

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions

J. C. Nicholson, Circuit Court Judge

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S.C. Supreme Court

Opinion No. 2015-UP-217
Heard February 5, 2015 – Filed April 29, 2015
Withdrawn, Substituted, and Refiled May 8, 2015

State of South Carolina Respondent/Petitioner

v.

Venancio Diaz Perez Petitioner/Respondent

JOINT APPENDIX VOL II
(Pages 501-694)

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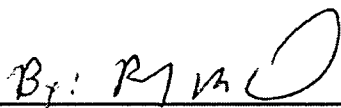
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The undersigned hereby certifies that the Appendix contains all material proposed to be included by any of the parties and not any other material.


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July 23, 2015

1 most impact. They don't know but they don't try to get
2 every incident.

3 And what you basically had in the tape was first
4 she's shown the picture of the children and she
5 identifies the privates. In the tape, it was the booby,
6 the culo and the pompi because she was using Hispanic
7 terms. And she says he touched all three. I think she
8 stands up and says, Here, here, here.

9 And the therapist says, the boobies, the pompi and
10 the culo?

11 And she says, Yes.

12 And then what she says is, Tell me about when he
13 touched the -- tell me about when he touched the culo,
14 tell me about when he touched pompi, and that is how she
15 kind of guided that interview.

16 One of the things that I would ask you to really,
17 really pay attention to and think about is this, and it
18 was in the tape and in her testimony but it was very,
19 very substantial. And not knowing -- you know, when you
20 first hear something you don't know what's going to be
21 important, but in court she talked first of all about the
22 time, I think she went to get her PSP -- and I may have
23 sequences wrong, pardon me if I do, but the time that she
24 went to get her PSP and he put her in the closet and
25 that's the time he put his finger inside of her.

1 She talked about another time in court where the
2 food truck came and the momma and the children were out
3 at the food truck, and her little brother was sleeping
4 and she was in, and he touched her that time. And I
5 said, How did he touch you that time? Did he put his
6 finger in you?

7 She said, No. That time he did not.

8 If you listen carefully in the tape when she talks
9 about the time that he touched her culo she starts off by
10 saying, The food truck was there and this man comes and
11 sells all the food and they go out.

12 And then Jessica asked her, Well, did he touch you
13 inside or outside.

14 She says, Outside.

15 That's still what she says today. That particular
16 time that she gave the details about touching the culo to
17 Jessica she said, No, that was not the time that he put
18 his finger in me. She doesn't say it that way. She just
19 responds, No, it was outside.

20 And Jessica, not wrongly, but didn't go back and
21 ask her, well, were there other times that he put his
22 finger in you. And if you remember the way she testified
23 I probably had to go three levels before she talked about
24 the finger. She's not going to volunteer, But wait, let
25 me tell you about another time. He actually did put his

1 finger in me one time. She just responded.

2 You have all of the statements. They are not as
3 inconsistent in my opinion as Mr. Grimes has discussed.
4 They are more perhaps not always talking about the same
5 incident. And she even says to -- I guess said it best
6 to Mr. Grimes. There are just too many times. It's too
7 confusing for me to talk about all of them, when she was
8 trying to explain that how some of them are confused.

9 If she were to come in here and tell you about the
10 first time, the second time, the third time, the fourth
11 time and never miss a beat, always exact, I would say
12 that is not a memory. That is a memorization. When you
13 talk from memory you pull different recollections out.

14 If you tried to memorize something it's always
15 going to be exactly the same, and that's a distinction
16 that I would ask you to look at and to think about. If
17 it had happened one time it would be much more reasonable
18 to expect the details to remain exactly the same but it
19 didn't. It happened many times.

20 I would also ask you to consider the time frame.
21 It went on from beginning of April until middle of July,
22 during that time frame. It was two and a half years ago.
23 That's another difficulty of children in court, the time
24 frame, and she's a whole different level of development
25 now. And her age at the time, she had just turned nine.

1 Look at all of the other witnesses. We'll just go
2 over them briefly. Ms. Jimenez talked about finding the
3 babysitter. When she took **Minor 1** there she saw Mr. Perez
4 there. Sometimes when she dropped them off, more often
5 when she picked them off, but he was there. She worked
6 from nine to nine. **Minor 1** was not always there until nine
7 o'clock at night. Sometimes her father picked her up,
8 but she was sometimes.

9 Ms. Jimenez was honestly shocked and upset. That
10 was obvious. This is not something she ever planned on
11 happening to her little girl. It was a shock. She also
12 felt very guilty, you could tell by her nervousness,
13 because she is the one who referred **Minor 2's** family to
14 go to this place, and then something happens to **Minor 2**

15 Now, before **Minor 2** talks about it there had been a
16 misunderstanding between the families and they were no
17 longer speaking, because **Minor 2** doesn't tell until
18 January of 2012. **Minor 1** makes her report in July of 2010.

19 You have **Minor 2's** testimony, you have all these
20 common things between the two of these children. They
21 were both females, they were the same age, they had the
22 same relationship to Mr. Perez. This happened at the
23 same place. There were various times when he could get
24 them alone. They were within the same time frame, some
25 in the trailer and in the house.

1 He touched both of them on their top private, their
2 bottom private, on their skin and on top of their
3 clothes. Minor 2 didn't tell until she just couldn't
4 hold it in anymore, she says. She just -- she just
5 couldn't hold it in.

6 Now, it was probably obvious to you that talking
7 about this was much, much more difficult for Minor 2
8 Whether it was her memory, as she said, I just don't
9 remember, I just don't remember, or whether it's just
10 more difficult for her to handle.

11 There's some limitations there that were probably
12 obvious. There is a language difficulty. And as
13 Dr. Elsey said, some children just have a more difficult
14 time talking about it or dealing with it; hence, her
15 waiting so long to even be able to talk about it at all.

16 I do not actually remember any testimony about any
17 big difficulty between Minor 2 and her mother as
18 Mr. Grimes said but I may be wrong. I just don't
19 remember any testimony about a huge problem between the
20 two of them.

21 Minor 2's mother, she also took this child to the
22 babysitter, both at the trailer and the house. She saw
23 him come in when she left Minor 2 there. It was very
24 difficult for her, you saw how upset she got, because
25 this child can't even talk to her about it.

1 We next heard from Minna. She helped do a physical
2 -- excuse me, the photo lineup because they wanted to
3 choose someone who didn't know who he was, didn't know
4 anything about the case, would be impartial, and when it
5 began she didn't. She didn't.

6 And she told you the form that she read, the
7 admonishment she gave to the child, and Minor¹ picked it
8 out. She was 90 percent sure. And as Mr. Grimes said,
9 the only picture that they could locate was a picture
10 that was 10 years old from an old ID in North Carolina,
11 so that is the one that they used which may explain why
12 it was 90 percent.

13 As far as the ID and when I asked her, Do you see
14 him now in court, before I talk about that I would like
15 to just comment on one thing. It seemed that Mr. Grimes
16 thought or wanted to say to you that this child has been
17 almost coached. Well, if she was coached don't you think
18 I would have told her exactly where he was going to be
19 sitting and made sure that the podium was out of the way
20 and she could see him? It wouldn't be right, so it
21 wasn't done.

22 Whether or not she can ID him in the courtroom on
23 Tuesday isn't the issue for you. The issue for you is
24 how you know he is the one who did it. She says the
25 person who did this to me was Minor³'s daddy, Minor⁴'s

1 daddy, the babysitter's husband, the man who was there
2 when I went to the trailer, when I went to the house.

3 How do you know it was him? When I asked her that
4 she said, Because I saw his face. I was asking her how
5 did she know which person it was, which man it was. She
6 said, I saw his face. She told you. The issue for you
7 about the ID is how you know it was him, and he doesn't
8 deny that he fits any of those bills. He's the daddy of
9 both and he is the husband of the babysitter.

10 Minna also explained to you how reluctant
11 Ms. Jimenez was about the U-Visa, but that it's her life.
12 It's four years so that she can be here for the
13 prosecution.

14 Dr. Elsey also spoke just about how children
15 report, what may impact the way they report, why they may
16 not report, why they may continue very often to go back
17 to a place where this is happening.

18 Mr. Grimes insinuated to you, well, it doesn't make
19 any sense at all that Minorl would have gone into the
20 bathroom if this man had been abusing her. Well, that is
21 exactly why Dr. Elsey was here because the way children
22 react to sexual abuse does not make any common sense.

23 It would be unfair to you as jurors and it would be
24 unfair to Minorl to let you make a decision without that
25 knowledge based on the research and the expertise of

1 someone who deals with this all the time. Kids go back,
2 kids follow people that are going to do this. What else
3 can they do? It's hard for us as adults to really
4 imagine how vulnerable children are.

5 If your child comes home and the teacher has called
6 you and said, you know, Johnny said something bad at
7 school, most parents don't even ask Johnny. They are
8 going to punish him because adults believe adults. And
9 children know that, their experience is that. And they
10 know that if they are saying one thing and an adult is
11 saying another adults believe other adults.

12 And children lie, of course. Adults are just
13 better at it because we've had more practice. So the
14 knowledge that Dr. Elsey gave you was to combat that
15 exact kind of thought, Well, it doesn't make any common
16 sense that she would go back or she would go in the room.

17 Detective Lacher made the referrals to have her
18 examined at the Lowcountry Children's Center and refer
19 the other people there. Detective Lacher, who by the way
20 isn't on trial here today, made these decisions to send
21 these people to other places. Your decision is based on
22 all of the evidence that you have and not just the police
23 investigation.

24 Dr. Abel also testified that the exam was normal
25 but that does not rule out penetration. Let's talk a

1 little bit about that. It may -- I had her describe why
2 she didn't do swabs and look for trace evidence of DNA,
3 just because of the time frame, and it may be wasting
4 your time because it's common sense maybe but maybe not,
5 just like with Dr. Elsey.

6 The professional stuff may not be -- you see it on
7 TV all the time when they get DNA 15 years ago, but what
8 DNA is is just something left on the skin from another
9 person and they match it back. If it's been days, and
10 days, and bathed, and showered, and changed clothes and
11 been different places that's just not there.

12 She at the time of her exam, as you will see from
13 her report, only had the knowledge of what the child had
14 told Jessica about, the one time that she told her about
15 it not being penetration. So she wrote down fondle. But
16 when she was on the stand I asked her about digital
17 penetration and she said it would even be less likely to
18 cause trauma.

19 I think she gave some research that was kind of
20 shocking, that some of the research where children have
21 been videotaped being penetrated. I guess it's like
22 child pornography that she's talking about that. They do
23 the exam and it's a normal exam. So it does not rule out
24 penetration.

25 Mr. Perez testified, and just like with every

1 person, think about what motive he may possibly have for
2 saying what he said. I do not doubt for one moment that
3 he is a hardworking person and that he does work a lot,
4 but he wanted to tell you I was absolutely never home
5 when I asked him. Never, never.

6 Then when I brought up well, what about July 12th
7 and July 15th? Well, those were days that I was home for
8 lunch. But, you know, at first it was never. And
9 ironically, mysteriously the one, the two days out of a
10 year and a half that he's home are the two days the
11 police happen to be there.

12 He says he was never angry. He was never home.
13 The other thing that -- and I do not remember how to
14 quote this verbatim. I just don't remember, but he was
15 asked tell the jury, basically, why you would not harm a
16 child. And he said, I would never harm my daughters, my
17 parents or my work. Something like that. No mention of
18 other children. Perhaps he does treasure his daughters
19 much more than a random child.

20 We also know from the defendant that he -- they
21 said, Well, he went in late if it rained. Well,
22 sometimes in Charleston it rains all day. It's basically
23 he was at home. Enough. Enough.

24 Luis Diaz, he said the defendant was off the day of
25 the arrest but Mr. Perez says he was at lunch. And

1 Mr. Diaz says, Well, when he goes to lunch if we're close
2 by we go to lunch and I go with him. That's my thing.
3 He feeds me.

4 The police were there twice. They took the list of
5 who was there. They told you who was there. Mr. Diaz
6 was not there. Doesn't make any sense, yet this is his
7 uncle.

8 Angelica Carmona, think also about her motive. One
9 of the very saddest things of a prosecutor that gets to
10 see crime all the time, and just crime, is that there are
11 always secondary victims. There's your primary victim
12 but there's the family of the person who committed the
13 crime, and they are victims, also. And it is sad but it
14 doesn't lesson the crime. It's a hard thing to deal with
15 and it may be hard for you thinking, well, look at this
16 family. But they are the secondary victims. He
17 committed the crime.

18 Look at what she had on her plate. She was
19 watching a one-month old, a one-year old, two three-year
20 olds, and three eight-year olds. Now, we don't know
21 exactly when they were all there but those were the kids
22 that she was watching. You all know one-month old,
23 one-year old, two three-year olds, I don't know. I
24 couldn't do it. Let's hope, and I would assume, that if
25 one of them is going to go unsupervised it's going to be

1 an eight-year old and not a one-year old or a three-year
2 old.

3 And I understand that she loves him and that is
4 totally understandable but she can't watch all of these
5 kids and always know where they are. It's kind of a
6 thing of you have so many people how could it happen?

7 Well, that's why maybe. You know, if it would have
8 just been her, and Mr. Perez, and ~~Minor 1~~ maybe it would
9 have been a lot more obvious that, where are they, than
10 you have a whole small little trailer or small little
11 house full of people.

