitual and continuous abuse of defendant's three former foster daughters in his criminal sexual conduct trial for abuse of a fourth foster daughter); *Henry*, 313 S.C. at 107, 432 S.E.2d at 490 (involving the prior sexual abuse of two of defendant's step-daughters which continued over a period of years in his trial for abuse of a third step-daughter); *Blanton*, 316 S.C. at 32, 446 S.E.2d at 439 (admitting testimony of two females in defendant's trial for criminal sexual conduct against his granddaughter where the females had been sexually molested by the defendant at approximately the same age and in the same manner as defendant's granddaughter); *Wingo*, 304 S.C. at 176, 403 S.E.2d at 324 (involving prior bad acts of sexual abuse on victim's sister and victim's cousin); *Hubner*, 384 S.C. 436, 683 S.E.2d 279 (involving two unrelated victims where abuse of each female continued over several years).

ii. State v. Kirton

In *Kirton*, this Court explained that the common-scheme or plan exception is generally applied in cases involving sex crimes, where evidence of acts prior and subsequent to the act charged in the indictment tend to show ***continued illicit acts*** between the same parties. *Kirton*, 381 S.C. at 28, 671 S.E.2d at 117. The *Kirton* court then went through a thorough review of previous cases addressing prior bad act evidence in child sexual abuse cases, most of which involved continuous illicit acts, as opposed to distinct, isolated acts. *Id.* at 28-39, 671 S.E.2d at 117-21.

Kirton also stressed that the case law analyzing such evidence in sexual abuse cases and those permitting the admission of such evidence "do not lower the bar for admissibility under *Lyle* simply because sexual crimes are involved." *Id.* at 30, 671 S.E.2d at 119.

> Regardless of the nature of the charges facing the defendant, there must be evidence that the defendant employed a common scheme or plan in the commission of the crimes. Where there is a ***pattern*** of continuous misconduct, as commonly found in sex crimes, that pattern supplies the necessary connection to support the existence of a plan. Presumably, this is so because the same evidence that establishes the ***continuous nature*** of the assaults will generally suffice to prove the existence of the common scheme or plan as well. In *Weaverling* and *McClellan*, the sheer volume of repeated occurrences, together with the close similarities in the assaults, evidenced a pattern of continuous illicit conduct. Accordingly, these cases fall squarely within the plain meaning of common scheme or plan evidence. *McClellan*, 283 S.C. at 392, 323 S.E.2d at 774 (stating it would be difficult to conceive of evidence more within the common scheme or plan exception); *Weaverling*, 337 S.C. at 469, 523 S.E.2d at 791 (stating the pattern of sexual abuse represented "quintessential common scheme or plan evidence").

Id. at 31-32, 671 S.E.2d at 119 (quoting *Tutton*, 354 S.C. at 328-29, 580 S.E.2d at 191) (emphasis added).

In this case, the trial court improperly ruled that a single prior alleged incident established a common scheme or plan. There was no continuous illicit conduct present in this case like the

conduct in nearly all cases where prior bad act evidence has been allowed. *See Kirton*, 381 S.C. at 28-39, 671 S.E.2d at 117-21 (reviewing the history of South Carolina jurisprudence addressing prior bad act evidence in sex crime cases, most of which involved continuous illicit acts, as opposed to distinct, isolated acts).

Likely recognizing that one prior incident does not establish a common scheme, the State originally claimed that it intended to introduce ***three*** prior bad act witnesses. However, during the *Lyle* hearing and at trial, it presented only ***one***. The Court of Appeals' opinion affirming the trial court's admission of this single prior bad act stands in stark contrast to the few cases in which our courts have addressed the issue of whether a single prior act establishes a common scheme.

iii. Single Incident Cases

Two South Carolina cases are especially relevant here. These two cases analyze the common scheme exception in the context of a single prior bad act. *See State v. Davenport*, 321 S.C. 134, 467 S.E.2d 258 (Ct. App. 1996); *State v. Berry*, 332 S.C. 214, 503 S.E.2d 770 (Ct. App. 1998). *See also State v. Rivers*, 273 S.C. 75, 254 S.E.2d 299 (1979) (holding defendant's previous sexual misconduct with his wife, a person other than the victim of the charged crime, was inadmissible because of the dissimilarities between the charged offense and the prior act).

