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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SUMTER COUNTY
Court of General Sessions
Roger M. Young, Circuit Court Judge

Court of Appeals Appellate Case No. 2016-001264

The State,..... Respondent

v.

Larry Durant,..... Appellant.

Petition for Certification Pursuant to Rule 204(b), SCACR

Pursuant to Rule 204(b), SCACR, Pastor Larry Durant respectfully petitions this Court for an order certifying this case for review by this Court. The primary issue in this appeal is a request to overrule *State v. Wallace,* 384 S.C. 428, 683 S.E.2d 275 (2009). The Court of Appeals "lacks the authority to rule against prior published precedent from our supreme court, but is bound by the decisions of the supreme court." *State v. Cheeks*, 400 S.C. 329, 342, 733 S.E.2d 611, 618 (Ct. App. 2012), *affirmed as modified by State v. Cheeks,* 408 S.C. 198, 758 S.E.2d 715 (2014); *see also* S.C. Const. Art. V, § 9.

STATEMENT OF THE CASE

On June 22, 2013, the Sumter Police Department charged Pastor Larry Durant with second-degree criminal sexual conduct with a minor based on allegations made by K.R. On October 23, 2014, the Sumter County Grand Jury returned a true bill indictment. R. 789.

From May 23 to 26, 2016, the State tried Pastor Durant before the Honorable Roger M. Young, Sr. and a jury. Kinli Bare Abee and David Fernandez of the South Carolina Attorney General's Office represented the State. Shaun Kent, Cameron Blazer, and David Weeks represented Pastor Durant. The jurors convicted Pastor Durant, and Judge Young sentenced him to imprisonment for twenty years. R. 712-32; R. 796.

On May 27, 2016, Pastor Durant moved for a new trial based on a *Brady*[1] violation. R. 786-88. On June 8, 2016, Judge Young convened a hearing on the motion. After hearing arguments form counsel, Judge Young denied the motion. R. 734-70.

On June 8, 2017, Pastor Durant filed a notice of appeal. In his brief in the Court of Appeals, Pastor Durant raised the following issues:

I. Did the trial judge err when he did not declare a mistrial after telling the jurors that the State charged Pastor Larry Durant with second-degree criminal sexual conduct with a minor, three counts of third-degree criminal sexual conduct, and forgery, when the only the second-degree criminal sexual conduct with a minor was being called to trial?

II. When admitting the testimony of A.R., T.H., and D.B, did the trial judge err when relying on *State v. Wallace,* 384 S.C. 428, 683 S.E.2d 275 (2009), *b*ecause our Supreme Court's holding in *State v. Wallace* is contrary to Rule 404(b) and *State v Lyle* and should be overruled?

III. Did the trial judge err in admitting the testimony of A.R., T.H., and D.B. since that testimony was inadmissible under *State v. Wallace* and other valid precedent when the dissimilarities of the witnesses' testimony outweighed the similarities and the danger of unfair prejudice from the testimony substantially outweighed the probative value?

IV. After the jurors announced a deadlock, did the trial judge err by giving an *Allen* charge that singled out the sole non-voting juror, directing that juror not to prevent a unanimous verdict, after which the jurors returned a unanimous verdict in less than thirty-four minutes?

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[1] *Brady v. Maryland*, 373 U.S. 83 (1963).

V. Did the trial judge err by denying Pastor Larry Durant's new trial motion based on a *Brady* violation resulting from the prosecutor not disclosing the prior criminal history of Ulanda McRae when her prior criminal history for dishonesty impeached her credibility?

VI. Should [the Court of Appeals] order a new trial for Pastor Larry Durant based on the Cumulative Error Doctrine?

STATEMENT OF FACTS

A. Introduction.

Four teenage women, K.R., A.R., T.H., and D.B., alleged sexual assaults by Pastor Larry Durant. All four women were connected to Lizzy Johnson, a former romantic partner of Pastor Durant, who was in an on-going property dispute with Pastor Durant involving cross-allegations of forged property deeds. All four were also connected to Ulanda McRae,[2] Lizzy Johnson's daughter. K.R. and A.R. are both granddaughters of Lizzie Johnson. Ulanda McRae is A.R.'s mother and K.R.'s aunt. T.H. is A.R.'s God Sister. K.R. lived with Ms. Johnson and Ms. McRae and A.R. beginning in July 2012, and K.R. has lived with D.B., as well. T.H. was a frequent visitor of K.R.'s, and all four—K.R., A.R., D.B., and T.H.—are close friends. While K.R., A.R., D.B., and T.H. all made allegations against Pastor Durant, the State only proceeded to trial on the allegations involving K.R.

B. Pastor Durant and Lizzy Johnson.

Pastor Larry Durant is the minister of World International Ministries and presides over services at two locations, a smaller church on Manning Avenue and a larger church on North Guinyard Drive. Because Pastor Durant is legally blind and has had both legs

[2] Ulanda McRae's name sometimes appears in the trial transcript as Ulanda Riley. In the post-post trial motion hearing, her name appears and Yolanda McRae or Yolanda McCray. As seen in Question V, *infra*, the correct spelling of her name is significant.

amputated below the knee, he has assistants known as "armor bearers,"[3] who help him before, during, and after services, after which he is often quite tired. The church also has many additional employees; including accountant, treasurer, secretary, and superintendent.