12 She believes her husband, I don't doubt that for a
13 moment. And she believes he would not harm his
14 daughters, and he may not have harmed his daughters. She
15 said he would never harm his daughters. What about other
16 children? Only God knows that. I don't know why she
17 said that but that's what she said.

18 There were two children besides his own daughter in
19 that home that were old enough to report, and they were
20 ~~Minor 1~~ and ~~Minor 2~~.

21 ~~Minor 3~~ also loves her dad, and every child does. No
22 matter how serious the situation, how bad children love
23 their parents. She does say though that -- and who knows
24 why she said it, but there was never a time that ~~Minor 1~~
25 was out of her sight. Never a time that ~~Minor 1~~ was out of

1 her sight, but we know that that's not accurate. I'm not
2 saying anybody told her to say that. She knows what this
3 is about and she believes her dad. She loves him.

4 She does say that -- and one time we know she was
5 out of her sight. They were playing hide and go seek and
6 he came into the closet. And she says they danced, they
7 played with their bikes, they played with the PSPs, a lot
8 of what *Minor* says.

9 Jessica said there were no follow-up questions, and
10 looking back perhaps there should have been. I've kind
11 of gone over that. She does say that *Minor* had
12 nightmares. And Mr. Grimes is right. I will tell you
13 that this is a nightmare for *Minor*, and it's not going to
14 be over soon. But this is her day in court to try to
15 help those nightmares.

16 She also talked about her fear of the defendant
17 coming back to get her with the therapy because she
18 remembered that he had gone with her or she had gone with
19 his family to a waterfront park so he knew where she
20 lived. And she did tell another child that she was
21 sexually abused and they did talk with her about that.

22 Beyond a reasonable doubt is the standard that the
23 State must meet in order to prove Mr. Perez guilty. The
24 burden is beyond a reasonable doubt. Not any doubt, not
25 every doubt, not some doubt, not the shadow of a doubt

1 but a reasonable doubt that a reasonable juror seeking
2 the truth would hesitate to act.

3 There are few things in this world that you will
4 ever know with absolute certainty. That's not the
5 standard. The standard is reasonableness and reasonable
6 doubt. If absolute certainty were the standard there
7 would never be a conviction. If you knew this with
8 absolute certainty you would have been there and seen it
9 and you would have been sitting up there and not there.

10 You came in here on Monday not knowing nothing
11 about any of these people. If you now believe that
12 Mr. Perez sexually assaulted and sexually molested *Minor* (
13 the State has met that burden.

14 *Minor* -- well, first of all, let me address this.
15 Why an adult would sexually touch, put his finger in,
16 expose himself to a child is almost if not absolutely
17 impossible to understand. It is even -- or chase one
18 around, which may go to the child, that behavior.

19 It's almost impossible to understand but it's even
20 more impossible to even envision. We don't even want to
21 go there. And why? To understand why is beyond us and
22 that's not what we are here about because we know it
23 happens. Sometimes at the hands of citizens that are
24 respectable and credible and have all of the good
25 reputation and it still happens.

1 Minor I told you that Mr. Perez put his finger in her
2 and that it felt awkward, and she told you all the
3 circumstances around that. That is the proof that you
4 have that he committed a criminal sexual assault in the
5 first degree.

6 She also told you about the touching, a separate,
7 that's why there are two charges. The touching is the
8 lewd act upon a minor. You have evidence of both of
9 these crimes.

10 Minor I doesn't know there's a different crime for
11 putting the finger inside. She just knows that's what
12 happened. There would be no reason for her to change it
13 and say that. She's just telling what happened. That
14 may be something that was more difficult for her to talk
15 about but there would be no reason for her to add that.

16 He's guilty of putting his finger in her, he is
17 guilty of touching her and we would ask that you find him
18 guilty of both of these crimes that he committed upon
19 this child. Thank you.

20 THE COURT: We've been going about an hour and 45
21 minutes. Instead of taking a break let me just let you
22 all stand and stretch for a few minutes. If you'll stand
23 and stretch and relax for a few minutes I'll get the
24 charge on the law and very shortly after that you can
25 begin your deliberations because I know you've been

1 sitting there almost two hours -- not quite two hours but
2 an hour and 45 minutes.

3 (PAUSE.)

4 THE COURT: All right. Ladies and gentlemen of the
5 jury panel, the Court has permitted you to take notes
6 during the course of this trial. You've not been
7 obligated to take the notes but if you have taken notes
8 these should be used only as memory aids.

9 You should not give your notes precedent over your
10 independent recollection of the evidence. If you've
11 chosen not to take notes you should rely on your own
12 independent recollection of the proceedings and you
13 should not be influenced by the notes of other jurors.

14 I emphasize that notes are not entitled to any
15 greater weight than the recollection or impression of
16 each juror as to what the testimony may have been.
17 Further, these notes are your notes and you may destroy
18 them, keep them or the Court will destroy them for you.

19 I will give you a copy of these instructions in
20 written form. During your deliberations you may refer to
21 the instructions to guide your decision making. You must
22 consider the instructions as a whole and not follow some
23 and ignore others. Please return the instructions to the
24 Court after you have reached a verdict.

25 The defendant has pled not guilty to the

1 indictments which places the burden on the State to prove
2 the defendant guilty. A person charged with committing a
3 criminal offense in South Carolina is never required to
4 prove himself innocent.

5 I charge you that it's a vital important rule of
6 law that the defendant in a criminal trial no matter what
7 the seriousness of the charge may be must also be
8 presumed to be innocent until his guilt has been proven
9 beyond a reasonable doubt.

10 This presumption of innocence remains with the
11 defendant at all times, from the moment he appears in
12 this court, throughout the trial until you, the jury,
13 have reached a verdict of guilty beyond a reasonable
14 doubt based on the testimony and evidence which has been
15 presented.

16 The presumption of innocence is a substantial right
17 to which every defendant is entitled unless and until you
18 reach a verdict beyond a reasonable doubt. If you, the
19 jury, do not find the defendant guilty beyond a
20 reasonable doubt it's your duty to acquit the defendant.

21 Now, you've heard evidence that the defendant has
22 committed a bad act not the subject of a conviction other
23 than the one for which the defendant is now on trial.
24 This testimony, if you conclude it is true, may be
25 considered by you on the question of common scheme or

1 plan and for no other reason or no other purpose.

2 You may give this evidence the weight and value, if
3 any, which you find it should have on the sole issue of
4 common scheme or plan. You must not consider evidence of
5 commission of another bad act not the subject of a
6 conviction as proof of the defendant's guilt of the
7 charges we're trying today.

8 INTERPRETER GAINER: Your Honor, the interpreter
9 cannot follow.

10 THE COURT: Pardon?

11 INTERPRETER GAINER: The interpreter cannot follow,
12 Your Honor. If Your Honor can slow down a bit.

13 THE COURT: All right. Thank you.

14 INTERPRETER GAINER: Thank you, Your Honor.

15 THE COURT: There's two types of evidence which are
16 generally presented during a trial. Direct evidence is
17 the testimony of a person who claims to have actual
18 knowledge of a fact such as an eyewitness. It is
19 evidence which immediately establishes the main fact to
20 be proved.

21 Circumstantial evidence is proof of a chain of
22 facts and circumstances indicating the existence of a
23 fact. It is evidence which immediately establishes
24 collateral facts from which the main fact may be
25 inferred. Circumstantial evidence is based on inference

1 and not on personal knowledge or observation.

2 The law makes absolutely no distinction between the
3 weight or value to be given to either direct or
4 circumstantial evidence, nor is a greater degree of
5 certainty required of circumstantial evidence than of
6 direct evidence.

7 You should weigh all the evidence in the case.
8 After weighing all the evidence if you are not convinced
9 of the guilt of the defendant beyond a reasonable doubt
10 you must find the defendant not guilty.

11 The evidence or lack of evidence which you are to
12 decide the case includes the following: The sworn
13 testimony of witnesses both on direct and
14 cross-examination regardless of which side calls the
15 witness, the exhibits which have been received into
16 evidence by the Court, any facts agreed or stipulated to
17 by all the lawyers.

18 The following are not evidence and you may not
19 consider them in deciding the facts: Arguments and
20 statements made by the lawyers are not evidence. The
21 lawyers are not witnesses. Their opening statements,
22 closing arguments and other statements are intended to
23 help you interpret the evidence but are not evidence. If
24 the facts as you remember them differ from the way the
25 lawyers state, your memory controls.

1 Questions and objections by the lawyers are not
2 evidence. Lawyers have a duty to their client to make
3 objections when they believe a question is improper under
4 the rules of evidence. You should not allow any
5 objection or the Court's ruling on the objection to
6 influence you.

7 Testimony that's been stricken that you have been
8 instructed to disregard is not evidence and must not be
9 considered. Anything you may have seen on television, or
10 read in the newspaper, or on the internet, or heard from
11 others when court is not in session is not evidence.

12 You should base your decision solely on the sworn
13 testimony of the witnesses, exhibits received into
14 evidence by the Court, any facts agreed or stipulated to
15 by all the lawyers.

16 The fact the defendant was arrested, charged and
17 indicted in this case are not evidence and cannot be
18 considered as evidence of guilt, nor does it create any
19 presumption of inference of guilt. The indictment is
20 simply a formal written instrument which contains the
21 charges made against the defendant.

22 Now, what is reasonable doubt? A reasonable doubt
23 is the kind of doubt that would cause a reasonable person
24 to hesitate to act. The State has the burden of proving
25 the defendant guilty beyond a reasonable doubt.

1 Some of you may have served as juror in civil cases
2 where you were told that it's only necessary to prove
3 that a fact is more likely true than not true, such as a
4 greater weight or preponderance of the evidence. In
5 criminal cases the proof must be more powerful than that.
6 It must be beyond a reasonable doubt.

7 Proof beyond a reasonable doubt is proof that
8 leaves you firmly convinced of defendant's guilt. There
9 are very few things in this world that we know with
10 absolute certainty and in criminal cases the law does not
11 require proof that overcomes every possible doubt.

12 If based on your consideration of the evidence you
13 are firmly convinced that the defendant is guilty of the
14 crime charged you must find the defendant guilty. On the
15 other hand, if you think there's a real possibility the
16 defendant is not guilty you must give the defendant the
17 benefit of the doubt and find the defendant not guilty.

18 Now, under the constitution and code of laws only
19 you, the jury, can make findings of facts in this case.
20 I am not permitted to indicate to you how I may feel
21 about the testimony and evidence which has been presented
22 throughout this trial. It's been my intention to be fair
23 and impartial towards each of the parties involved.

24 Necessarily, you must determine the credibility of
25 the witnesses who have testified in this case.

1 Credibility means believability. It's your duty as
2 jurors to analyze and to evaluate the evidence and
3 determine which evidence convinces you of its truth.

4 As you decide whether or not to believe a witness's
5 testimony about a particular matter you may consider the
6 following: The manner and appearance of the witness
7 while on the witness stand. Was he or she
8 straightforward or hesitant to answer.

9 The testimony of a witness. Was he consistent or
10 inconsistent? How did the witness come to know the facts
11 that he or she testified to. Was the witness present
12 during the incident, the witness happen on the scene
13 after the incident occurred?

14 The reason the witnesses would want to give
15 testimony which would help or hurt one side or the other.
16 Has the witness exhibited to you any interest, bias,
17 prejudice or other motive in this case, or you may
18 consider whether the particular witness may gain some
19 reward, payment, personal advantage, vindication through
20 his or her testimony.

21 The strength of the witness's testimony. Was the
22 testimony of a witness straightened or weakened by other
23 testimony or evidence?

24 The duration or length of time between the incident
25 and when they were reported. Would the duration or

1 length of time weaken or strengthen the witness's memory
2 of the incidents?

3 All prior statements. Were the prior statements
4 made by the witness consistent or inconsistent with the
5 testimony?

6 In determining the believability of the witnesses
7 who have testified in this case you may believe one
8 witness over several, or several witnesses over one. You
9 may believe a part of the testimony of a witness and
10 reject the remaining part of the testimony of the same
11 witness. You may believe the testimony of a witness in
12 its entirety or reject the testimony of the witness in
13 its entirety.

14 Now, the same constitution and laws which designate
15 and make you the finders of fact make me the sole
16 instructor of the law. It's my duty to charge you the
17 law applicable to this case and it's your duty as jurors
18 to accept and apply the law as I now state it to you.

19 The lawyers are not the instructors of the law.
20 You must accept the law and apply the law exactly as I
21 say it to you. You must not base your decision making on
22 your idea of what the law is or what you think the law
23 should be.

24 First degree criminal sexual conduct with a minor.
25 The defendant is charged with first degree criminal

1 sexual conduct with a minor. The State must prove beyond
2 a reasonable doubt that the defendant engaged in a sexual
3 battery with the victim.

4 A sexual battery is sexual intercourse,
5 cunnilingus, fellatio, anal intercourse or any intrusion,
6 however slight, of any part of a person's body or any
7 object into the genital or anal openings of another
8 person's body except when the intrusion is accomplished
9 for medically recognized treatment or diagnostic
10 purposes.

11 The State must prove beyond a reasonable doubt that
12 the victim was less than 11 years old at the time of the
13 sexual battery.