In *Davenport*, the Court of Appeals held that similar threats and weapons, as well as the tangential relationships between the alleged victims and the defendant, were insufficient to establish a common scheme or plan. 321 S.C. at 138-39, 467 S.E.2d at 261. In this case, like *Davenport*, there was no similarity in the class of the victims; there was no significant similarity between the females' relationships with the defendant; the location of the assaults occurred in two different geographical areas—in *Davenport*, one assault occurred in Orangeburg while the other occurred in Newberry; and the manner or occurrence of the acts were not similar.

In *Berry*, the incidents occurred fifteen months apart, under different circumstances, at different times, and in different ways. 332 S.C. 214, 219, 503 S.E.2d 770, 773. The Court of Appeals explained that merely because the two alleged victims both wore glasses and claimed that the defendant grabbed their throats did not make the assaults sufficiently similar such that they were a common scheme or plan. *Id.* Similarly here, the alleged incidents occurred: eight months apart; under different circumstances; in different places—in the present case one alleged assault occurred in Darlington County while the other alleged assault occurred in Hartsville or Florence County; with two different and unrelated victims; and in different ways.

B. Alleged Prior Victim and Cusack's testimony are linked only by very general similarities common to most if not all sexual assaults.

Because there is no pattern of continuous illicit conduct present in this case, the common scheme or plan evidence cannot be admitted on just a generalized basis. *Tutton*, 354 S.C. at 328, 580 S.E.2d at 191. Rather, to be admissible as a common scheme or plan, there must be a close degree of similarity or connection between the prior bad act and crime. *Kirton*, 381 S.C. at 27, 671 S.E.2d at 117. Here, there were only general similarities between Prior Victim and Cusack's testimony. These similarities were insufficient to establish a common scheme or plan.

As an initial matter, Prior Victim and Cusack's testimony are linked only by superficial similarities, which are common to most sexual assaults in general. *See Tutton*, 354 S.C. at 328, 580 S.E.2d at 191 (providing in sex crime cases general similarities are not sufficient to support the finding of a common scheme or plan unless a pattern of continuous illicit conduct is established). In support of admitting Prior Victim's testimony, the State relied on facts common to most sexual assaults: both victims were young females; both females were acquaintances of Cotton; both were allegedly alone with Cotton at the time of the alleged incidents; both incidents allegedly occurred at night and in a private place; and both incidents allegedly involved implicit

or explicit forms of violence. These factors are common to several, if not most, sex crimes, and lack any real significance.

Furthermore, Cotton is a young male and thus associates with other young individuals.[13] In most cases of sexual assault, the victim knows the perpetrator.[14] Additionally, it is common sense that sexual assaults rarely, if ever, occur in public and predominately take place at night.[15] Moreover, the very nature of sexual assaults involves the explicit or implicit use of force and violence. *See State v. Rogers*, 992 P.2d 229 (Mont. 1999) (holding the trial court erred in admitting prior sexual assaults based upon similarities common to sexual assaults, specifically voluntary entry into defendant's vehicle, driving to remote areas, advances, resistance, and forcible intercourse). There is nothing about the prior incident and the charged crime which make them unique. *See State v. Timmons*, 327 S.C. 48, 53, 488 S.E.2d 323, 326 (1997) (holding the trial court erred in admitting prior robberies based upon similarities common to all robberies).

C. The Court of Appeals overlooked the abundant dissimilarities between the prior bad act and this case.

The Court of Appeals failed to take into account the abundant dissimilarities between the prior bad act and this case. Here, Prior Victim and Cusack's testimony described two distinct, isolated acts against two different and unrelated individuals, at different times, at different places, and under different circumstances.

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[13] A U.S. Department of Justice study found that in eighty percent of sexual assault cases, the victims were under the age of thirty. An Analysis of Data and Rape and Sexual Assault, U.S. Department of Justice, Bureau of Justice Statistics, 1997, p. 11.

[14] According to another U.S. Department of Justice study, ninety percent of sexual assault victims knew their perpetrator. The Victimization of College Women, U.S. Department of Justice, Office of Justice Programs, National Institute of Justice, Research Report, 2000, p. 17.

[15] The same study found that 88.3% of sexual assaults occurred between 6 p.m. and 6 a.m. *Ibid*, p. 18.

In *Wallace*, this Court set forth various factors for the trial court to consider when determining whether there is a close degree of similarity between the prior bad act and the charged crime:

> (1) the age of the victims when the abuse occurred; (2) the relationship between the victims and the perpetrator; (3) the location where the abuse occurred; (4) the use of coercion or threats; and (5) the manner of the occurrence, for example, the type of sexual battery.

