THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to the Court of Appeals
APPEAL FROM DARLINGTON COUNTY
J. Michael Baxley, Circuit Court Judge

Appellate Case No. 2017-002402

The State, ... Respondent,

v.

Damyon M. Cotton, ... Petitioner.

Opinion No. 2017-UP-356 (S.C. Ct. App. Filed 9/6/17)

PETITIONER'S REPLY BRIEF

Lesley A. Firestone
Moore & Van Allen, PLLC
78 Wentworth Street
Charleston, SC 29401
(843) 579-7000

Lara Mary Caudy, Esquire
Robert Michael Dudek, Esquire
Chief Appellate Defender
PO Box 11589
Columbia, SC 29211
Attorneys for Petitioner

William M. Blitch, Jr., Esquire
Alan McCrory Wilson, Esquire
South Carolina Attorney General's Office
PO Box 11549
Columbia, SC 29211
Attorneys for Respondent

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to the Court of Appeals
APPEAL FROM DARLINGTON COUNTY
J. Michael Baxley, Circuit Court Judge

Appellate Case No. 2017-002402

The State, ...Respondent,

v.

Damyon M. Cotton, ... Petitioner.

Opinion No. 2017-UP-356 (S.C. Ct. App. Filed 9/6/17)

PETITIONER'S REPLY BRIEF

Lesley A. Firestone
Moore & Van Allen, PLLC
78 Wentworth Street
Charleston, SC 29401
(843) 579-7000

Lara Mary Caudy, Esquire
Robert Michael Dudek, Esquire
Chief Appellate Defender
PO Box 11589
Columbia, SC 29211
Attorneys for Petitioner

William M. Blitch, Jr., Esquire
Alan McCrory Wilson, Esquire
South Carolina Attorney General's Office
PO Box 11549
Columbia, SC 29211
Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

ARGUMENT

I. As the State's response demonstrates, lower courts generally, and the trial court here, are fundamentally misusing the word "similar" during their Rule 404(b) analysis.

The fundamental problem with both *State v. Wallace* and the State's response here is that each rely heavily—indeed, almost exclusively—on the word "similar." That word appears nowhere in Rule 404(b) and, as Justice Hearn recently articulated in *State v. Perez*, the outsized role it currently plays in the 404(b) analysis has profoundly (and incorrectly) altered whether, how, and to what extent trial courts admit evidence of so-called "prior bad acts" in criminal cases generally, and in sexual assault cases specifically. *State v. Perez*, 2018 WL 2709474, at *6 (2018) (Hearn, J., concurring) ("[I]n a marked departure from earlier case law requiring some connection between crimes ***beyond mere similarity*** in order to meet the common scheme or plan exception, the *Wallace* majority held. . . ." (emphasis added)).

State v. Lyle, and the cases cited therein, considered and ***expressly rejected*** the idea that a jury can hear about a prior bad act as soon as the State establishes a sufficient "similarity" between it and the charged offense. Instead, the proper analysis is for a court to determine whether one of the five 404(b) exceptions applies. *See* Rule 404(b), SCRE

> 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.

(emphasis added). In other words:

> (1) must the State ***show*** that ***motive*** is not in doubt?
> (2) must the State ***show*** that ***identity*** is not in dispute?
> (3) must the State ***show*** that the charged crime and the uncharged act are intrinsically connected and inseverable, i.e., part of a ***common scheme***?
> (4) must the State ***show*** that the victim is not ***mistaken*** or that what happened was not an ***accident***? or
> (5) must the State ***show*** that the defendant acted with the requisite ***intent***?

If the answer to these questions is "no," i.e., "motive, identity, common scheme, mistake/accident, or intent" are ***not*** in dispute—then the analysis stops there, and it matters not one whit whether the charged and uncharged acts are sufficiently "similar." Thus unless, for example, the State needs to resolve an "identity" dispute, it has no reason at all to introduce evidence of a prior bad act—whether the acts are similar or not.

Notably, the State essentially admits its (understandable) confusion when it explains that "Courts of this state have long held prior bad acts admissible when they serve to prove some fact or element related to the crime charged," *see* Resp. Br., p. 10, but does ***not*** explain what "fact or element related to the crime charged," that Petitioner's prior bad act actually "served to prove." In other words (again), the State has not and cannot explain ***why*** it needed to admit Petitioner's prior bad act in the first place (by explaining which of the five 404(b) exceptions applies) and, instead, it jumps directly into an explanation of why the two are allegedly "similar."