14 Consent, wellness, indifference or ignorance on the
15 part of minor, if any, as to what was taking place does
16 not in any way affect the charge of criminal sexual
17 conduct with a minor because an unmarried woman under the
18 age of 14 cannot legally consent to sexual intercourse.

19 If you find that the State has failed to prove that
20 the defendant is not guilty of criminal sexual conduct
21 first degree you must then decide whether the State has
22 proven the defendant's guilt of assault and battery of a
23 high and aggravated nature.

24 In order to prove assault and battery of a high and
25 aggravated nature the State must prove beyond a

1 reasonable doubt that the defendant committed an assault
2 and battery with a circumstance of aggravation. A
3 circumstance of aggravation can be the taking of indecent
4 liberties or familiarities with a female.

5 Lewd act on a minor. The defendant is charged with
6 committing a lewd act on a minor. A minor is a person
7 under the age of 18. The State must prove beyond a
8 reasonable doubt that the defendant was over the age of
9 14. Next the State must prove that the defendant
10 willfully, lewdly committed or attempted a lewd or
11 lascivious act on or within the body of its parts of a
12 child under the age of 16 years with the intent to
13 arouse, appeal to, gratify to the lusts, passions or
14 sexual desires of the defendant or the child.

15 Willfully means voluntarily and intentionally with
16 the specific intent to do something the law forbids.
17 Lewd means obscene, lustful, indecent or lecherous.
18 Lascivious means intending to incite lust, lewd,
19 indecent, obscene or intending to deprive the morals in
20 respect to sexual relations.

21 The defendant is charged with the offense of a
22 criminal sexual conduct with a minor first degree and
23 lewd act upon a minor. He may be found guilty if the
24 proof shows beyond a reasonable doubt that he committed
25 any one or more of such acts.

1 In order to find the defendant guilty all jurors
2 must agree that he committed the same act or acts. It is
3 necessary that the particular act or acts committed so
4 agreed upon be stated in the verdict.

5 The testimony of a victim may not be corroborated
6 in prosecutions. The victim is defined as the
7 complaining witness.

8 The defendant has presented evidence of his good
9 reputation and character to show that it would be
10 inconsistent with the defendant committing the crime.
11 The weight to give to that testimony like all other
12 testimony in the case is for you to decide.

13 In your good judgment you may consider the
14 testimony of the defendant's good character along with
15 all the other evidence in deciding whether or not the
16 defendant committed the crime.

17 You have been selected as fair and impartial jurors
18 sworn to impartially try and determine the facts of this
19 case. When you comply with your oath to do so no one
20 would have the right to criticize your verdict and you
21 will have fully discharged your duty as jurors.

22 You decide this case according to testimony you've
23 heard from the lips of the sworn witnesses along with the
24 other evidence introduced.

25 I charge you as jurors you must make your decision

1 in this case without bias, without prejudice to any party
2 and not allow yourself to be governed by sympathy,
3 prejudice, passion or public opinion, or any other
4 arbitrary factor. Both the State and the defendant have
5 the right to expect that each one of you will carefully
6 and impartially consider all the evidence in this case
7 and that you will follow the law as I have explained it
8 to you.

9 Nothing I may have said or done during the course
10 of this trial has been in any way intended to express or
11 suggest a view of this case or an opinion as to facts,
12 the weight of evidence or the credibility of the witness.
13 If you believe any of my actions or words have indicated
14 otherwise you must disregard such and form your own view
15 of this case or your own opinion as to the facts, the
16 weight of the evidence and the credibility of the
17 witnesses.

18 Mr. Foreman, ladies and gentlemen of the jury, I
19 have prepared two verdict forms. The first verdict form
20 has the name of the case, the case number.

21 As to the charge of criminal sexual conduct with a
22 minor first degree, we, the jury, by unanimous consent
23 find the defendant guilty of criminal sexual conduct with
24 a minor first degree, not guilty.

25 If you find the defendant not guilty of criminal

1 sexual conduct with a minor first degree then as to the
2 lesser included offense, we, the jury, by unanimous
3 consent find the defendant guilty of assault and battery
4 of high and aggravated nature, not guilty, place for the
5 foreperson to sign it.

6 You cannot find the defendant guilty of both
7 charges. You can find the defendant innocent of both
8 charges, or not guilty of both charges.

9 The other verdict form, caption of the case, case
10 number. As to the charge of lewd act upon a minor, we,
11 the jury, by unanimous consent find the defendant guilty
12 of lewd act upon a minor, not guilty, a place for the
13 foreman to sign.

14 Now, I will tell you the verdict form says your
15 verdict has to be unanimous. All 12 of you have to
16 agree. I would ask you to respect each other's opinion
17 or evaluate your opinions. If you think it's a
18 collective reasoning process on all 12 of you all's part,
19 it's a give and take situation, look at the evidence,
20 discuss the evidence and reach a just and fair verdict.

21 What I'm going to do is ask you to go to the jury room
22 but please -- you may take your notes with you, but please
23 do not begin your deliberations until I have had an
24 opportunity to go over my charge with the attorneys for
25 the State and attorneys for the defense and see if

1 there's anything that I need to bring you back and charge
2 or change that I make.

3 The bailiff will bring all the exhibits that have
4 been admitted into evidence along with the charge book
5 and tell you to begin your deliberations when I have
6 finished that process.

7 The two alternates, Mrs. Coleman and Mrs. Mikulla,
8 will you all keep your seats, please, while the rest of
9 the jurors go to the jury room.

10 Mr. Foreman, if you'll go with the jury to the jury
11 room, please.

12 (WHEREUPON, the jury leaves the courtroom at
13 approximately 12:48 p.m.)

14 THE COURT: All right. Any exceptions to the
15 charge from the State?

16 MS. HERRING-LASH: No, Your Honor.

17 THE COURT: Any from the defendant?

18 MR. GRIMES: Yes, sir, two exceptions. Our first
19 exception is the charge on the victim's testimony does
20 not need to be corroborated. We believe that's a comment
21 on the facts and that charge should be taken out.

22 And our second exception is the charge -- we
23 believe that your charge on good character was
24 insufficient. It does not include the language or
25 language similar that evidence of good character and good

1 reputation and honesty may in and of itself create a
2 doubt as to the guilt --

3 THE COURT: You got something you want to mark as a
4 court's exhibit?

5 MR. GRIMES: Yes, sir.

6 THE COURT: Okay. You can mark it as Court's
7 Exhibit Number 4.

8 (WHEREUPON, Court's Exhibit Number 4, Defendant's
9 Charge Request, was marked and made a part of the
10 record.)

11 THE COURT: Any other exceptions?

12 MR. GRIMES: No, sir.

13 THE COURT: All right. I'm going to deny those two
14 requests.

15 Would the parties come forward and make sure all
16 the exhibits are present and put on the record the
17 exhibits are present, and I will get the bailiff to take
18 the exhibits back along with the charge book and the
19 verdict form and tell them to begin their deliberations.

20 (PAUSE.)

21 THE COURT: All right. All the exhibits present?

22 MR. GRIMES: Yes, Your Honor.

23 MS. HERRING-LASH: Yes, sir.

24 THE COURT: All right. If you will take the
25 exhibits and charge book, and I believe the verdict form,

1 and ask the jury to --

2 MR. GRIMES: Does the CD -- I don't think the CD
3 goes back.

4 THE COURT: Yes. It's redacted. And please tell
5 the foreman if they want to see the CD I'm going to have
6 to bring them in the courtroom to see it.

7 (WHEREUPON, the jury was instructed to begin their
8 deliberations at approximately 12:54 p.m., and the trial
9 of this case was recessed while awaiting a verdict.)

10 THE COURT: Bring the jury in and tell them to
11 bring their personal belongings.

12 (WHEREUPON, the jury enters the courtroom at
13 approximately 5:18 p.m.)

14 THE BAILIFF: All present, Your Honor.

15 THE COURT: Thank you very much.

16 All right. Mr. Foreman, ladies and gentlemen of
17 the jury, what I'm going to do -- I just got your message
18 and I understand you all have problems, pick up problems
19 and daycare pick up problems and other issues so I'm
20 going to send you home tonight, tell you to come back in
21 the morning at 9:30 and continue deliberations.

22 Now, I'm going to instruct you again, as I've done
23 every night, don't discuss the case with anybody; with
24 your husband, your girlfriend or anybody. If they ask
25 you just tell them you cannot discuss it. I don't want

1 you to discuss it. I want you to come back at 9:30 and
2 continue your deliberations.

3 Does anybody else need to go in the jury room to
4 pick up any personal items?

5 (There was no response.)

6 THE COURT: All right. If you'll go with the
7 bailiff. It's after five, they'll show you how you can
8 get out of the courthouse.

9 How are they going to get out of the courthouse?

10 THE BAILIFF: I think the sheriff is going to lead
11 them out.

12 THE COURT: All right. The sheriff will take you
13 out of the courthouse since it's after 5:00. So be back
14 in the jury room 9:30 in the morning to continue
15 deliberations. I'll see you tomorrow. Have a good
16 evening.

17 (WHEREUPON, the jury leaves the courtroom at
18 approximately 5:20 p.m.)

19 THE COURT: Anything from the State before we
20 break?

21 MS. HERRING-LASH: No, Your Honor.

22 THE COURT: Anything from the defense?

23 MR. GRIMES: No, sir.

24 THE COURT: And for the record, we discussed
25 sending the jury home tonight and bringing them back

1 tomorrow in the chamber and the State and the defense
2 agreed to that. Is that correct from the State?

3 MS. HERRING-LASH: Yes, Your Honor.

4 THE COURT: Is that correct from the defense?

5 MR. GRIMES: Yes, sir.

6 THE COURT: All right. Thank you all so very much.

7 (WHEREUPON, the trial of this case was recessed for
8 the day.)

9 Friday, January 18, 2013

10 (WHEREUPON, the jury returns at approximately 9:30
11 a.m. to resume deliberations.)

12 (WHEREUPON, Court's Exhibit Number 5, a Note From
13 Jury, was marked and made a part of the record.)

14 THE COURT: Bring us the jury, please.

15 (WHEREUPON, the jury enters the courtroom at
16 approximately 10:45 a.m.)

17 THE BAILIFF: All present, Your Honor.

18 THE COURT: I understand the jury would like to
19 listen to the video, and we'll play it at this time. If
20 you need the volume higher or lower, please let us know
21 and we'll adjust the volume so you can hear it.

22 (WHEREUPON, State's Exhibit Number 9, the Forensic
23 Interview, was played for the jury.)

24 THE COURT: All right, Mr. Foreman. If you all
25 would go to the jury room and continue with your

1 deliberations.

2 (WHEREUPON, the jury leaves the courtroom at
3 approximately 11:38 a.m.)

4 (WHEREUPON, the trial of this case was in recess
5 while awaiting a verdict from the jury.)

6 THE COURT: For the record, during the
7 deliberations the foreman sent out a letter asking for
8 explanation on assault and battery. The Court typed up
9 an explanation, submitted it in response to the letter,
10 and the State reviewed it and the defense reviewed it and
11 agreed with the presentation.

12 Is that correct from the State.

13 MS. HERRING-LASH: Yes, Your Honor.

14 THE COURT: Is that correct from the defense?

15 MR. GRIMES: I'm sorry, Your Honor. I was talking.

16 THE COURT: This letter, you know, the assault and
17 battery question from the jury that I typed out. I'm
18 just putting it on the record to make it a court's
19 exhibit. That it was agreed to by the State and the
20 defendant; is that correct?

21 MR. GRIMES: Yes, sir.

22 THE COURT: Okay. Thank you very much.

23 (WHEREUPON, Court's Exhibit Number 6, Definition
24 for the Jury of Assault and Battery, was marked and made
25 a part of the record.)

1 THE COURT: Bring us the jury, please.

2 (WHEREUPON, the jury enters the courtroom at
3 approximately 3:42 p.m.)

4 THE COURT: Mr. Foreman, I understand you have
5 reached a verdict; is that correct?

6 THE FOREMAN: We have, Your Honor.

7 THE COURT: Would you hand the verdict forms to the
8 bailiff, please, sir.

9 (PAUSE.)

10 THE COURT: All right. Would you publish the
11 verdict, please, sir.

12 THE CLERK: Yes, Your Honor.

13 Please have the defendant stand.

14 The verdict form is in the matter of the State of
15 South Carolina vs. Venancio Diaz Perez, defendant. The
16 first form. As to the charge of lewd act upon a minor,
17 we, the jury, by unanimous consent find the defendant
18 guilty of lewd act upon a minor, signed by the foreperson
19 of the jury on January 18, 2013.

20 Ladies and gentlemen of the jury, if this was your
21 verdict, please raise your right hand.

22 (All hands were raised.)

23 THE CLERK: Thank you. Please let the record
24 reflect that all 12 jurors raised their right hand.

25 As to the charge of criminal sexual conduct with a

1 minor first degree; we, the jury, by unanimous consent
2 find defendant not guilty of criminal sexual conduct with
3 a minor first degree.

4 The alternative; we, the jury, by unanimous consent
5 find the defendant guilty of assault and battery of a
6 high and aggravated nature, signed by the foreperson of
7 the jury on January 18th, 2013.

8 Ladies and gentlemen of the jury, if this was your
9 verdict, please raise your right hand.

10 (All hands were raised.)