Lizzy Johnson met Pastor Durant in 1995 and began attending his church in 1998. She served in various positions in the church including treasurer, secretary, and superintendent. (Ulanda McRae began attending his church in 1999 and also held many positions within the church, including armor bearer. R. 249, 251.) Ms. Johnson admitted that in 1989 she "loaned" her cousin money out of a safe box, resulting in a charge for breach of trust. She was also investigated by federal authorities for stealing money from an apartment complex owned by the church. R. 356-59; 379.

Ms. Johnson once lived at Pastor Durant's house. They dated and had a sexual relationship for six months to a year. She later moved into another house owned by Pastor Durant. The legal ownership of this property—whether it was Ms. Johnson or Pastor Durant—remained an issue through the trial.[4] Ms. Johnson's daughter, Ulanda McRae, and her daughter K.R. also lived at this address. Ms. McRae's niece, A.R. moved in with them in July 2012. Both K.R. and A.R. are Ms. Johnson's granddaughters. T.H. and D.B. visited Ms. Johnson, Ms. McRae, K.R., and A.R. at this address. K.R., A.R., T.H., and D.B. are all close friends.

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[3] "An armor bearer is someone that serves and protects the leaders" of the church. R. 575-76.

[4] This will be discussed in more detail, *infra*.

C. Property Dispute.

Lizzy Johnson lived with Pastor Durant for a while and then moved into another house he owned. Lizzy Johnson claimed Pastor Durant gave her this property. Pastor Durant had purchased the property for $23,000.00, but it reached a value of $112,000.00. Lizzy Johnson alleged that Pastor Durant deeded the property to her and forged her signature on a deed returning it to him. She made these allegations to law enforcement, which resulted in Pastor Durant being charged with forgery. Lizzy Johnson applied for and obtained a $20,000.00 government grant for making improvements the property she claims Pastor Durant gave to her. Lizzy Johnson also acknowledged Pastor Durant had evicted her from the residence at one point because she was not paying rent. R. 364-91.

D. ***Sexual Assault Allegations.***

On May 19, 2013, Lizzie Johnson and Ulanda McRae claim to have overheard a conversation between A.R. and K.R. detailing sexual abuse by Pastor Durant. Ms. Johnson first confronted Pastor Durant about the abuse allegations over the phone, while Ms. McRae and A.R. listened in. Pastor Durant denied any abuse had occurred. Ms. Johnson later confronted Pastor Durant in person. R. 252-57; 359-63.

K.R. attended Pastor Durant's churches since she was five years old. She attended with her family, including her aunt Ulanda McRae and grandmother Lizzie Johnson, on Tuesdays, Wednesdays, Fridays, and Sundays of each week. A typical Sunday included an 8:00 a.m. worship service at the smaller church on Manning Avenue. After that service concluded at 9:00 a.m., members moved the bigger church on North Guinyard Drive for Sunday School and the 11:00 a.m. worship service. K.R. claims that in 2012, when she was thirteen years old, Pastor Durant began sexually abusing her in the

church offices of both churches. According to K.R., an armor bearer would summon her to the office for prayer to help her "not like girls and not catch[] any diseases." A.R. claimed Pastor Durant inserted his fingers into her vagina in the office of the smaller church. K.R. claimed Pastor Durant inserted his penis into her vagina and had sexual intercourse in the office of the larger church. K.R. claimed the sexual abuse happened several times a week. R. 21-29. K.R. claimed she did not tell an adult about the alleged abuse because she "was afraid no one would believe." She acknowledged, "at the time [she] was lying real [sic] bad about having a cell phone and a lot about [her] grades." R. 227-44. Ms. McRae confirmed that, at the time K.R. frequently lied to get her way. R. 258-59. K.R. acknowledged that she has lived with both A.R. and D.B., that T.H. visited her house, and that the four complaining witnesses are "pretty close." R. 247 l. 13—248 l. 3.

A.R. began attending both of Pastor Durant's churches when she was four years old. Her mother is Ulanda McRae, and her grandmother is Lizzy Johnson. She attended church three to five times a week for Bible study, choir rehearsal, praise dancing, and worship services. When she was eighteen years old, A.R. claimed Pastor Durant called her to his office at the larger church "to pray for me to make sure I wouldn't get any diseases or no kind of harm would come to my body," including "unmarital pregnancies." Once inside the office, A.R. claimed Pastor Durant told her to pull down her pants and put his fingers in her vagina. A.R. claimed the sexual activity continued at both churches. A.R. claimed Pastor Durant told her "God was taking him to a new level and we're going to have to go further in this process." A.R. claimed Pastor Durant began having sexual intercourse with her when she was eighteen years old. R. 38-56. A.R. said

that she "could not tell anyone because they wouldn't understand" and claimed to be afraid to tell, though she never explained of whom or what she was afraid. She claimed her mother overheard her and K.R. talking about the assaults. She listened when Ms. Johnson called Pastor Durant to confront him and heard Pastor Durant deny the allegations. R. 259-72. A.R. acknowledged that she and K.R. (her cousin) are "close" (like sisters) and that the two lived together at the time of the allegations. R. 275, ll. 3-16.)