Id. The *Wallace* court emphasized that "these factors are set out merely for guidance and that other factors may be relevant in weighing the similarities and dissimilarities between the crime charged and the bad act evidence." *Id* at 434, 683 S.E.2d at 278.

i. Significant Differences Between the Alleged Incidents

Significant differences existed between the alleged assaults of these two females. These significant differences include but are not limited to:

> **(1)** Cusack being an adult and Prior Victim being a minor;
> **(2)** Cusack and Cotton having an established relationship opposed to Prior Victim and Cotton being mere acquaintances;
> **(3)** Cusack and Cotton met on two different occasions, while Prior Victim and Cotton only met on one occasion;
> **(4)** Cusack and Cotton met for a purpose of a date, while Prior Victim met Cotton in order to get a ride;
> **(5)** No other people were present other than Cusack and Cotton for their date, while Cotton's brother was present for a portion of the car ride with Prior Victim;
> **(6)** Cotton made stops at public places with Cusack prior to the incident, while Cotton and Prior Victim made no stops at public places;
> **(7)** Cotton took Cusack's phone but did not take Prior Victim's phone during the alleged abuse;
> **(8)** Cotton was under the influence of marijuana[16] during the alleged assault of Cusack while there was no evidence that Cotton was under the influence of drugs during the alleged assault of Prior Victim;
> **(9)** According to the females, Cotton threatened Cusack with a gun while he threatened Prior Victim with the use of physical violence;

[16] The sexual assault examination protocol indicated that Cotton used marijuana on the night of the incident. (App. p. 474).

(10) Cotton allegedly removed Cusack from the car and took off her clothes, while Prior Victim took off her clothes and got out of the car on her own volition;
(11) Cusack's assault only involved either vaginal intercourse or oral and vaginal intercourse[17] as opposed to Prior Victim's assault, which involved oral, vaginal, and anal intercourse;
(12) Cotton allegedly asked Prior Victim specific demeaning questions during intercourse, while there was no evidence that Cotton said anything to Cusack during intercourse; and
(13) The location of the alleged assaults differed—one allegedly occurred in Darlington County, while the other occurred in Hartsville or Florence County.

As explained in Cotton's appellate briefs, Prior Victim and Cusack were three years apart in age; had vastly different relationships with Cotton; described two very different types of assaults at two completely different geographical locations; and explained that the alleged assaults were carried out by different types of threats. Thus, the Court of Appeals overlooked the fact that there is not a clear connection or close degree of similarity between the prior bad act and crime charged and that the trial court's ruling on such was in error. *See Lyle,* 125 S.C. at 417, 118 S.E. at 807 (holding "if the [trial] court does not clearly perceive the connection between the extraneous criminal transaction and the crime charged, that is its logical relevancy, the accused should be given the benefit of the doubt and the evidence should be rejected").

ii. The relationships between Cotton/Alleged Prior Victim vs. Cotton/Cusack

The Court of Appeals failed to acknowledge the significant differences between Prior Victim and Cusack's relationships with Cotton. The trial court erred in finding that the females' relationships with Cotton were similar on the basis of the allegations that he met both females on social media. First, the record does not establish that Cusack and Cotton in fact met through social media. Rather, the record is full of evidence which supports the fact that Cotton and Cusack met through a friend and then started a relationship by communicating over the phone.

[17] Her testimony at trial indicates that only vaginal intercourse occurred.

Even if Cusack and Cotton met on a chat line rather than through a friend, the communication and relationship that developed between them was of a romantic and more personal nature than the relationship that existed between Cotton and Prior Victim, which was based on a couple of impersonal messages sent over Facebook. The record indicates that Cotton and Cusack communicated continuously over the phone for a certain period of time. While Cusack did not testify how long this period was, Cotton testified that their relationship lasted approximately two to four months. Further, while Cusack denied that their relationship was of a romantic nature, facts in the record suggest otherwise – Cusack and Cotton made plans to go on a date; prior to their date they discussed getting each other Valentine's Day gifts; they actually went to K-mart for the purpose of Valentine's Day shopping; and after the alleged intercourse, Cotton told Cusack he loved her.