11 THE CLERK: Thank you. Please let the record
12 reflect that all 12 jurors raised their right hand.

13 THE COURT: Okay. Thank you very much.

14 Mr. Foreman, I have filled in on the indictment
15 from the verdict form and it's a place for you to sign,
16 and I have dated it today, January 18th.

17 If I could get him to sign it, please.

18 (PAUSE.)

19 THE COURT: All right. Solicitor, do you have a
20 sentencing sheet?

21 MS. HERRING-LASH: No, Your Honor. I'll have to
22 get it.

23 THE COURT: Do you have one on the lewd act?

24 MS. HERRING-LASH: I'll have to go get someone to
25 get it.

1 THE COURT: How long do you think it will take to
2 get a sentencing sheet?

3 All right. Before we get to that, Solicitor, if
4 you'll put that in motion I'd appreciate it.

5 MS. HERRING-LASH: I have. She's doing it from
6 here.

7 THE COURT: All right. Any motions from the State
8 as far as the jury is concerned?

9 MS. HERRING-LASH: No, Your Honor.

10 THE COURT: Any from the defense?

11 MR. GRIMES: Yes, sir. We would request that the
12 jury be polled.

13 THE COURT: All right, if you would, Mr. Clerk,
14 poll the jury on the lewd act and assault and battery of
15 a high and aggravated nature.

16 (WHEREUPON, the jury was polled.)

17 THE COURT: All right. It appears the jury has
18 been polled. All 12 jurors have answered in the
19 affirmative. Do you have any other motions?

20 MR. GRIMES: Yes, sir.

21 THE COURT: I'll be glad to hear you. You going to
22 renew your motions from the end of the State's case and
23 the end of the defense case or is there anything else you
24 would you like to add?

25 MR. GRIMES: There's one motion I would like to

1 add, Your Honor.

2 THE COURT: Okay. As far as the renewal of the
3 motions at the end of the State's case and of your case,
4 those motions are denied. What's the new motion?

5 MR. GRIMES: We don't believe the Court has
6 jurisdiction over the lewd act on the minor charge
7 because that was a direct indictment and Mr. Perez was
8 never formally presented the direct indictment, so the
9 Court does not have jurisdiction over him and that charge
10 should be dismissed.

11 THE COURT: You say he was never arraigned?

12 MR. GRIMES: He was never arraigned, never
13 presented it formally, you know --

14 THE COURT: Was a bond set?

15 MR. GRIMES: No, sir.

16 THE COURT: The bond was never set? Was he ever
17 brought before a bond hearing?

18 MR. GRIMES: No, sir.

19 THE COURT: Did you bring a motion for a bond
20 hearing?

21 MR. GRIMES: No, sir.

22 THE COURT: Did you ever make a request for an
23 arraignment?

24 MR. GRIMES: No, sir.

25 THE COURT: Have you ever done any of that?

1 MR. GRIMES: No, sir.

2 THE COURT: Why do you wait until the end of the
3 trial to raise a judicial issue? Why didn't you raise it
4 at the beginning of the trial?

5 MR. GRIMES: Because it could have been easily
6 cured at the beginning of the trial and if we had won the
7 case --

8 THE COURT: What's the State's position?

9 MS. HERRING-LASH: Your Honor, the case was called
10 and he sat here and listened to the case be called, and I
11 think that is sufficient.

12 THE COURT: You sat through trial. Motion denied.

13 All right. Any other motions?

14 MR. GRIMES: No, sir.

15 THE COURT: All right. When we going to have --

16 MS. HERRING-LASH: She went to get them, Your
17 Honor.

18 THE COURT: How long is it going to be?

19 MS. HERRING-LASH: Ms. McCoy can check on her.
20 They printed it before she left.

21 THE COURT: Ladies and gentlemen of the jury, the
22 only thing left will be the sentencing as soon as I get a
23 sentencing sheet. You're welcome to stay if you want to
24 stay. Otherwise, I'll be happy to excuse you at this
25 time. I want to thank you for your services. But you're

1 welcome to stay. Just as soon as I get the sentencing
2 sheets I'm going to sentence the defendant this
3 afternoon. Whatever you want to do. If you want to
4 stay, fine. If you want to leave, that's fine too. If
5 you all want go to the jury room.

6 THE FOREMAN: Can some stay and some leave?

7 THE COURT: Yes. That's fine.

8 (WHEREUPON, a juror left the courtroom.)

9 THE FOREMAN: Thank you, Your Honor.

10 THE COURT: All right. Mr. Grimes, be glad to hear
11 you on sentencing, and I'll be glad to hear anything from
12 Mr. Perez that he would like to say.

13 MR. GRIMES: Thank you, Your Honor. May I
14 approach, Your Honor?

15 THE COURT: Yes, sir.

16 (WHEREUPON, a document was handed to the Court.)

17 MR. GRIMES: While the jury was out I was working
18 on a sentencing memorandum. I think someone from our
19 office went to print it out and bring it over. I think I
20 can try to accurately go from memory on most of that.

21 But what I handed up to the Court is some pictures
22 I took off my phone yesterday when ~~Minor 3~~ and ~~Minor 4~~ were
23 able to see their father for the first time in quite a
24 while, and it was pretty emotional back there. And ~~Minor 3~~
25 was first laughing with a big smile on her face and then

1 later on with tears.

2 I got a picture of Mr. Perez and his reaction to
3 seeing his children. It was one of the biggest smiles
4 I've ever seen on him. And then ~~Minor 4~~, she's very
5 quiet. You know, we would have liked to call her to
6 testify about whether he'd ever hit her, as ~~Minor 1~~ said.
7 And, you know, she always told us no but I just don't
8 think she would have been competent to testify in Court.

9 She's very shy and soft spoken and just -- you
10 know, yesterday we met chambers a little bit about she
11 did have one request, and that was to be able to give her
12 dad a hug. And, you know, I'm not sure if or when she'll
13 ever see him again. He may be going to prison probably
14 for a substantial period of time then after that going to
15 be sent to Mexico.

16 And, you know, I don't know if she's going to go
17 back down there and visit him or what, or if he will even
18 get out of prison, the way the prison situation is. So
19 that's why I handed those pictures up, and there's an old
20 family picture showing, as we talked about yesterday,
21 what a family man he is, how much he values his family.

22 You know, in preparing for the trial we were
23 worried about some issues with some of his witnesses
24 possibly facing deportation if they came to court. And
25 he said, Well, if there's any chance that could happen I

1 don't want to call them because my family comes first.

2 And when we talked about ~~Minda~~ and whether she
3 could testify and he said that I don't want her
4 testifying. She's too young, she has some health
5 problems. So he's always put his family ahead of him.

6 I think that's one of the most admirable qualities
7 I've seen in anybody. A lot of defendants would do
8 anything they can to try to gain an edge or something,
9 and he was quite the opposite in that respect.

10 And as you know, you heard his testimony, you heard
11 the character testimony put up how he worked. He is a
12 46-year-old man who's never even been arrested before.
13 And while we respect the jury's verdict, we understand
14 where it comes from, we do respectfully disagree with it.

15 And it's just so out of character for, you know,
16 the Venancio I know, the Venancio his friends and family
17 told me about. I think that would just sort of qualify
18 as one of the grounds I would argue for a minimal
19 sentence, you know, out of the ordinary conduct.

20 You have someone who's 46 years old, no history of
21 anything, much less anything this egregious. No motive
22 to do anything like this. And, you know, he's comes
23 forward and like I said in closing, I feel like we're
24 trying to prove a negative. And unfortunately we weren't
25 able to do that.

1 You know, obviously I think I would argue any
2 sentence he would get will have a devastating impact on
3 his family. You heard the testimony when he was
4 arrested, how they reacted. I'm sure it's going to be
5 much worse now.

6 And, you know, we didn't want Minor 4 in here to
7 hear some of this stuff and I'm still not sure how much
8 she understands what is going on.

9 Minor 3 certainly does and we thought she may not
10 want to be here to watch the video to hear some things
11 but she wanted to be in here. She wanted to support her
12 dad, see what was going on.

13 THE COURT: How long has he been incarcerated?

14 MR. GRIMES: I think I had calculated numbers and I
15 may have left that in the other folder, but since July
16 15th of 2010.

17 THE COURT: Since when?

18 MR. GRIMES: July 15th of 2010, which I think was
19 maybe 918 days.

20 THE COURT: July 15, 2010. Okay.

21 MR. GRIMES: Yes, sir. Another factor we would ask
22 the Court to consider is his being susceptible to abuse
23 in the prison system. I was looking at some of the case
24 law under the federal guidelines, that is a ground for
25 departure and the cases quoted --

1 THE COURT: You talking about the federal
2 guidelines or what guidelines you talking about?

3 MR. GRIMES: United States sentencing guidelines,
4 Your Honor.

5 THE COURT: So what's the downward departure on
6 that?

7 MR. GRIMES: It's in the Court's discretion.

8 THE COURT: Oh, okay. All right.

9 MR. GRIMES: And there's a case I had, United
10 States vs. Parish, where they were quoting testimony of
11 Dr. Scolatti, S-c-o-l-a-t-t-i. As probably the Court
12 knows anyone convicted of a sex offense involving minors
13 is going to have a rough time in prison.

14 And the Court said, well, that by itself might not
15 be a ground for downward departure. When you look at the
16 person's other factors, such as inexperience in the
17 prison system, obviously he's never been in prison
18 before, never been arrested for anything.

19 In that case it went on to talk about the person's
20 positive and caring nature, and you heard how he
21 testified about how he was very respectful toward
22 everybody, that's how he was raised by his family. He
23 works very hard. So take all those factors in
24 combination.

25 And then the defendant's inability to speak

1 English. You know, and having probably an ICE hold on
2 him he's not going to be eligible for any work release
3 programs, probably not going to be able to get any
4 education credits because he just can't take the classes.

5 Hopefully maybe he will learn English and
6 accomplish something like that but he's been here since
7 2000 and hasn't picked up adequate English yet, so it's
8 going to be very hard for him to. And that's probably
9 going to lead to more prison abuse, and that is
10 something I think the Court can and should consider in
11 this type of case.

12 And second to last ground I have would be the
13 federal courts also recognize that someone is deportable
14 whether they are a resident alien or here illegally that
15 if they sort of gave up any of their rights to contest
16 any deportation hearings that that could be a ground for
17 a departure. And I think, you know, Venancio certainly
18 would do that and we could put that in writing.

19 And finally, the last case I would cite would be
20 Justice Sotomayor, one of her first opinions from 2011,
21 and Peppers vs. United States where basically she says
22 the sentence fitting the defendant, not merely the crime.

23 And when you look at the defendant I think a time
24 served sentence would fit him, quite honestly. He will
25 be sent back to Mexico. He's not going to be any risk to

1 any further citizens of the United States. He'd be
2 probably back working in the fields doing who knows what.

3 You know, he's probably going to be susceptible to
4 abuse in Mexico. When you see reports on TV about drug
5 cartels taking advantage of people and some stories about
6 where they waited at deportation centers where people
7 come from the United States and, you know, take advantage
8 of them there one way or another. Going back to Mexico
9 may be considered punishment in and of itself.

10 And not to minimize the facts of the case but I
11 think one thing we don't know on the lewd act charges,
12 you heard a wide variety of acts --

13 THE COURT: Let's don't get into arguing the facts
14 of the case. Just tell me something about him and
15 sentencing. You've been doing that. I don't want to get
16 into the facts of the case. I heard the case. Okay?

17 MR. GRIMES: I understand, Your Honor. I'm not
18 trying to get into the facts I just want to -- you know,
19 it would be one thing if the jury found him guilty of
20 flashing or an indecent exposure allegation as opposed to
21 another one. So I think under Prinity (phonetic) vs. New
22 Jersey about a specific finding on the record of what act
23 it was I think the Court should assume the least serious
24 of the acts.

25 THE COURT: You made that request on the charge and

1 I followed South Carolina law on that issue. Okay?

2 MR. GRIMES: Thank you, Your Honor. And yesterday
3 we had several other people in court who are not here
4 today. There's Pastor Carlos Valles, V-a-l-l-e-s. I'll
5 probably mispronounce the name of his church, Iglesia,
6 I-g-l-e-s-i-a, Bida, B-i-d-a, Nueva, N-u-e-v-a, and
7 Venancio went sort of occasionally. He didn't go to
8 church a lot but the pastor has been working with his
9 wife. He's been there for help and they are very
10 supportive. He's been, I think, seeing Venancio at the
11 jail and trying to keep his -- keep up with his spirits.

12 His wife was here yesterday. She's been teaching
13 Sunday school with *Minor 4* and *Minor 3*.

14 We also have Maria Sanchez in court today. She
15 works at Northwoods Church, something they have, an Adopt
16 a Street Program, and somehow they found out about
17 Ms. Carmona's situation. Ms. Sanchez spoke Spanish, she
18 had been working with them. She does not really know
19 Venancio but she can address the impact that his absence
20 has had on his children. We'd call her at this time to
21 address those points.

22 MS. SANCHEZ: Yes, sir. My name is Maria Sanchez
23 and I've know the family for over a year and a half now.
24 And like he said I don't know --

25 THE COURT: You're going to have to speak up so the

1 court reporter can hear you, okay?

2 MS. SANCHEZ: Sorry. Like I said, I don't know him
3 personally but I've seen his family suffer for the last
4 -- for two years. And I just want to say -- (crying).