T.H. attended Pastor Durant's churches with her family on Sundays from age four to sixteen. Her mother sang in the choir and taught Sunday School. A.R. is her God Sister. T.H claimed Pastor Durant would pray to prevent "[s]exual diseases, breast cancer," and anything that could cause harm. T.H. claimed Pastor Durant would "touch my breasts or fondle in my vagina." According to T.H., Pastor Durant never actually inserted his fingers inside her vagina or had sexual intercourse with her. She claimed the abuse began in 2012 when she was fourteen or fifteen years old, occurred six or seven times, and happened in Pastor Durant's offices at both churches. R. 57-69. T.H. said that she had revealed the abuse to her mother in February 2013. She claimed the abuse stopped when she told A.R. and her mother. On cross-examination, T.H. acknowledged she told law enforcement that the alleged abuse started when she was sixteen, and her courtroom testimony was the first time she claimed it happened when she was younger than sixteen. R. 57-69. T.H. further acknowledged that she is close with K.R., A.R., and D.B. R. 313-16.

D.B. began attending Pastor Durant's churches at a young age with her family. Her mother was an usher, her nephew was an armor bearer, and sister oversaw the

daycare. In 2012 or 2013, when she was fourteen or fifteen years old, Pastor Durant began sexually abusing her. She claimed Pastor Durant "prayed and put his fingers inside my vagina when I had bladder issues." She claimed Pastor Durant had sex with her "in his office and at his home." She claimed Pastor Durant said he would "bump the seed out" after she got pregnant by another man.[5] Pastor Durant arranged for D.B.'s mother to receive $500.00 to pay for an abortion. D.B. testified Pastor Durant's penis had a pink discoloration. R. 69-78. D.B. testified that she spoke with Investigator Valerie Williams of the Sumter Police Department in February 2014 and "copied" a statement. D.B. claimed Investigator Williams "put words in [her] mouth." R. 340-55.

E. The Trial.

1. Preliminary Instructions to the Jury.

Pastor Durant's case was called to trial on May 23, 2016, before the Honorable Roger M. Young, Sr. and a jury. During his initial comments to the panel of prospective jurors, Judge Young said:

> I should let you know. I don't have the indictments in front of me to read them to you, but Mr. Durant is charged with criminal sexual conduct with a minor between the ages of 11 and 14. And, also, with three counts of criminal sexual conduct third degree and a charge of forgery.

R. 2, ll. 17-22. The trial judge correctly stated Pastor Durant's pending charges, R. 789-95, but the prosecution was proceeding only on the second-degree criminal sexual conduct charge involving K.R.

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[5] Detective Natalie Kelly of the Sumter Police Department and Investigator Valerie Williams of the Attorney General's Office interviewed D.B. After confirming that Pastor Durant was not the father of D.B.'s underage pregnancy, they did not conduct an investigation to determine the identity of the father, even though the pregnancy probably resulted from criminal sexual conduct with a minor. R. 454-56.

Defense counsel interjected, "Your Honor, I have something to bring up at another point in time." The trial judge responded, "Pardon?" Defense counsel informed the trial judge, "I'll bring it up later." The trial judge continued:

> Again, I bring that up just for the purpose of letting y'all [know] this case involves allegations of sexual abuse. So, again, he pled not guilty to those charges. The State has the burden of proving them.

R. 2, l. 23 – 3, l. 5.

The trial judge convened a sidebar. After the sidebar, the trial judge informed the potential jurors:

> I have to apologize to y'all and to Mr. Durant. I made a mistake. My law clerk is not with me today. He is getting sworn in. He just passed the bar exam. And he sent me an e-mail with the – what he thought were the charges. He was incorrect. There's only one charge that Mr. Durant is facing, and that is criminal sexual conduct with a minor in the second degree. So I was incorrect in stating those other charges before. So please do not consider that in any way or hold that against Mr. Durant.

R. 3, ll. 6-19. Although a good faith effort to correct an honest mistake, the trial judge's explanation to the jurors was not true.

The trial judge went on to explain the significance of a grand jury indictment. He explained grand jurors "determine if there was probable cause to charge someone with a crime." And, grand jurors are "sort of a buffer between the State and the person so they can be put on notice of what they are charged with." The trial judge then read the indictment containing the allegations involving K.R. R. 3, l. 20 – 5, l. 7.