The State suggested there was a similarity in the parties' relationships based on the fact that both females were acquaintances of Cotton. As explained above, this is a general similarity which is common to nearly all sexual assaults, and even if this were considered to be a similarity, the relationship between Cusack and Cotton was more than mere acquaintances. Moreover, South Carolina case law indicates that a similarity in the parties' relationship based on the fact that the victims were both acquaintances of the defendant is insufficient to establish a connection between the prior bad act and the crime charged. *See Davenport*, 321 S.C. at 138, 467 S.E.2d at 261 (holding that knives were used in both instances and that the relationships of the parties, that defendant only tangentially knew both of the victims before the assaults, were not sufficient criteria to establish a connection between the acts). Therefore, the trial court ultimately erred in treating the relationship between the females and Cotton as a similarity in supporting its decision to allow admission of the prior bad act evidence.

iii. The Location of the Alleged Assaults

A majority of South Carolina case law provides that in order for there to be a similarity between the prior act and the crime charged based on location, the physical locations where the abuse occurred need to be the same. *See State v. Timmons*, 327 S.C. 48, 53, 488 S.E.2d 323, 326 (1997) (providing that the prior incident and the charged incident that both took place in the Cayce/West Columbia area was too general of a location to warrant the finding of a similarity); *Tutton*, 354 S.C. at 323-24, 580 S.E.2d at 188-89 (providing that the location was similar when all of the alleged abuse occurred at defendant's residence in Laurens County); *Kirton*, 381 S.C. at 13, 671 S.E.2d at 109-10 (admitting prior bad act evidence when the prior and charged abuse occurred in the defendant's trailer located in Georgetown County); *Wallace*, 384 S.C. at 431-32, 683 S.E.2d at 276-77 (admitting prior bad evidence when all abuse occurred in the family's residence located in Greenville County). Indeed, the State acknowledged that the prior act and current act did not happen in a singular location like most of the cases in which prior bad act evidence has been admitted. (App. p. 68).

In the face of overwhelming precedent, and the State's acknowledgment of the same, the trial court here found that because both alleged acts occurred in a car and an unpopulated area, the locations were sufficiently similar. This ruling was incorrect for several reasons. First, as explained above, most assaults do not occur in public places. It is common sense that sexual assaults will usually always take place where there are not a lot of people present. Second, while both acts allegedly occurred in unpopulated areas, the trial court completely disregarded the fact that these areas were in two completely different geographic locations. The alleged act with Cusack occurred somewhere in Darlington County off of Turnpike Road, while the alleged act

with Prior Victim occurred off of an unknown road likely somewhere in Florence or Hartsville County.[18]

Further, in regard to the acts that occurred in the car, the alleged touching of both females began at different locations inside the car. With Cusack it allegedly began when they were both located in the front seat; with Prior Victim it began when she was sitting in the back seat of the car. As to the oral sex that occurred immediately prior to intercourse, Cusack testified it occurred inside the car prior to trial, and, at trial, that it was attempted outside of the car. Prior Victim testified that the oral sex occurred inside the car. As to the alleged sexual intercourse that occurred – Cusack testified that it occurred immediately outside of the front passenger door, while Prior Victim testified that it occurred on the hood of the car. *See Atieh*, 397 S.C. at 648, 725 S.E.2d at 734 (admitting prior bad act evidence when the inappropriate touching occurred at defendant's restaurant in specific areas around the sink or cooler). Furthermore, as stated above, the alleged sexual intercourse with these two females happened at completely different geographical locations.

iv. The Manner of The Occurrence Between The Two Acts

The trial court improperly found that the manner of occurrence between the two acts was similar because they both began with oral sex and then proceeded to vaginal and other sex. (App. pp. 90-91). There were major differences in regard to the type of sexual battery that occurred. While Prior Victim's testimony established that she was forced to perform oral sex prior to her sexual assault, Cusack's testimony did not establish that her alleged assault on Turnpike Road began with or included oral sex. Prior to trial, she testified she performed oral sex at the Turnpike Road location. At trial she stated she did not perform oral sex at that location. Further, the trial

[18] Prior Victim testified that Cotton began inappropriately touching her soon after they dropped his brother at his house on Whitehall Lane, which is located in Hartsville. (App. p. 25, ll. 21-24, p. 175, l. 25-p. 176, l. 8).

court failed to address another major distinction in regard to the type of sexual battery that occurred. Cusack testified that only vaginal intercourse occurred as opposed to Prior Victim who testified that both vaginal and anal intercourse occurred.