5 I'm sorry. It's already been hard but I just know
6 it's going to be way harder now even though they know
7 exactly where he is because before they knew where he was
8 but they didn't know where he was going. So I know this
9 is going to be a huge setback for them. And I mean, I
10 know they have other family members supporting them but
11 just seeing them without a dad is going to be really
12 tough. So I'd just like to say that.

13 THE COURT: Thank you very much.

14 Anything from the State?

15 I'm sorry. You finished, Mr. Grimes?

16 MR. GRIMES: I don't believe so, Your Honor.

17 THE COURT: Pardon?

18 MR. GRIMES: May I have one moment?

19 THE COURT: Yes, sir.

20 (PAUSE.)

21 FEMALE LADY: (Spoke Spanish).

22 THE COURT: Can you tell me what she said, please.

23 INTERPRETER ALMEIDA: My name is Angelica Carmona.

24 I only want to request mercy from you. I want you to
25 look at his daughters and I want to ask you to give him

1 the least amount of time.

2 THE COURT: Tell her thank you very much.

3 Would you tell the defendant if there's anything he
4 would like to say I'll be glad to hear it.

5 INTERPRETER ALMEIDA: No.

6 MR. GRIMES: Ms. Parnell would like to address the
7 Court at this time, Your Honor.

8 THE COURT: Okay.

9 MS. PARNELL: If I may, Your Honor?

10 THE COURT: Yes, ma'am.

11 MS. PARNELL: I would just like to say that because
12 of the language barrier that we were facing in this case
13 that I've had a rare opportunity as the second chair in
14 this case to spend a considerable amount of time working
15 through the case, working with Mr. Diaz Perez, working
16 with his family and in all of that time I've been able to
17 hear his words directly from his mouth. I believe I've
18 been able to get a sense and a meaning from them that
19 sometimes gets lost in translation.

20 I just want to let the Court know I do believe that
21 this is a man that has a great sense of respect for
22 others, of courtesy for others, of kindness, a man that's
23 good through and through, and this is all shown through
24 in a time. It must have been probably the most difficult
25 kind of time that any of us have ever experienced in our

1 lives.

2 I would also like to state that along with
3 Mr. Grimes I respect very much the judgment of the Court,
4 that I too would strongly disagree with that verdict but
5 that I respect the judgment of the Court.

6 I do -- my genuine belief is that this is a man
7 who truly lives by the motto that he expressed in court,
8 that he has a great deal of respect for all people,
9 whether they are older people, whether they are younger
10 people. I would just ask the Court to consider, among
11 other things, the manner in which he has conducted
12 himself since the very day of his arrest to this moment.
13 That he has shown a great deal of restraint, self
14 control, kindness.

15 And I would also ask the Court to consider the lack
16 of a criminal record that this man has. The fact that
17 that Mr. Diaz Perez is an indisputably very hard worker
18 and the motivations behind the work that he does. Every
19 day has been the survival of his family and the
20 opportunity to provide them with a better life.

21 I do believe that he has a beautiful family here
22 today that is going to be wrecked by this and I would
23 just ask that Your Honor keep that in consideration and
24 spare them in any way that you deem appropriate.

25 THE COURT: Okay. Thank you very much.

1 I'll be glad to hear from the State or anyone you
2 would like me to hear from.

3 MS. HERRING-LASH: Your Honor, I think Ms. Jimenez
4 would like to address the Court.

5 MS. JIMENEZ: My full name is Alejandra Jimenez,
6 A-l-e-j-a-n-d-r-a J-i-m-e-n-e-z. And for me as a mother
7 discovering that my daughter was going through that
8 nightmare has been a horrible time.

9 Since the very first day, during all this time that
10 we have been for therapy, every single day that she came
11 asking me why was she having these nightmares, I just
12 have the deal with this feeling of failure for not being
13 able to protect her, for not being able to see what was
14 going on because I took her to that house every single
15 time without knowing she was suffering from this man, and
16 for that other girl that she went there because I told
17 the mother.

18 This is something that I will have to deal with for
19 the rest of my life. Now my daughter had to go through
20 all this -- (crying). I just don't know how am I going
21 to be able to deal with this -- (crying) -- deal with
22 this situation for so long. I didn't know every single
23 day she was at the mercy of this situation, and God knows
24 what could have happened if I didn't stop it. (Crying).

25 I am just hoping that this will give her the

1 strength that she'll know that I believe her, that I
2 support her that -- (crying).

3 THE COURT: Thank you so very much.

4 Yes, ma'am? Anything else, Solicitor?

5 MS. HERRING-LASH: Your Honor, I do not think that
6 Minor2's family wants to address the Court.

7 To start off with, I would like to say that I think
8 he is already getting an extreme advantage because I will
9 dismiss the criminal sexual conduct in the first degree
10 that involved sexual intercourse with Minor2 and the
11 lewd act upon a minor just because I don't think that she
12 has the capabilities of testifying about that through a
13 whole nother trial.

14 And as far as the potential for advantage being
15 taken of Mr. Perez, and as far as the potential of him
16 being harmed, he has already taken advantage of very
17 vulnerable young, young children. So we know that he has
18 already done that. And I feel extremely sorry for his
19 family but they are suffering because of his behavior,
20 and he has put them in that situation.

21 The other thing, Your Honor, this lewd act was as
22 far as lewd acts go a very series lewd act. It was
23 inside of clothes and it was repetitive, and it involved
24 a lot more as far as the ABHAND and the indecent
25 liberties. He did this over, and over, and over to these

1 two young girls, and we would ask you to run these
2 charges consecutive, as his behavior went on for an
3 extended amount of time he had no mercy. He is asking
4 this Court for mercy but he had no mercy when he was
5 dealing with these young girls.

6 THE COURT: Okay. Do the parties agree the max
7 sentence on the lewd act on a minor is 15 years? Is that
8 the State's understanding and the defense understanding?

9 MS. HERRING-LASH: Yes, Your Honor.

10 MR. GRIMES: Yes, sir.

11 THE COURT: And the maximum of assault and battery
12 high and aggravated is 10 years; is that correct?

13 MS. HERRING-LASH: Yes, sir.

14 MR. GRIMES: Yes, sir.

15 THE COURT: Okay. Thank you very much. Anything
16 else?

17 MR. GRIMES: No, sir.

18 THE COURT: All right. Thank you very much.

19 All right. Mr. Perez, on the indictment 7731,
20 that's the lewd act on a minor, you're sentenced to the
21 State Department of Corrections for a period of 15 years.
22 That's consecutive with the other indictment. I'll give
23 you credit for jail time since July the 15th, 2010. You
24 are to be placed on the central registry of child abuse
25 and neglect.

1 Indictment number 7730, it's assault and battery
2 with intent to kill [sic], sentenced to the State
3 Department of Corrections for a period of 10 years.
4 That's consecutive, give you credit since jail time from
5 September [sic] 15th, 2010. Thank you so very much.

6 MS. HERRING-LASH: Thank you, Your Honor.

7 MR. GRIMES: Your Honor, one more matter. I
8 normally don't bring this up but given the sentence we
9 would object to it as being vindictive.

10 THE COURT: I'm sorry, what now?

11 MR. GRIMES: We object to the sentences being run
12 consecutively as being vindictive and punishing Mr. Perez
13 for going to trial. I think there were -- and this is
14 where I'm a little reluctant to go into detail but we did
15 have -- I think I have to, to preserve Mr. Perez's rights
16 to make the record clear. We did have an in-chambers
17 conference where we talked about potential pleas --

18 THE COURT: I didn't have an in-camera conference.
19 I was talking to the two of you unofficially, off the
20 record trying to work out a plea. Now, if you want to
21 put that on the record I'll put that on the record.

22 I very clearly told you that if I was trying this
23 case nonjury I would find him guilty of lewd act and high
24 and aggravated. If you wanted to enter a plea I would do
25 away with the high and aggravated and let him plead to

1 the lewd act and give you a range of 10 to 15.

2 MR. GRIMES: Yes, sir.

3 THE COURT: That's what I told you.

4 MR. GRIMES: Yes, sir.

5 THE COURT: Now, if you want to take exception to
6 that, that's fine. That was an informal conference where
7 I was trying to assist you and the solicitor in
8 dismissing the case. Is that what you were doing?

9 MR. GRIMES: Yes, sir..

10 THE COURT: Because if it is it's the last time I
11 will speak with you without a court reporter present.

12 MR. GRIMES: I apologize. But, yes, sir. I think
13 I have to.

14 THE COURT: Pardon? It was not an in-camera
15 hearing. I was trying facilitate the disposition of this
16 case.

17 MR. GRIMES: I apologize if I mischaracterized a
18 hearing. You are correct. It was unofficial. It was
19 off the record, but that was what was said.

20 THE COURT: Pardon?

21 MR. GRIMES: That's an accurate summary of what was
22 said.

23 THE COURT: Okay. Now, do you want to make a
24 motion on that, what I put on the record?

25 MR. GRIMES: Yes, sir.

1 THE COURT: What's your motion?

2 MR. GRIMES: That running these sentences
3 consecutively is punishing Mr. Perez for his right to go
4 to trial.

5 THE COURT: Motion is denied. This Court is of the
6 opinion that the little girl was abused. This Court is
7 also of the opinion that there was penetration, digital
8 penetration based upon her sworn testimony. The jury has
9 found her not guilty.

10 The Court's of the opinion he's guilty of all the
11 charges from the testimony I've heard. So it's not any
12 abuse in giving him the consecutive. You understand?

13 MR. GRIMES: Yes, sir.

14 THE COURT: All right. Motion denied. Anything
15 else?

16 MR. GRIMES: No, sir.

17 THE COURT: Thank you very much.

18 You all may be excused to the jury room.

19 (WHEREUPON, the jury leaves the courtroom, and the
20 trial of the case was concluded.)

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C E R T I F I C A T E

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I, Sharon L. Vizer, Official Court Reporter for the
Ninth Judicial Circuit of the State of South Carolina, do
hereby certify that the foregoing is a true, accurate and
complete transcript of record of all the proceedings had
and the evidence introduced in the trial of the captioned
case in Circuit Court on the 14th through the 18th of
January 2013.

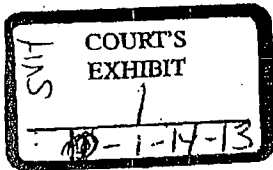
I do further certify that I am neither of kin, counsel
nor have an interest to any party hereto.

August 6, 2013



SHARON L. VIZER

CIRCUIT COURT REPORTER



State v Venancio Perez 404 (b) Chart

Description	Minor 1	Minor 2
Age	8—9	8
Gender	Female	Female
Relationship to Defendant	Babysitter's Husband	Babysitter's Husband
Time	Various Times of Day	Various Times of Day
Place	Defendant's Home	Defendant's Home
Sex Acts	Fondling/Digital	Fondling/Sexual Intercourse
Primary Care Giver	Defendant's Wife	Defendant's Wife
Timeframe	March 1, 2010 July 10, 2010	May 1, 2010 July 1, 2010
Friends	With Defendant's Daughter	With Defendant's Daughter
Fondling	On Top & Under Clothes	On Top & Under Clothes



North Charleston Police Department
Report of Photographic Lineup

OCA #: 2010029513
2010029614 Date: 7-15-10
Time: 1105 Location 2500 City Hall Lane
Investigating Officer: Det. Lacher
Identifying Witness (name & DOB) Minor1

minor1 I am going to show you a series of photographs of individuals or an array of six photographs of individuals (circle appropriate one).

minor1 These photographs may or may not be the person who committed the crime. It is just as important to clear innocent people as it is to identify possible suspects. Whether or not you identify someone, the police will continue to investigate.

minor1 After you are done, I will not be able to provide you with any feedback or comment on the results of the process.

minor1 4. Do not discuss this identification procedure or the results with other witnesses in this case.

minor1 Focus on the event; the place, view, lighting, your frame of mind, etc. Take as much time as you need.

minor1 People may not appear exactly as they did at the time of the event, because features such as clothing style, hair color, hair style, etc. may change, even in a short period of time.

minor1 1. As you look at the photographs, tell me if you recognize the person in them. If you do, please tell me how you know the person, and in your own words, how sure you are of the identification.

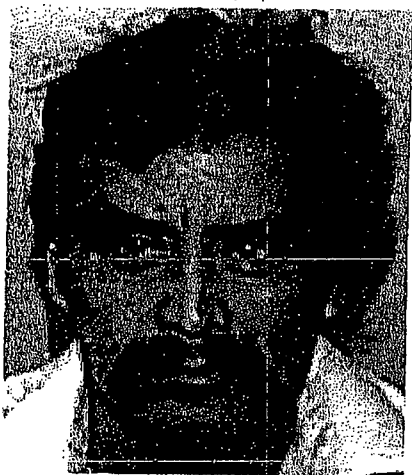
Witness Identification Statements

Identification Made: Yes ☒ No ☐

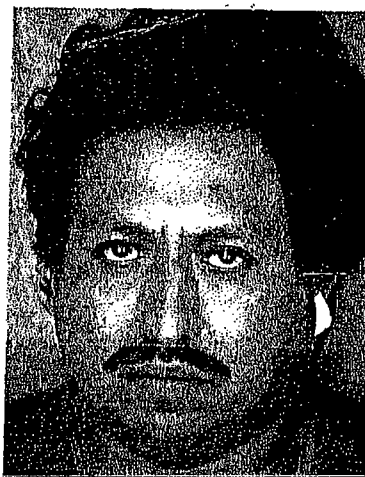
I'm pretty sure its him (#3). He is the
father of Minor3 and Minor4. He is the babysitter's
husband. I am 9 on the scale of 1 to 10.
that it is him.