Defense counsel placed the sidebar on the record, moved for a mistrial, and asked "for a continuance or a new jury panel." Counsel pointed out that the trial judge informed the potential jurors about the other criminal sexual conduct charges in a "situation where the State is actively trying to get these other charges" into evidence. R. 11, l. 5 – 13, l. 5. The trial judge denied the motions for a mistrial or a continuance. R.

14, ll. 5-25. Pastor Durant renewed all motions prior to the jurors being sworn. R. 162-63..

2. Pretrial *Lyle* Hearing.

The prosecution moved to introduce evidence of the other crimes pursuant to Rule 404(b), SCRE and *State v. Lyle*.[6] The trial judge convened a pretrial hearing and heard testimony. Specifically, despite choosing to proceed only on the charges involving K.R., the State wanted to introduce evidence of the allegations made by A.R., T.H., and D.B., including their testimony. The State argued the *Lyle* evidence was admissible under our Supreme Court's decision in *State v. Wallace*.[7] The State first argued, "These witnesses talked clearly about similar occurrences of sexual acts with [Pastor Durant], which would be relevant to the criminal sexual conduct with a minor charge." Second, the State argued the "common scheme or plan" exception of Rule 404(b) applied because, under *Wallace*, the State satisfied its burden "to show that the similarities outweigh the dissimilarities in the case." Finally, the State argued Rule 403, SCRE did not exclude the evidence because:

> Allowing this testimony in would not suggest that the jury come to a conclusion based on an improper basis, but would rather establish that a common scheme or plan existed by Pastor Durant to lure these younger girls back into his office, to pray for them, Your Honor, and to disguise this sexual assault as prayer for them, for girls that grew up in his church from the time that they were younger.

R. 78-83.

Counsel for Mr. Durant argued in response that the South Carolina rule regarding "common scheme or plan" is the same for charges of criminal sexual conduct with a

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[6] *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923).

[7] *State v. Wallace,* 384 S.C. 428, 683 S.E.2d 275 (2009).

minor as for other charges. Counsel then provided a classic example of a "common scheme or plan" where someone steals a car to facilitate committing other crimes.[8] Counsel discussed the facts and holdings in *Lyle* and the case it relied on, *People v. Molineux*, 168 N.Y. 264, 61 N.E. 286 (1901). Counsel argued that the analysis by the Court of Appeals in its earlier decision in *State v. Wallace*[9] "got it right." He argued admitting the challenged evidence would "allow[] the State of South Carolina to introduce propensity evidence," which our state's longstanding "jurisprudence has said that we don't want to do." He pointed out that the changing composition of our Supreme Court is likely "to change our analysis of how we look at *Lyle*." R. 83-95.

Trial counsel additionally argued, even under our Supreme Court's opinion in *Wallace*, the evidence was not admissible because the dissimilarities outweigh the similarities. He provided the trial judge with five charts illustrating how the dissimilarities outweighed the similarities.[10] The State dismissed the defense charts out of hand and argued simply that our Supreme Court's opinion in "*Wallace* is still good law" and should control. R. 87-95.

The trial judge believed he was bound by our Supreme Court's opinion in *Wallace* and concluded, "The similarities, in my analysis, far outweigh any of the dissimilarities." R. 95-97. The trial judge declared the defense motion a "continuing objection" that protected Pastor Durant for appellate review. R. 279, ll. 6-21.

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[8] *See, e.g., State v. Nix*, 288 S.C. 492, 343 S.E.2d 627 (Ct. App. 1986) (evidence of car theft was admissible as part of a common scheme or plan to accomplish a planned robbery, abduction, and rape).

[9] *State v. Wallace*, 364 S.C. 130, 611 S.E.2d 332 (Ct. App. 2005), *reversed by State v. Wallace*, 384 S.C. 428, 683 S.E.2d 275 (2009).

[10] These charts are discussed in more detail in Pastor Durant's brief in the Court of Appeals.

3. Trial Proceedings.

From the very beginning of the trial, the State made it clear that they planned to prove the allegations involving K.R. largely with evidence of the allegations by A.R., T.H., and D.B. During opening statements, the prosecutor told the jurors:

> This case, ladies and gentleman, is about power. It's about church abuse. It is about a man who is a pastor in two churches. And it is about a number of female victims, teenagers, who were taken advantage of.

The jurors would "hear from victims," not just K.R., but also A.R., T.H., and D.B. R. 179, ll. 1-4; 180, l. 12 – 181, l. 8.

The State called Detective Natalie Kelly of the Sumter City Police Department. Detective Kelly interviewed K.R. on May 22, 2013, the day after K.R. first reported the allegations to law enforcement. K.R. reported sexual abuse occurred in 2012 and 2013 inside the pastor's office at each of the two locations of World International Ministries. Detective Kelly next interviewed A.R., who reported sexual assaults in 2011 and 2012 in the pastor's office of each of the two churches and at the pastor's home when she was eighteen years old. Detective Kelly interviewed T.H, who reported sexual assaults occurring in the pastor's office at her church when she was sixteen years old. Detective Kelley interviewed D.B., who reported sexual assaults at her pastor's home when she was thirteen years old. After these interviews, Detective Kelly referred the four complaining witnesses for forensic medical exams. R. 187-193. Detective Kelly testified that none of the complaining witnesses alleged that Pastor Durant used a condom. Further, none of the complaining witnesses sought counseling for the alleged sexual abuse. R. 569-70.