The trial court also found that the abuse began in the same way—with Cotton coming around the car and taking the females out of the car. However, the manner in which intercourse was initiated was actually different. Cusack testified when Cotton could not get her pants off in the car, he got out of the car and went to the passenger side door and removed her from the car. She testified he then began undressing her. In contrast, Prior Victim testified that prior to sexual intercourse, she removed her pants and got out of the car on her own volition.

v. Summary

As noted, *Wallace* instructs the trial court to look at the following factors: (1) the age of the victims; (2) the relationship between the victims and the defendant; (3) the location where the acts occurred; (4) the use of threats; and (5) the manner of the occurrence, for example the type of sexual battery. As explained above, Prior Victim and Cusack were three years apart in age; had vastly different relationships with Cotton; described two very different types of assaults at two completely different geographical locations; and explained that the alleged assaults were carried out by different types of threats. Thus, there is not a clear connection or close degree of similarity between the prior bad act and crime charged. Consequently, the Court of Appeals erred in affirming the trial court's admission of Prior Victim's testimony about the prior bad act. *See Lyle,* 125 S.C. at 417, 118 S.E. at 807 (holding "if the [trial] court does not clearly perceive the connection between the extraneous criminal transaction and the crime charged, that is its logical relevancy, the accused should be given the benefit of the doubt and the evidence should be rejected").

IV. The probative value of Prior Victim's testimony is outweighed by its prejudicial effect.

"Even if prior bad act evidence is clear and convincing and falls within an exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant." *Tutton*, 354 S.C. at 325, 580 S.E.2d at 189. The determination of the prejudicial effect of the evidence must be based on the entire record, and the result will generally turn on the facts of each case. *Kirton*, 381 S.C. at 24, 671 S.E.2d at 115.

The Court of Appeals overlooked the fact that the dissimilarities between the alleged prior act with Prior Victim and the current alleged act with Cusack nullified the probative value of the prior bad act evidence. Moreover, the Court of Appeals failed to consider the extremely prejudicial nature of this evidence, which was testimonial evidence the jury could not have possibly ignored. Accordingly, counsel for Cotton urges this Court to reconsider this decision and find the trial court improperly allowed Rule 404(b) evidence in this case.

V. The trial court's admittance of the prior bad act testimony constitutes reversible error.

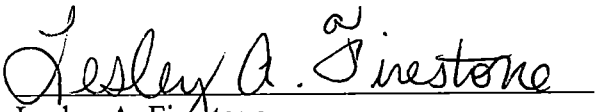
Further, the trial court's error in admitting the prior bad act evidence was not harmless and constitutes reversible error. It is impossible to conclude that, without reference to the uncharged prior sexual assault, the evidence of Cotton's guilt was overwhelming or that Cotton's guilt was the only rational conclusion that could have been reached from the evidence presented. *See Tutton*, 354 S.C. at 334, 580 S.E.2d at 186. Here, evidence of the prior bad act amounted to an attack on Cotton's character and credibility, issues that were central to his defense. *See Berry*, 332 S.C. at 220, 503 S.E.2d at 773 (concluding that evidence of a prior sexual assault amounted to a prejudicial attack on the defendant's character and credibility, which were central to his defense, and thus was not harmless error). The impact of this testimony undoubtedly contributed a great deal to the

verdict, and this Court cannot and should not ignore its prejudicial impact. Consequently, the trial court's error in admitting the prior bad act testimony cannot be deemed harmless.

CONCLUSION

For the foregoing reasons, Petitioner's convictions should be reversed.

Respectfully submitted,



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June 11, 2018

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM DARLINGTON COUNTY
J. Michael Baxley, Circuit Court Judge
Appellate Case No. 2017-002402

The State, ...Respondent,

v.

Damyon M. Cotton, ...Petitioner.

PROOF OF SERVICE

This is to certify that I have this day served counsel for the Respondent in the foregoing matter with a copy of the foregoing ***Petitioner's Brief*** by depositing same in the United States Mail with adequate postage affixed thereon to ensure delivery, addressed as follows:

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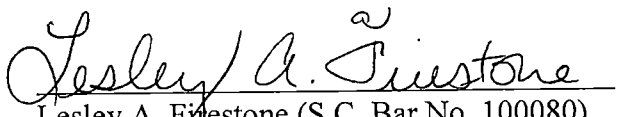

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