Kim Dossen
Independent Administrator's Signature

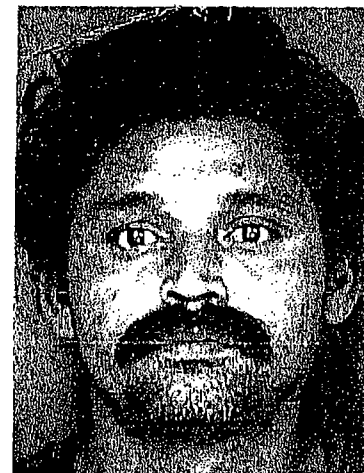
Minor1
Witness Signature



<3> Minor



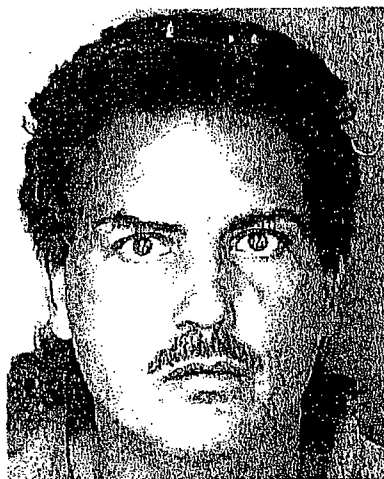
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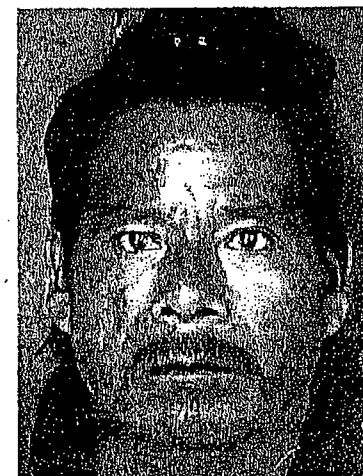
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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

ORIGINAL

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions

RECEIVED

JUN 10 2014

J. C. Nicholson, Circuit Court Judge

SC Court of Appeals

2010-GS-10-07730

2010-GS-10-07731

Appellate Case No. 2013-000179

State of South Carolina Respondent,

v.

Venancio Diaz Perez Appellant.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. Did the Trial Court commit reversible error under State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923) and Rules 403 & 404(b), SCRE, by allowing introduction of unrelated prior bad acts with a different minor and by excluding evidence of prior bad acts from the same witness that did not conform to the accuser's testimony?
- II. Did the Trial Court commit reversible error under Rules 403 & 611, SCRE, and the Confrontation Clause by refusing to allow the Appellant to fully cross-examine the mother of the State's Lyle witness about the visa she received, with the assistance of the Solicitor's office, because she was the mother of a crime victim?
- III. Was the Trial Court's imposition of maximum, consecutive sentences after the accused's refusal of an off-the-record plea offer vindictive and a violation of the accused's due process rights, when the Trial Court supports its decision with evidence that was not objective, relevant, reliable, and trustworthy?

STATEMENT OF THE CASE

On July 15, 2010, Appellant Venancio Diaz Perez was arrested for Criminal Sexual Conduct with a Minor ("Minor 1") (R. p. 12). He was formally indicted for Criminal Sexual Conduct with a Minor ("CSC")¹ and Lewd Act on a Minor ("Lewd Act")² on November 8, 2010. (R. pp. 10, 16). The cases were tried together January 14-18, 2013, before Judge J.C. Nicholson in Charleston County, South Carolina. (R. p. 18). The State was represented by Deborah Herring-Lash and Jennifer McCoy of the Charleston County Solicitor's Office, and Perez was represented by Andrew Grimes and Christina Parnell of the Charleston County Public Defender's Office. (R. p. 18).

The jury acquitted Perez of CSC, but did find him guilty of the lesser-included offense of Assault and Battery of a High and Aggravated Nature ("ABHAN")³ and Lewd Act. (R. pp. 9, 15, 553-54) The Court sentenced Perez to ten years imprisonment for the former, and fifteen years imprisonment for the latter. (R. pp. 8, 14, 554-56). The Court ordered these sentences to be served consecutively. (R. pp. 8, 14, 554-56). Perez served his Notice of Appeal on January 25, 2013. (R. p. 6-7).

¹ S.C. Code § 16-3-655(A) (Supp. 2010).

² S.C. Code § 16-15-140 (Supp. 2010).

³ State v. Fennell, 340 S.C. 266, 274, 531 S.E.2d 512, 516-17 (2000).

ARGUMENT

Appellant Venancio Diaz Perez is entitled to a new trial. The State bolstered their case with the unnecessary and inadmissible propensity evidence of another minor accuser. The Trial Court then refused to allow Perez to investigate the bias of this accuser's mother, who, like the victim's mother, was seeking legal status in exchange for this testimony. Finally, the Trial Court punished Perez with maximum, consecutive sentences because he refused the plea offer made by the Trial Court. These errors, jointly and independently, demand that this Court reverse and remand this action to the Court of General Sessions for a new trial.

I. The Trial Court committed reversible error in admitting Minor 2's highly prejudicial testimony of prior bad acts.

Perez's arrest arises out of the allegations of Minor 1, who was being babysat by his wife, Angelica Carmona at the couple's trailer (later house) in North Charleston. (R. pp. 10-13, 16-17, 134, 432, 434, 438-39). In the course of trial, the State sought to introduce the testimony of Minor 2, another minor female cared for by Carmona who accused Perez of similar, and worse, acts that the State refused to prosecute.⁴ (R. p. 552). Though Minor 2's testimony was subject to a limiting instruction (R. p. 249), her testimony hopelessly tainted any hope Perez had for a fair trial and merits a reversal by this Court.

⁴ Perez and Carmona had a daughter roughly the same age as the Minors; Charleston County Department of Social Services conducted an investigation of possible abuse of this child, and found no proof of abuse. (R. p. 447).

A. Evidence of prior bad acts – law.

Generally, evidence of prior crimes or bad acts is inadmissible to prove the specific crime charged; however, an exception exists for evidence tending to establish (1) motive, (2) intent, (3) the absence of mistake or accident, (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other, or (5) the identity of the person charged with the present crime. See State v. Lyle, 125 S.C. 406, 416, 118 S.E. 803, 807 (1923); Rule 404(b), SCRE. For the common scheme or plan exception to apply, a close degree of similarity or connection between the prior bad act and the crime charged is necessary. State v. Timmons, 327 S.C. 48, 52, 488 S.E.2d 323, 325 (1997). The connection between the prior bad act and the charged crime must be more than just a similarity, as a common scheme or plan concerns more than just the commission of similar crimes; some connection between the crimes is necessary. Id. Under the common scheme or plan exception, there must be a close degree of similarity or connection between the prior bad act and the crime charged which enhances the probative value of the evidence so as to outweigh its prejudicial effect. State v. Hough, 325 S.C. 88, 95, 480 S.E.2d 77, 80 (1997). Lyle demands that the defendant be given the benefit of the doubt where this connection is not clearly perceived. State v. Tutton, 354 S.C. 319, 327, 580 S.E.2d 186, 190 (Ct. App. 2003).

If the prior bad act is not the subject of a conviction, the trial court must first determine if clear and convincing evidence exists of the act. State v. Gaines, 380 S.C. 23, 29, 667 S.E.2d 728, 731 (2008). This determination is reviewed under a “clearly erroneous” standard. State v. Wilson, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001). After determining clear and convincing evidence supports a finding the defendant committed a

prior bad act, the court must determine whether the evidence falls within the common scheme or plan exception. Tutton at 326, 580 S.E.2d at 190. This determination is a matter of law reviewed *de novo*. Id. at 326-27, 580 S.E.2d at 190.

The South Carolina Supreme Court has set forth the following non-exclusive factors when determining whether there is a close degree of similarity between the bad act and the crime charged in a sexual abuse case: (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. State v. Wallace, 384 S.C. 428, 433-34, 683 S.E.2d 275, 277-78 (2009).⁵

Lyle requires the proponent of common scheme or plan evidence to answer a simple threshold question: What is the common scheme or plan evidence offered to prove? If the answer is some key fact, such as identity, then, the court should proceed with a similarity analysis. If the answer is that common scheme or plan evidence is *only* offered to show the crimes are similar, then the court need proceed no further, because what is really being offered is inadmissible character evidence. If all that the common scheme or plan proves is that the defendant committed an act in the past and that makes it more likely he committed the charged crime, then the evidence is nothing more than character and propensity evidence trying to sneak around Rule 404(a), SCRE, through Rule 404(b)'s back door. Without asking this basic first question, there is no logically

⁵ The Appellant does not believe these factors, and the Supreme Court's decision in Wallace, are consistent with the holdings of Lyle, but this is an argument for the Supreme Court. See Jean Hoefer Toal, et al., Appellate Practice in South Carolina 12 (2nd ed. 2002) ("The Court of Appeals is an error-correction court, whereas the Supreme Court is a law-giving court.").

consistent way to differentiate inadmissible propensity evidence from admissible common scheme or plan evidence; otherwise, the exception that is 404(b) swallows 404(a)'s rule.

The Supreme Court recognized the need to return to the basic reasoning of Lyle in State v. Fonseca, 393 S.C. 229, 229, 711 S.E.2d 906, 906 (2011). The Supreme Court adopted the Court of Appeals' decision as its own in this opinion. Id. Fonseca recognized the "thin disguise" of character evidence costumed in the threadbare garb of motive, intent, or common scheme or plan evidence in a child sex case. State v. Fonseca, 383 S.C. 640, 649, 681 S.E.2d 1, 5 (Ct. App. 2009).

South Carolina appellate courts have examined situations that clearly fit the mold of a "scheme or plan". In State v. McClellan, a father began abusing each of his daughters about the time they reached age 12. 283 S.C. 389, 323 S.E.2d 772 (1984). The father would enter their bedroom late at night, waking them, and taking one of his three daughters to his bedroom. Id. There he would explain the Biblical verse that children are to "Honor thy Father", and would also indicate he was teaching them how to be with their husbands. Id. In State v. Weaverling, an uncle engaged in a grooming scheme with his nephew. State v. Weaverling, 337 S.C. 460, 523 S.E.2d 787 (Ct.App.1999). The accused in Weaverling showed pornographic materials to the child repeatedly while performing oral sex upon him, which occurred over 100 times. Id. In both of these cases, it is clear that the prior bad acts are introduced not for proof of propensity to commit crimes, but for the inference that the defendant "developed a criminal scheme and employed that scheme." Tutton at 331, 580 S.E.2d at 192.

B. Lyle hearing testimony.

Because the State wished to introduce testimony of alleged misconduct with Minor 2, the Trial Court conducted a hearing pursuant to State v. Lyle prior to trial, where the Minors presented the following testimony:

Minor 1 (victim)

(1-a) Minor 1 testified that once when she went inside her babysitter's trailer to retrieve a PlayStation Portable ("PSP") from Perez's daughter's room, Perez approached her, pulled her into a closet, and digitally penetrated her vagina. (R. pp. 29-30).

(1-b) Minor 1 testified that once when went inside her babysitter's trailer to retrieve a PSP from Perez's daughter's room while the family was at a food truck, Perez approached her, pulled her into a closet, and digitally penetrated her anus. (R. pp. 31-32).

(1-c) Minor 1 testified that once when her friends were inside the babysitter's trailer pretending to be singers in front of the television ("playing like superstars"), Perez exposed his penis to her. (R. pp. 33, 51-52).

(1-d) Minor 1 testified that once at the babysitter's house,⁶ Perez asked Minor 1 to assist him in repairing a wall. After repairing the wall, Perez refused to allow Minor 1 to leave and touched her breasts and vagina and bit her on her breast. (R. pp. 33-34, 50-51).

(1-e) Minor 1 testified that once at the babysitter's house, Perez chased her in an attempt to "touch" her and forced her to hide under the bed from him. (R. pp. 35, 52).

⁶ Carmona originally lived in a trailer, but eventually moved to a house in North Charleston. (R. pp. 13, 32, 139, 202).

(1-f) Minor 1 testified that once she went inside the babysitter's house playing hide-and-seek and decided to hide in a closet. Minor 1 testified that Perez was in that closet and that he grabbed her and touched her vagina. (R. pp. 35-36, 53-54).

(1-g) Minor 1 testified that Perez would attempt to bribe her with money. (R. pp. 49-50).

Minor 2 (Lyle witness)

(2-a) Minor 2 testified that once she fell asleep watching High School Musical at the babysitter's house and Perez touched her vagina. (R. pp. 62-63).

(2-b) Minor 2 testified that once Perez touched her vagina and anus in a bedroom near the kitchen of the babysitter's house. (R. p. 63). However, under cross-examination, Minor 2 admitted that she alleged that Perez had either vaginal or anal intercourse⁷ with her in her initial forensic interview. (R. pp. 73-75, 85-86). In cross-examination, it became apparent in her initial forensic interview she stated Perez had threatened her with a knife to perform these acts. (R. pp. 85-86).