Detective Kelly obtained a search warrant for cell phone records for cell phones belonging to Pastor Durant and some of the state's witnesses. The records did not

produce any evidence that corroborated the statements of any of the complaining witnesses. R. 212-13.

Detective Kelly also sought and obtained search warrants for the two church locations and Pastor Durant's home. Based on statements from K.R., she collected

> two cans of Febreze Gain scent, one can of Lysol disinfectant spray, vanilla and blossom scent, two bottles of instant hand sanitizer, one suspected hair fiber from the carpet, two DNA swabs from the black leather chair, two DNA swabs from the right side of the desk, two test swabs from the front of the desk, two DNA swabs from the right – the left side of the black couch cushion, two DNA swabs from the right side of the black cushion.

This evidence was packaged by the Sumter Police Department Forensic Unit and sent to the South Carolina Law Enforcement Division ("SLED") for DNA analysis.[11] R. 193-94; 206-11; 224-25.

Jessica Stowe, a forensic serologist at SLED, found acid phosphatase—which is found in semen, vaginal fluid, fecal matter, plant matter, some feminine hygiene products, spermicide, and herbicides—on a hand sanitizer bottle, and forwarded it for DNA testing. Ms. Stowe also examined a dress belonging to K.R. but did not find anything of evidentiary value.[12] R. 290-304.

Jennifer Bartman, a DNA analyst at SLED, testified no STR/DNA identification evidence was found on the hand sanitizer bottle. Ms. Bartman also examined swabs from the leather chair, which contained a mixture of two DNA samples. Although Pastor

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[11] James Tallon, a crime scene technician at the Sumter Police Department assisted in serving the search warrant, collecting evidence based on witness statements, and transferring the evidence to SLED for analysis. R. 281-89.

[12] Valerie Williams, an investigator for the Attorney General's Office, assisted Detective Kelly during this investigation and collected the dress from K.R. for examination. R. 422-26.

Durant could not be excluded as contributing to the DNA mixture, K.R., A.R., and T.H. were excluded. R. 318-30.

The State called K.R., A.R., T.H., Ulanda McRae, and Lizzy Johnson, who testified as described, *supra*.

The State called Investigator Jacob Mitchell of the Sumter Police Department. He photographed Pastor Durant's penis. Pastor Durant cooperated with this process. R. 499-504. The four complaining witnesses gave similar descriptions of discoloration of Pastor Durant's penis, but, as the defense pointed out, these witnesses could have gotten that information from Lizzy Johnson who had been intimate with Pastor Durant. R. 664-66.

Kathy Saunders, a family nurse practitioner at the Sumter County Health Center, performed medical exams on K.R., A.R., and T.H. The examinations of K.R. and A.R. were normal with no indications of sexual trauma. The examination of T.H. was consistent with past penetration. T.H., however, disclosed to Dr. Saunders that she had been sexually active. R. 389-721. None of the complaining witnesses had a sexually transmitted disease.

David Kellin was qualified as an expert in child maltreatment and child abuse dynamics. He had never interviewed any of the complaining witnesses or reviewed any of the investigative materials. He testified about the process of grooming. He distinguished accidental and purposeful disclosure of child sexual abuse. He also testified about the reasons why a child might delay disclosing sexual abuse. The prosecutor wanted Mr. Kellin to connect religion with delayed reporting of sexual abuse,

so he "guess[ed]" religion could "play a role in whether or not someone discloses sexual abuse." R. 469-81.

The State called Samara Samuels, a notary. Through her, the State introduced evidence of two quit claim deeds—one purporting to deed a property from Pastor Durant to Lizzy Johnson and one purporting to deed the property back from Lizzy Johnson to Pastor Durant. Ms. Samuels testified she notarized the quit claim deed purporting to transfer the property from Pastor Durant to Lizzy Johnson. She claimed her signature was forged on the deed purporting to transfer the property from Lizzy Johnson back to Pastor Durant. R. 493-98.

Pastor Durant called Melvin "Mickey" Dawson, Jr., a forensic document and handwriting examiner to demonstrate that Pastor Durant never transferred the disputed property to Lizzy Johnson. Mr. Dawson examined the two quit claim deeds. He compared the signatures on the quit claim deeds to known handwriting samples of Pastor Durant, Lizzy Johnson, and Samara Samuels. He concluded that Pastor Durant was not the person that singed his name to the two deeds. He concluded that Lizzy Johnson signed both documents. Samara Samuel's signature on the first and second deeds was not singed by the same person. R. 530-55 Defendant's Ex. 1, R. 771-73.