Lower courts, like the trial court here, are consistently analyzing the 404(b) question in a similarly incorrect fashion. Trial courts typically begin the analysis by asking whether the two events are sufficiently similar and, if they are, they generally admit the evidence without ever considering the proper question—is the prior bad act essential to prove the crime charged. As this case demonstrates, that incorrect analysis has grave consequences.

Here, the State sought to introduce Petitioner's prior bad act as evidence of a "common scheme or plan." But, the State never explained (because the trial court never asked), ***why*** it needed to do so. Instead, the assistant solicitor, the trial court, the court of appeals, and the State here, ***all*** proceeded directly to the "similarity" analysis. As both *Lyle* and a re-reading of Rule 404(b) make plain, that misses the forest for the trees. *See State v. Lyle*, 125 S.C. 406, 118 S.E.2d 803, 808 (1923)

> As to plan or system. A plan or system common to other crimes ***was not*** an essential ingredient of the crime charged. Whether such crime was committed as part of a common plan or system ***was wholly immaterial***, unless proof of such system would serve to identify the defendant as the perpetrator of the particular crime charged or was necessary to establish the element of criminal intent.

(emphasis added); *see also People v. Molineux*, 168 N.Y. 264, 292, 61 N.E. 286, 294 (1901)

> Some connection between the crimes must be shown to have existed in fact and in the mind of the actor, ***uniting them for the accomplishment of a common purpose, before*** such evidence can be received. This connection must clearly appear from the evidence. Whether any connection exists is a judicial question. If the court does not clearly perceive it, the accused should be given the benefit of the doubt, and the evidence rejected. The minds of the jurors must not be poisoned and prejudiced by receiving evidence of this irrelevant and dangerous description.

(emphasis added); *see also id.*

> As to a common plan or scheme: It sometimes happens that two or more crimes are committed by the same person in pursuance of a single design, or under circumstances ***which render it impossible to prove one without proving all.*** To bring a case within this exception to the general rule which excludes proof of extraneous crimes, there must be evidence of system between the offense on trial and the one sought to be introduced. They must be connected as parts of a general and composite plan or scheme, or they must be so related to each other as to show a common motive or intent running through both.

(emphasis added).

No one disputes that Rule 404(b) codified *Lyle* which, in turn, relied almost entirely on *People v. Molineux*. Those cases illustrate the carefully circumscribed manner in which evidence of a "common scheme or plan" can be admitted—when (and only when) the State ***seeks to prove a common scheme or plan*** as a fact or element of the underlying offense.

Wallace compounded this problem and the State's Response illustrates how. Jumping back-and-forth between fact patterns it says are "similar" and those that are "not similar enough," the State ably demonstrates the confusion wrought by *Wallace* because that case ***not only*** permits

courts to ask ***only*** whether the events are sufficiently similar (without even asking the proper 404(b) question) it ***also*** says that the word "similar" means something ***different*** when the prior and charged acts are of a sexual nature. In short, many post-*Lyle*/pre-*Wallace* cases ask the wrong question and *Wallace* supplies the wrong answer in sex crime cases.

This Court, through this case, can set things right. By overruling *Wallace* and, in so doing, correcting the error of prior decision of finding mere similarity sufficient to admit the other bad acts. This Court can and should provide the bench and the bar with the correct sequence of events in a Rule 404(b) analysis. *See Perez*, 2018 WL 2709474, at *7 (Hearn, J., concurring) ("Accordingly, I would overrule *Wallace* and restore the common scheme or plan exception in sexual misconduct cases to its original purpose as articulated in Lyle. . .").[1]

II. The prior bad act was not admitted to prove Petitioner's identity, which was never in dispute.

A "common scheme or plan" is but one of five Rule 404(b) exceptions. Identity is another. In its response, the State appears to argue Petitioner's prior bad act was separately admitted to prove his identity. *See generally* Resp. Br. pp. 10, 18-19, 22, 25.