(2-c) Minor 2 testified that Perez threatened her ("he'll keep being mean to me") to keep her quiet about his acts. (R. p. 64). However, under cross-examination it became apparent that in her initial forensic interview she stated that Perez had threatened her with a knife. (R. pp. 75, 86).

(2-d) Under cross-examination, Minor 2 testified that Perez did *not* attempt to bribe her with gifts. (R. pp. 78, 93).

⁷ It is worthwhile to note that Minor 2 would have been approximately eight years old at this time. (R. pp. 13, 229, 504). Presumably, such an act would have left injury that would have been noticeable by medical personnel, as State's witness Dr. Anne Abel testified that a larger object would likely cause more damage. (R. p. 353). However, the State chose not to go forward with a prosecution for these acts. (R. p. 552).

(2-e) Under cross-examination, Minor 2 testified that Perez did *not* attempt to bite her. (R. p. 78).

(2-f) Under cross-examination, Minor 2 testified that Perez did *not* attempt any untoward acts while she was playing games with other children. (R. p. 80).

(2-e) Under cross-examination, Minor 2 testified that Perez “touched” her when she was helping him repair a doorknob. (R. pp. 80-81).

The Trial Court found that under Wallace, that there was a close degree of similarity between the bad acts and those accused of Perez, specifically finding a similarity in: (1) the ages of the Minors, (2) the relationship between the Minors and Perez, (3) the location of the alleged abuse, (4) “the manner of the occurrence, such as type of sexual battery”. (R. pp. 113-14). The Trial Court further found under Rule 403, SCRE, that this testimony was more probative than prejudicial. (R. p. 114). The Trial Court also excluded any testimony of Minor 2 regarding her allegations of intercourse with Perez.⁸ (R. p. 114).

C. Trial testimony.

Minor 1 (victim)

Minor 1 was called first as a witness. With some notable exceptions, her trial testimony was largely consistent with her Lyle hearing testimony:

(1-a) Minor 1 testified that once when she went inside her babysitter’s trailer to retrieve a PlayStation Portable (“PSP”) from Perez’s daughter’s room, Perez approached her, pulled her into a closet, and digitally penetrated her vagina. (R. pp. 140-41). This was substantially similar to her Lyle hearing testimony. (R. pp. 29-30).

⁸ The State nonetheless presented this evidence to the Trial Court during sentencing. (R. p. 552).

(1-b) Minor 1 testified that once when went inside her babysitter's trailer to retrieve a PSP from Perez's daughter's room while the family was at a food truck, Perez approached her, pulled her into a closet, touched her vagina and anus without penetration. (R. pp. 141-42). This differed from her Lyle hearing testimony, where she testified that Perez digitally penetrated her anus. (R. pp. 31-32).

(1-c) Minor 1 testified that once when her friends were inside the babysitter's trailer pretending to be singers in front of the television ("playing like superstars"), Perez exposed his penis to her. (R. pp. 147-49). This was substantially similar to her Lyle hearing testimony. (R. pp. 33, 51-52).

(1-d) Minor 1 testified that once at the babysitter's house, Perez asked Minor 1 to assist him in repairing a wall. After repairing the wall, Perez refused to allow Minor 1 to leave and touched her breasts and vagina and bit her on her breast. (R. pp. 150-51). This was substantially similar to her Lyle hearing testimony. (R. pp. 33-34, 50-51).

(1-e) Minor 1 testified that once at the babysitter's house, Perez chased her in an attempt to "touch" her and forced her to hide under the bed from him. (R. p. 155). This was substantially similar to her Lyle hearing testimony. (R. pp. 35, 52).

(1-f) Minor 1 testified that once she went inside the babysitter's house playing hide-and-seek and decided to hide in a closet. Minor 1 testified that Perez was in that closet and that he grabbed her and touched her vagina and anus. (R. pp. 152-53). This differed from her Lyle hearing testimony, where she testified that Perez only touched her vagina. (R. pp. 35-36, 53-54).

(1-g) Minor 1 testified that Perez would attempt to bribe her with money to allow him to continue touching her. (R. p. 156). This was substantially similar to her Lyle hearing testimony. (R. pp. 49-50).

Minor 2 (Lyle witness)

Minor 2 testified several days later, and was offered subject to the Trial Court's restriction that Minor 2's allegations of intercourse were to be excluded. (R. p. 226). Her testimony differed greatly than that proffered at the Lyle hearing:

(2-a) Minor 2 testified that once she fell asleep watching High School Musical at the babysitter's house and Perez touched her vagina ("top privates"). (R. pp. 235-36). This was substantially similar to her Lyle hearing testimony. (R. pp. 62-63).

(2-b) Minor 2 testified that once Perez touched her vagina and anus in a bedroom near the kitchen of the babysitter's house. (R. pp. 233-35). Minor 2 *did not* testify that Perez had intercourse with her in this encounter, nor did she testify that he had threatened her with a knife to make her enter this bedroom, as she did in her forensic interview. (R. pp. 85-86).

(2-c) Minor 2 testified that Perez threatened her ("he'll do something bad to me") to keep her quiet about his acts. (R. pp. 238-39). Minor 2 *did not* testify that Perez threatened her with a knife, as she did in her forensic interview. (R. pp. 75, 86).

(2-d) Minor 2 *did not* testify that Perez attempted to bribe her with gifts.

(2-e) Minor 2 *did not* testify that Perez attempted to bite her.

(2-f) Minor 2 *did not* testify that Perez attempted any untoward acts while she was playing games with other children (e.g. hiding in a closet while they were playing hide-and-seek).

(2-e) Minor 2 *did not* testify that Perez “touched” her when she was helping him repair a doorknob, as she did in the Lyle hearing. (R. pp. 80-81).

Perez renewed his objection to this testimony, but this objection was overruled and the Trial Court issued a limiting instruction to the jury. (R. pp. 240, 249). Perez subsequently moved for a mistrial.⁹ (R. p. 468).

D. There is no evidence of any criminal scheme or plan.

The State presents no logical connection between the abuse of Minor 1 and Minor 2 that evidences any criminal scheme or plan. The only similarity¹⁰ between the abuse is that it occurred; there is no evidence of grooming (as in Weaverling) and no evidence of a plan to abuse the Minors (as in McClellan). The differences of the testimony of the Minors further reinforce a lack of scheme or plan:

- a) Minor 1 alleged abuse at the babysitter’s trailer and house, while Minor 2 only alleged abuse at the house.
- b) Minor 1 did not allege Perez threatened to keep her quiet, while Minor 2 did make this allegation.
- c) Minor 1 alleged that Perez attempted to bribe her with gifts, while Minor 2 made no such allegation.
- d) Minor 1 alleged that Perez bit her during the commission of one of his acts, while Minor 2 made no such allegation.

⁹ This motion was made on January 17, 2013, (two days later), but the Trial Court acknowledged that this issue was preserved for appeal. (R. p. 468)

¹⁰ The Trial Court excluded Minor 2’s allegations of intercourse with Perez. (R. p. 114). While this exclusion was justified by the Trial Court by citing Wallace, Perez believes that such a redaction of the testimony is impermissible, as set forth by the Court of Appeals in Wallace. See State v. Wallace, 364 S.C. 130, 141, 611 S.E.2d 332, 338 (Cl. App. 2005) (“The law should not permit a trial judge to make similar that which is different by redacting a part of the testimony.”).

The only relevant similarities in this case are the ages of the Minors and the fact they took place at a babysitter's house. The lack of connection between these two acts is exactly the situation where Lyle demands that a defendant be given the benefit of the doubt.

The admission of Minor 2's testimony was not harmless and has caused Perez significant prejudice. Much like in Tutton, the evidence against Perez consisted of the Minors' accusations against him. Tutton at 334, 580 S.E.2d at 194. Also like Tutton, there was no medical evidence of abuse, and Perez denied the accusations made against him. Id. Without the testimony of Minor 2, there is not overwhelming evidence of Perez's guilt, especially in light of the fact that the jury acquitted Perez of CSC with Minor 2's testimony admitted and the questions of Minor 1's truthfulness. (R. pp. 205, 460-61).

The Trial Court's limiting instruction (R. p. 249 ll. 1-15) could not cure the prejudice to Perez's defense. It does not provide sufficient detail on what exactly constitutes a "common scheme or plan" and omits important language clarifying this exception found in Tutton ("...part of an overall plan or scheme devised by him to perpetuate the type of misconduct that occurred...").

Accordingly, the testimony of Minor 2, even in the edited and limited form presented to the jury, does not provide proof of any plan or scheme to perpetuate abuse of the Minors; its prejudice to Perez's defense warrants reversal of the Trial Court and a new trial.

II. The Trial Court committed reversible error in excluding evidence of witness Amanda Maldonado's potential bias.

The mothers of Minor 1 and Minor 2, who were both undocumented immigrants at the time of Perez's arrest, both received assistance from the State in preparing applications for U Visas, which both women received because of their daughters' cooperation with the State. The Trial Court limited cross-examination of Minor 2's mother regarding her U Visa application and her immigration status; this was important evidence of bias and its exclusion violates Perez's rights under the Confrontation Clause and merits him a new trial.

A defendant has the right to cross-examine a witness concerning bias under the Confrontation Clause. Davis v. Alaska, 415 U.S. 308 (1974); State v. Brown, 303 S.C. 169, 399 S.E.2d 593 (1991); U.S. Const. amend. VI; U.S. Const. amend. XIV. "On cross-examination, any fact may be elicited which tends to show interest, bias, or partiality' of the witness." State v. Brewington, 267 S.C. 97, 101, 226 S.E.2d 249, 250 (1976) (quoting 98 C.J.S. Witnesses § 560a (1957)); see also Rule 608(c), SCRE ("Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced.").

A U Visa ("U nonimmigrant status") legalizes the status of an undocumented immigrant who "...been helpful, is being helpful, or is likely to be helpful to a certifying agency in the investigation or prosecution of the qualifying criminal activity..." 8 C.F.R. § 214.14(b)(3). Such a *quid pro quo* transaction is a powerful indicator of bias on the part of a witness, and other courts have recognized its importance. In State v. Valle, the lower court excluded the victim's testimony regarding her seeking and obtaining a U Visa as a

victim of crime. 298 P.3d 1237, 1240 (Or. Ct. App. 2013) (en banc). The Oregon Court of Appeals reversed and remanded for a new trial, finding that:

...[the victim] had applied for a U visa on the ground that she was a victim of abuse. From that testimony alone, a jury could infer that [the victim] had a personal interest in testifying that she had been abused. Simply put, [the victim] had applied for an opportunity to stay in the country on the ground that she had been abused; based on that fact, a jury could reasonably infer that she had a personal interest in testifying in a manner consistent with her application for that opportunity.

Valle at 1243.

Alejandra Jimenez, mother of Minor 1, testified that the City of North Charleston Police Department's Victim Advocate told her about the possibility of her obtaining a U Visa and assisted her with preparing the application. (R. pp. 213-14, 220-22, 227-28). The Victim Advocate also testified that she encouraged Jimenez to apply and that the Solicitor's office signed off on Jimenez's application. (R. pp. 296-97, 300-302). However, the Trial Court excluded any testimony from Amanda Maldonado, mother of Minor 2, regarding her immigration status and her U Visa pursuant to Rule 403, SCRE, Rule 611, SCRE, and State v. Jenkins, 322 S.C. 360, 474 S.E.2d 82 (Ct. App. 1996).¹¹ (R. pp. 259-60, 265-66). Maldonado's proffered testimony indicates that her U Visa was also encouraged and facilitated by the Solicitor's office. (R. pp. 263-65).

The jury that decided Perez's fate was *not* aware that *both* Alejandra Jimenez, mother of Minor 1, and Amanda Maldonado, mother of Minor 2, would not be legal residents of the United States but for the U Visas the State was helping them obtain. Maldonado applied, with the encouragement and assistance of the State, for an opportunity to legally stay in this country on the basis that her daughter had been abused.

¹¹ The Trial Court refers to State v. Jenkins as "State v. Jennings" in the record. (R. p. 265).

Based on this fact, a jury could reasonably infer that she had a personal interest in making certain her daughter testified in a manner consistent with her application for that opportunity. See Valle at 1243. However, the Trial Court excluded all of Maldonado's testimony related to her immigration status and her efforts to obtain a U Visa. (R. pp. 260, 265). There was no physical evidence of Perez's alleged misconduct with the Minors, and DSS found no abuse occurred with his daughter (R. pp. 353, 390, 447). The jury had a right to know that Maldonado was receiving assistance from the State in exchange for her daughter's testimony; it would have been a powerful closing argument to point out that *all* testimony against Perez was "bought and paid for" by the State via U Visas.¹² The exclusion of this critical and highly relevant testimony prevents Perez from fully confronting the witnesses against him and mandates that this Court reverse the Trial Court and remand for a new trial.

III. The sentence imposed by the trial court was vindictive and violated Perez's due process rights.

A criminal must be sentenced based on the crime he was convicted of, not a crime he was acquitted of. Further, a criminal defendant must never be punished for exercising his right to a jury trial. Unfortunately, the Trial Court violated both of these proscriptions and Perez is entitled to, at a minimum, resentencing before another judge.