Pastor Durant called Myer Mack, who has been a member of Pastor Durant's churches for twenty years. He is an elder and armor bearer. After a worship service, Mr. Mack would wait outside Pastor Durant's office door. Often, church members wanted to see Pastor Durant. Sometimes Pastor Durant would accept the visitors, but "a lot of times he [would] be tired and worn out." When Pastor Durant would receive a visitor, Mr. Mack would wait outside the door, which was never locked, has a window, and is not

sound proof. Most visitors stayed for a short period of time, less than five to ten minutes. If a visitor stayed for a long period of time, he would "find out what was going on because . . . we have other people waiting." R. 570-79.

Mr. Mack knows Lizzy Johnson, K.R., A.R., T.H., and D.B. All were members of Pastor Durant's church. They were always together. There were times they would go into Pastor Durant's office, but Mr. Mack never observed or heard anything inappropriate when they—or anyone else—went into Pastor Durant's office. R. 579-80.

Elvin Vaughn was also an armor bearer for Pastor Durant. Pastor Durant is legally blind and does not have legs from the knees down. He also knows K.R., A.R., T.H. and D.B., who were always together. He never saw any of the four complaining witnesses meet alone with Pastor Durant. R. 594-602

Arlisa Vaughn, a trustee and the accountant for Pastor Durant's churches, wrote a check in the amount of $500.00 payable to D.B.'s mother. Melody Durant, Pastor Durant's wife who is also a minister at the churches, asked Ms. Vaughn to write the check as a loan. R. 628-35.

Dr. Jason Leonard, M.D. testified that he had been Pastor Durant's doctor since 2009. Dr. Leonard confirmed that Pastor Durant is legally blind and a double amputee. Pastor Durant has chronic pain in his knees that requires medication and other treatment. Dr. Leonard knew Pastor Durant was diagnosed with erectile dysfunction in 2007 or 2008, which he continued to treat. Finally, Dr. Leonard diagnosed Pastor Durant with a chronic sexually transmitted disease. This sexually transmitted disease remained active the entire time Dr. Leonard treated Pastor Durant. R. 640-46.

During closing arguments, defense counsel reminded the jurors that the trial is about the allegations made by K.R., but the State threw in a "bunch of other people," even though there were no other charges. Counsel emphasized the lack of physical evidence and pointed out that the first two complaining witnesses, K.R. and A.R., lived together and with Lizzy Johnson. All four complaining witnesses had Lizzy Johnson in common. Lizzy Johnson knew about the discoloration of Pastor Durant's penis because of her prior intimate relationship. Trial counsel argued that the property dispute with Pastor Durant was Lizzy Johnson's motive. Trial counsel pointed out that two armor bearers contradicted the allegations. Pastor Durant has a sexually transmitted disease that the complaining witnesses do not have. R. 659-70.

The Solicitor argued, "[Y]es, a lot of this case rest[s] on the testimony of K.R., A.R., T.H., and D.B." Pastor Durant "was supposed to be their shepherd, but he was nothing but a wolf in sheep's clothing." He "went from praying for them to preying on them." R. 674-75.

4. Sentencing

By sentencing, it was clear that even the trial court had come to believe that the trial was about the allegations involving all four women. During sentencing, the trial judge stated:

> Well, the *charges* in this case were really unlike any I've heard before. The evidence that the State presented was compelling. The defense made a strong case. And the jury chose to believe the young *ladies*.

R. 731, ll. 9-13 (emphasis added).

The trial judge sentenced Pastor Durant to the maximum sentence of imprisonment for twenty years. R. 732; 796.

ARGUMENT

When admitting the testimony of A.R., T.H., and D.B, did the trial judge err when relying on *State v. Wallace,* 384 S.C. 428, 683 S.E.2d 275 (2009), *b*ecause our Supreme Court's holding in *State v. Wallace* is contrary to Rule 404(b) and *State v Lyle* and should be overruled?

The State alleged Pastor Durant sexually assaulted A.R., T.H., and D.B in a manner similar to the allegations made by K.R. This Court's decision in *State v. Wallace* was the trial judge's sole basis for admitting the testimony of A.R., T.H., and D.B. That decision, of course, *overruled* the earlier Court of Appeals decision. Pastor Durant's brief in the Court of Appeals pointed out this Court was considering *State v. Perez*, 423 S.C. 491, 816 S.E.2d 550 (2018) and had granted Mr. Perez's motion to argue against precedent.[13] On June 6, 2018, this Court issued an opinion granting Mr. Perez a new trial. Justice Hearn filed a concurring opinion, joined by Chief Justice Beatty, which began by stating:

> I concur in the result reached by the majority; however, I write separately because I believe the Court should take this opportunity to overturn our holding in *State v. Wallace*, 384 S.C. 428, 683 S.E.2d 275 (2009), which, in my opinion, has so expanded the admissibility of prior bad acts in sexual offense cases that the exception has swallowed the rule.

Id. 423 S.C. at 501, 816 S.E.2d at 556.