But there never was any identity dispute because Petitioner's DNA was on the victim's jeans, she identified him at trial, they admitted knowing each other, and he admitted meeting up with her on one occasion. And, in any event, the trial court expressly ruled it was ***not*** admitting

[1] The State submits that Petitioner never expressly asked either lower court to "overrule *Wallace*." True enough. That does not mean the "issue" is not preserved. The "issue" is whether the trial court incorrectly admitted evidence of Petitioner's prior bad act. It did, that ***issue*** is plainly preserved and, in the course of ***arguing*** his case below, no one could reasonably expect Petitioner's trial counsel to ask the lower courts for the impossible—an order overruling one of this Court's prior cases. In other words, this is not an "issue" that could have been "preserved" it is an "argument" in support of Petitioner's "issue," and nothing prevents this Court from overruling itself on the way to reversing Petitioner's conviction. Further, Petitioner plans to move this Court, pursuant to Rule 217, SCACR, to argue against precedent.

the prior bad act to resolve an identity dispute because, again, there was not one. The trial court stated:

> If the State has offered [the prior bad act] for identity as well, the Court finds this case is not really about the identity of the perpetrator because typically when you have an identity issue it's when someone has worn a mask or has some, attempted to hide their identity in such a way that they cannot be identified and thus you look to prior incidents to see whether there may be some assistance with identity. That is not the case here; thus, ***this evidence cannot come in for identity purposes.***

App. p. 88, l. 18-p. 89, l. 2 (emphasis added). Accordingly, Respondent's argument is without merit.

III. The trial court's error of admitting the prior bad act was anything but harmless.

The Assistant Solicitor passionately seeks admission of allegedly "critical" prior bad act evidence at trial. The trial court erroneously admits said evidence. The Assistant Attorney General argues the prior bad act evidence was, in fact, ***not*** critical ***and*** that the other evidence of guilt was "overwhelming," ***but*** without ever explaining why, if the "other evidence" was indeed so "overwhelming," the solicitor sought admission of the prior bad act in the first place.

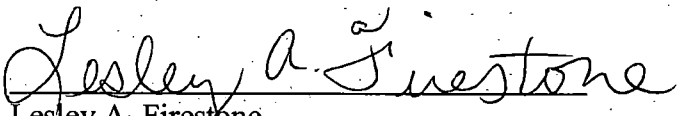
The State's three pieces of "other evidence" were anything but overwhelming. The alleged victim's testimony merely contradicted Petitioner's—he said, she said testimony is a quintessential credibility question and contributes nothing to the "overwhelming" calculus. The alleged victim did identify Petitioner's license plate but, again, this adds nothing because Petitioner testified that he met victim on one occasion where she talked to him through the driver side window of his vehicle. Finally, although the DNA evidence perhaps provided ***some*** evidence that Petitioner committed rape, its presence was hardly "overwhelming," especially in light of another individual's DNA being found on victim's jeans and Petitioner's alternative explanation for the presence of his DNA on her jeans.

In sum, the State has not—and cannot—explain why the trial court's erroneous admission of Petitioner's prior bad act should be excused because it should not be.

CONCLUSION

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

Respectfully submitted,



Lesley A. Firestone
Moore & Van Allen, PLLC
78 Wentworth Street
Charleston, SC 29401
(843) 579-7000

Lara Mary Caudy, Esquire
Robert Michael Dudek, Esquire
Chief Appellate Defender
PO Box 11589
Columbia, SC 29211

Attorneys for Appellant

August 10, 2018

RECEIVED

AUG 13 2018

S.C. SUPREME COURT

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,

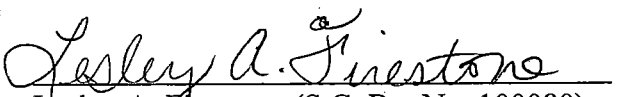
v.

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 Reply Brief*** by depositing same in the United States Mail with adequate postage affixed thereon to ensure delivery, addressed as follows:

William M. Blitch, Jr., Esquire
Alan McCrory Wilson, Esquire
South Carolina Attorney General's Office
PO Box 11549
Columbia, SC 29211



Lesley A. Firestone (S.C. Bar No. 100080)
MOORE & VAN ALLEN, P.L.L.C.
78 Wentworth Street
Charleston, SC 29401
(843) 579-7000

Lara Mary Caudy, Esquire
Robert Michael Dudek, Esquire
Chief Appellate Defender
PO Box 11589
Columbia, SC 29211

Attorneys for Petitioner

August 10, 2018