In his brief in the Court of Appeals, Pastor Durant argued this Court's holding in *Wallace* is inconsistent with the traditional Rule 404(b), SCRE analysis.[14] Under the traditional Rule 404(b) analysis for a common scheme or plan, the testimony of A.R., T.H., and D.B. would not be admissible. As this Court observed in *State v. Nelson*:

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[13] Former Chief Justice Pleicones participated in the oral argument in *Perez* but has retired prior to this Court issuing its opinion.

[14] The Court of Appeals' opinion in *Wallace*, identified inconsistent approaches to our state's Rule 404(b) analysis. 364 S.C. at 139, fn. 2, 611 S.E.2d at 337, fn. 2.

> In a criminal case, the State cannot attack the character of the defendant unless the defendant first places his character in issue. In a similar vein, evidence of other crimes or bad acts is generally inadmissible to prove the crime charged unless the evidence tends to establish (1) motive, (2) intent, (3) absence of mistake or accident, (4) a common scheme or plan, or (5) identity. *Both rules are grounded on the policy that character evidence is not admissible for purposes of proving that the accused possesses a criminal character or has a propensity to commit the crime with which he is charged.*

31 S.C. 1, 6, 501 S.E.2d 716, 718-19 (1998) (internal quotations and citations omitted) (emphasis added). Traditionally, admissibility under *Lyle*, *supra*, and Rule 404(b) is ***not*** determined by similarity. Regarding the admissibility of prior crimes, this Court warned in *Lyle*:

> True, such evidence strongly tends to induce the jury to believe that, merely because the defendant was guilty of the former crimes, he was also guilty of the latter; but that is the precise inference the general rule was wisely designed to exclude.

Lyle, 125 S.C. at 420, 118 S.E. at 808. "The substance of these common law rules has now been codified in" Rule 404, SCRE. *Nelson*, 331 S.C. at 6, fn. 7, 501 S.E.2d at 718-19, fn. 7.

Under the traditional interpretation of the rule, "[i]f the court does not clearly perceive the connection between the extraneous transactions and the crime charged, that is, its logical relevance, the accused should be given the benefit of the doubt, and the evidence rejected." *State v. Brooks*, 341 S.C. 57, 61, 533 S.E.2d 325, 327-28 (2000). *See also State v. Fletcher*, 379 S.C. 17, 25, fn. 3, 664 S.E.2d 480, 484, fn. 3 (2008) ("Prior acts must be so intimately connected to the crimes charged that their introduction is appropriate to complete the story of the crime charged."); *State v. Pagan*, 369 S.C. 201, 211, 631 S.E.2d 262, 267 (2006) ("To be admissible, the bad act must logically relate to the crime with which the defendant has been charged."); *State v. Timmions*, 327 S.C. 48,

52, 488 S.E.2d 323, 325 (1997) ("A common scheme or plan concerns more than the commission of two similar crimes; some connection between the crimes is necessary."); *State v. Parker*, 315 S.C. 230, 234, 433 S.E.2d 831, 833 (1993) ("noting that "a general similiarity . . . [is] insufficient to support the common scheme or plan exception."); *State v. Johnson*, 293 S.C. 321, 234, 360 S.E.2d 317, 319 (1987) (Evidence of other crimes is never admissible unless necessary to establish a material fact or element of the crime charged."); *State v. Stokes*, 279 S.C. 191, 193, 304 S.E.2d 814, 815 (1983) ("The 'common scheme or plan' exception requires more than a mere commission of two similar crimes by the same person. There must be some connection between the crimes. If there is any doubt as to the connection between the acts, the evidence should not be admitted.").

As pointed out by Justice Hearn, Wallace "so expanded the admissibility of prior bad acts in sexual offense cases that the exception has swallowed the rule." *Perez*, 423 S.C. at 501, 816 S.E.2d at 556. This Court's holding in *Wallace*, and similar appellate court decisions of this state,[15] effectively created a rule *allowing* admission of prior bad acts against individuals other than the alleged victim in the case to demonstrate general propensity in direct contravention of Rule 404(b), SCRE. *See Wallace*, 384 S.C. at 435-36, 683 S.E.2d at 279 (Pleicones J. dissenting) ("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."); *State v. Fonseca*, 383 S.C. 640, 647,

[15] *E.g. State v. Hubner*, 384 S.C. 436, 683 S.E.2d 279 (2009); *State v. Hallman*, 298 S.C. 172, 379 S.E.2d 115 (1989); *State v. McClellan*, 283 S.C. 389, 323 S.E.2d 772 (1984); and *State v. Rivers*, 273 S.C. 75, 254 S.E.2d 299 (1979).

681 S.E.2d 1, 4 (Ct. App. 2009) ("Although *Lyle* does not distinguish between sexual offenses and non-sexual offenses, the common trend in South Carolina is to apply the *Lyle* exceptions differently to sexual offenses.") *affirmed by State v. Fonseca*, 393 S.C. 229, 711 S.E.2d 906 (2011).

South Carolina's rule allowing admission of propensity evidence in child sexual abuse cases violates due process under the United States and South Carolina Constitutions. Although the Supreme Court of the United States has not addressed "whether a state law would violate the Due Process Clause if it permitted the use of 'prior crimes' evidence to show propensity to commit a charged crime," *Estelle v. McGuire*, 502 U.S. 62, 75, fn. 5 (1991), the High Court has recognized the unfair danger of admitting such evidence by explaining:

> Not that the law invests the defendant with a presumption of good character, but it simply closes the whole matter of character, disposition and reputation on the prosecution's case-in-chief. The State may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. *The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge.*

Michelson v. U.S., 335 U.S. 469, 475-76 (1948) (internal citations omitted) (emphasis added). *See also Old Chief v. U.S.*, 519 U.S. 172, 182 (1997) (holding the exact nature of a prior crime too prejudicial to be admissible even though it was an element of the current offense).

Further, it is well settled that a state can decide a constitutional issue on adequate and independent state grounds. *Michigan v. Long*, 463 U.S. 1032 (1983). South Carolina has a tradition of deciding constitutional issues based on adequate and independent state

grounds. *See, e.g., State v. Brown*, 284 S.C. 407, 326 S.E.2d 410 (1985) (chemical castration is cruel and unusual punishment pursuant to S.C. Const Art I, §15); *State v. Forrester*, 343 S.C. 637, 645, 541 S.E.2d 837, 841 (2001) ("The South Carolina Constitution, with an express right to privacy provision included in the article prohibiting unreasonable searches and seizures, favors an interpretation offering a higher level of privacy protection than the Fourth Amendment."). Article I, Section 3 of the South Carolina Constitution guarantees due process of law.

Other state courts that have addressed the admissibility of propensity evidence in child sexual abuse cases have held that introducing this type of propensity evidence violates the due process clauses of state constitutions. For example, "[b]ased on Iowa's history and the legal reasoning for prohibiting admission of propensity evidence out of fundamental conceptions of fairness, . . . the Iowa Constitution prohibits admission of prior bad acts evidence based solely on general propensity." *State v. Cox*, 781 N.W.2d 757, 768 (Iowa 2010). In reaching this conclusion, the Iowa Supreme Court reviewed its state's "policy against admissibility of general propensity evidence stems from a fundamental sense that no one should be convicted of a crime based on his or her previous misdeeds." *Id.* at 767 (internal quotations omitted). The Iowa Supreme Court further noted, "The general rule prohibiting propensity evidence was firmly established in Iowa courts at common law." *Id.* at 764 (citing *State v. Vance,* 119 Iowa 685, 686, 94 N.W. 204, 204 (1903)). Likewise, the Missouri Supreme Court "act[ed] consistently with a long line of cases holding that the Missouri constitution prohibits the admission of previous criminal acts as evidence of a defendant's propensity" and invalidated a state

statute admitting this type of evidence in child sexual abuse cases. *State v. Ellison*, 239 S.W.3d 603, 607-08 (Mo. 2007).

The same considerations are just as firmly rooted in South Carolina's common law. Our Supreme Court decided *Lyle* in 1923 based on our state's precedent. *See also State v. Kenny*, 57 S.E. 859, 861-62 (S.C. 1907) ("Logically, the commission of an independent offense is not proof, in itself, of the commission of another crime.... Without [an] obvious connection it is not only unjust to the prisoner to compel him to acquit himself of two offenses instead of one, but it is detrimental to justice to burden a trial with multiplied issues that tend to confuse and mislead the jury.").

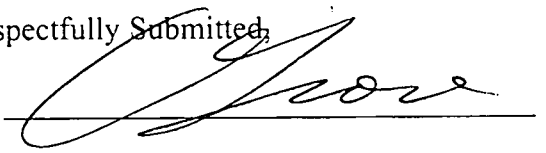
This Court's decision in *Wallace*, allowing propensity evidence in child sexual abuse cases, is in direct contravention of the common law approach to propensity evidence, as codified in Rule 404 (b), SCRE, violates the due process clauses of the United States and South Carolina Constitutions, and should be overruled.

CONCLUSION

For the foregoing reasons, this Court should certify this case and consider whether to overrule *Wallace*. Pastor Durant's case is an appropriate vehicle to consider this issue.

IT IS SO MOVED.

Respectfully Submitted,

By 

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November 29, 2018.

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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SUMTER COUNTY
Court of General Sessions
Roger M. Young, Circuit Court Judge

Court of Appeals Appellate Case No. 2016-001264

The State,..... Respondent

v.

Larry Durant,..... Appellant.

Certificate of Service

I certify that I have served this pleading on the State of South Carolina by placing a copy in the United States Mail, postage prepaid, on the date reflected below, addressed to:

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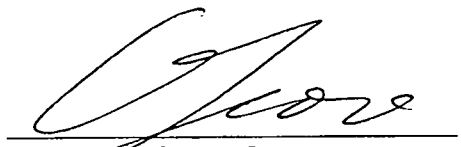

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