A. The Trial Court impermissibly punished Perez for exercising his right to a jury trial.

It is a due process violation to punish a person for exercising a protected statutory or constitutional right. State v. Higgenbottom, 344 S.C. 11, 14-15, 542 S.E.2d 718, 720

¹² This is especially relevant in light of the allegations of dishonesty on the part of the Minors. (R. pp. 205, 460-61).

(2001). A trial court may not impose a greater sentence on a defendant because the defendant exercised his constitutional right to stand trial rather than plead guilty. See Alabama v. Smith, 490 U.S. 794 (1989); Davis v. State, 336 S.C. 329, 520 S.E.2d 801 (1999). The South Carolina and United States Constitutions grant every criminal defendant the absolute right to plead not guilty and to be tried by a jury. U.S. Const. art. III, § 2; U.S. Const. amend. VI; S.C. Const. art. I, § 14.

The sentencing judge's mere disavowal of considering the defendant's assertion of his right to a jury trial is insufficient to avoid reversal in South Carolina, without an otherwise appropriate basis appearing in the record. In State v. Brouwer, despite the trial judge's comments that he would never punish someone for exercising his or her right to a jury trial, the majority opinion found the trial judge improperly considered that fact during sentencing, "especially since the record fail[ed] to reflect an otherwise appropriate basis for Brouwer's disparate sentence." 346 S.C. 375, 388, 550 S.E.2d 915, 922 (Ct. App. 2001); cf. North Carolina v. Pearce, 395 U.S. 711, 726 (1969) ("whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear... so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal."); Higgenbottom (A defendant's due process rights are violated when, in response to the defendant's motion for reconsideration and without any reasons on the record, the judge increases his sentence.). However, any basis for the court's sentence placed on the record by the judge must be based on "relevant, reliable and trustworthy" evidence. State v. Gullledge, 326 S.C. 220, 229, 487 S.E.2d 590, 594 (1997).

Perez was sentenced to fifteen years for his conviction for Lewd Act and ten years for ABHAN. (R. pp. 8, 14, 554-56). These were the maximum sentences for each crime, and the Trial Court ordered Perez to serve them consecutively, thus effectively sentencing him to twenty-five years in prison. (R. pp. 8, 14, 554-56). Following the imposition of this sentence, the following colloquy took place between the Trial Court and Perez's trial counsel:

Defense Counsel: Your Honor, one more matter. I normally don't bring this up but given the sentence we would object to it as being vindictive.

Trial Court: I'm sorry, what now?

Defense Counsel: We object to the sentence being run consecutively as being vindictive and punishing Mr. Perez for going to trial. I think there were -- and this is where I'm a little reluctant to go into detail but we did have -- I think I have to, to preserve Mr. Perez's rights to make the record clear. We did have an in-chambers conference where we talked about potential pleas --

Trial Court: I didn't have an in-camera conference. I was talking to the two of you unofficially, off the record trying to work out a plea. Now, if you want to put that on the record I'll put that on the record. I very clearly told you that if I was trying this case nonjury I would find him guilty of lewd act and high and aggravated. If you wanted to enter a plea I would do away with the high and aggravated and let him plead to the lewd act and give you a range of 10 to 15.

Defense Counsel: Yes, sir.

Trial Court: That's what I told you.

Defense Counsel: Yes, sir.

Trial Court: Now, if you want to take exception to that, that's fine. That was an informal conference where I was trying to assist you and the solicitor in dismissing the case. Is that what you were doing?

Defense Counsel: Yes, sir.

Trial Court: Because if it is it's the last time I will speak with you without a court reporter present.

Defense Counsel: I apologize. But, yes, sir. I think I have to.

Trial Court: Pardon? It was not an in-camera hearing. I was trying to facilitate the disposition of this case.

Defense Counsel: I apologize if I mischaracterized a hearing. You are correct. It was unofficial. It was off the record; but that was what was said.

Trial Court: Pardon?

Defense Counsel: That's an accurate summary of what was said.

Trial Court: Okay. Now, do you want to make a motion on that, what I put on the record?

Defense Counsel: Yes, sir.

Trial Court: What's your motion?

Defense Counsel: That running these sentences consecutively is punishing Mr. Perez for his right to go to trial.

Trial Court: Motion is denied. This Court is of the opinion that the little girl was abused. This Court is also of the opinion that there was penetration, digital penetration based upon her sworn testimony. The jury has found her not guilty. The Court's of the opinion he's guilty of all the charges from the testimony I've heard. So it's not any abuse in giving him the consecutive. You understand?

Defense Counsel: Yes, sir.

Trial Court: All right. Motion denied. Anything else?

Defense Counsel: No, sir.

Trial Court: Thank you very much.

(R. p. 554 l. 7 – p. 556 l. 17).

The Trial Court offered Perez a sentence of ten to fifteen years, and dismissal of his other charges, in exchange for a guilty plea to Lewd Act. (R. pp. 554-55). After this deal was refused, and after the jury returned a verdict finding him not guilty of CSC (but guilty of ABHAN) and guilty of Lewd Act, the Trial Court sentenced him to at total of twenty-five years in prison. (R. pp. 8, 14, 554-56). This scenario on its face smacks of punishment for Perez exercising his right to trial by jury. Apparently recognizing this concern, the Trial Court did attempt to place on the record grounds for its decision (R. p. 556 ll. 5-12), but these grounds are not objective and do not rise to the level of "relevant, reliable and trustworthy" evidence:

First, the Court incorrectly found that there was digital penetration. In order to find a person guilty for CSC of any degree, there must be a finding of "sexual battery". S.C. Code § 16-3-655 (Supp. 2010). "Sexual battery" is defined as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body..." S.C. Code § 16-3-651(h) (Supp. 2010). Digital penetration is considered sexual battery. (R. pp. 11, 124, 337). The jury made no finding of "sexual battery" (*i.e.* digital penetration) necessary for a conviction for CSC; in fact, it acquitted Pérez of this crime. (R. p. 536). The jury instead found Perez guilty of ABHAN, which required no finding of "sexual battery" (*i.e.* digital penetration). (R. pp. 337, 524-25, 536). This is problematic, as the United States Supreme Court has held that any fact that leads to enhancement of a sentence must be proven beyond a reasonable doubt to a jury. Apprendi v. New Jersey, 530 U.S. 466 (2000). Accordingly, it was improper for the Trial Court to consider this finding in sentencing.

Second, the Trial Court incorrectly considered Perez guilty of CSC. The Trial Court stated on the record that it believed Perez to be "guilty of all the charges", presumably including CSC (which he was acquitted of). (R. pp. 536, 556).

Third, the Trial Court incorrectly considered the criminal status of Minor 1: "The jury has found her [Minor 1] not guilty." (R. p. 556). Minor 1 was not on trial in this matter, and her innocence or guilt is irrelevant.

Finally, even though the Trial Court previously excluded testimony of alleged intercourse between Minor 2 and Perez, this testimony was brought up by the State during sentencing. (R. pp. 114, 552).

The imposition of a "trial tax" in sentencing, combined with a lack of objective, relevant, reliable, and trustworthy evidence to support the enhanced sentence, merits a new trial, or at the minimum a new sentencing hearing before a different judge.

B. The record reflects evidence of partiality and prejudice on the part of the Trial Court

While sentencing judges are given deference to their decisions, an appellate court may reverse such a decision in the event of a constitutional violation or that the sentencing judge acted with partiality, prejudice, or pressure. Garrett v. State, 320 S.C. 353, 356, 465 S.E.2d 349, 350 (1995). The Trial Court stated on the record that it believed Perez to be "guilty of all the charges", presumably including CSC, which he was acquitted of. (R. pp. 536, 556). The Trial Court stated on the record that "there was penetration, digital penetration", when this was an element of CSC, which he was acquitted of. (R. pp. 536, 556). The plea offer (from the Trial Court, not the State) was made off-the-record, in violation of ABA Standards and is evidence of pressure to accept a guilty plea.¹³ The comment: "The jury has found her [Minor 1] not guilty" indicates a

¹³ The off-the-record plea offer by the Trial Court is a violation of ABA Standard 14-3.3(f):

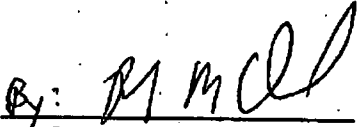
All discussions at which the judge is present relating to plea agreements should be recorded verbatim and preserved, except that for good cause the judge may order the transcript of proceedings to be sealed. Such discussions should be held in open court unless good cause is present for the proceedings to be held in chambers. Except as otherwise provided in this standard, the judge should never through word or demeanor, either directly or indirectly, communicate to the defendant or defense counsel that a plea agreement should be accepted or that a guilty plea should be entered.

Harden v. State, 276 S.C. 249, 255, 277 S.E.2d 692, 694-95 (1981). While this standard is not the law of South Carolina, it is persuasive and instructive. See State v. Blakely, 402 S.C. 650, 663, 742 S.E.2d 29, 36 (Ct. App. 2013). While the Appellant believes that

bias toward the victim, and thus the State. The comment: "...it's the last time I will speak to you without a court reporter present" also indicates bias against the defense. Such prejudice, partiality, and pressure merits a new trial, or at the minimum a new sentencing hearing before a different judge.

CONCLUSION

Critical errors have occurred that have prevented Perez from getting the fair trial he is entitled to under the law. Perez would ask this Court to reverse the Trial Court and remand this action to the Court of General Sessions for a new trial, or at the minimum a new sentencing hearing before a different judge.

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violation of this standard should constitute pressure *per se*, this is an argument that must be made before the Supreme Court. See Toal, *supra*.

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February 5, 2014

Jenny Abbot Kitchings
Clerk of Court
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RE: State of South Carolina v. Venancio Diaz Perez
Court of Appeals Case No.: 2013-000179
Supreme Court Case No.: 2013-002769
Our File No.: 79-915

Dear Ms. Kitchings:

Pursuant to Rule 208(b)(7), SCACR, please find attached the supplemental authority of Lindsay v. United States, __ A.2d __, 12-CM-1211 & 12-CM-1336 (D.C. Issued January 30, 2014). This citation bears upon Issue III and Argument III in Appellant's Initial Brief, and is provided now because it was not available at the time the Appellant's Initial Brief was prepared.

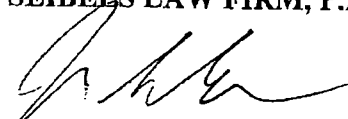
Because Issue/Argument III is also relevant to the Appellant's pending Motion to Certify before the Supreme Court, the Clerk of the Supreme Court is copied on this correspondence.

Should you have any questions or require further information, please do not hesitate to contact me.

With kind personal regards I remain

Sincerely yours,

SEIBELS LAW FIRM, P.A.



Jason Scott Luck

/JSL
Enclosures

cc: Salley Elliott, counsel for Respondent (w/enc)
Robert Dudek, co-counsel for Appellant (w/enc)
Daniel Shearouse, Clerk of S.C. Sup. Ct. (w/enc)

ORIGINAL

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Court of General Sessions
J.C. Nicholson, Circuit Court Judge

RECEIVED

JUL 03 2014

SC Court of Appeals

Court of Appeals Case No. 2013-000179

The State of South Carolina,

Respondent,

v.

Venancio Diaz Perez,

Appellant.

Final Brief of Respondent

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STATEMENT OF ISSUES

I.

Did the trial court err in admitting evidence of the other bad acts committed by Appellant against Minor 2 under Rule 404(b), SCRE, when the acts were established by clear and convincing evidence and they were admissible to show the existence of a common scheme or plan and, under Rule 403, SCRE, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice?

II.

Did the trial court err in prohibiting the defense from questioning Ms. M, the mother of Minor 2 about her immigration status and U visa application when it was irrelevant?

III.

Inasmuch as the Record on Appeal clearly establishes the sentence in this case was not based upon Appellant's exercise of his right to trial by jury, but upon the trial court's proper consideration of the crimes of which Appellant was convicted and the evidence presented, did the trial court err in sentencing Appellant?

STATEMENT OF THE CASE

Appellant was indicted for the offense of lewd act on a minor (Indictment 2010-GS-10-7731) and criminal sexual conduct with a minor in the first degree (Indictment 2010-GS-10-730). He pled not guilty and proceeded to trial by jury on January 14, 2013. At the conclusion of his trial, the jury found him guilty of lewd act on a minor and assault and battery of a high and aggravated nature, as a lesser-included offense of criminal sexual conduct with a minor in the first degree. The trial court thereafter sentenced Appellant to a 15-year term of incarceration on the lewd act conviction and a consecutive 10 year sentence on the assault and battery of a high and aggravated nature conviction. The trial court also ordered, on the lewd act conviction, that Appellant was to be placed on the Central Registry of Child Abuse and Neglect.

This appeal follows.

ARGUMENT

I.

Inasmuch as the bad acts against Minor 2 were established by clear and convincing evidence and evidence of such was admissible to show the existence of a common scheme or plan, the trial court properly admitted evidence of the other bad acts committed by Appellant under Rule 404(b), SCRE. The evidence was also properly admitted under Rule 403, SCRE, because the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. (Issue

D)

Factual Background

After the jury was selected and released for the day, the trial court held a hearing on the State's motion to allow evidence of other bad acts committed by Appellant on Minor 2, who was not the victim in crimes for which Appellant was on trial. During the hearing, the State called both Minor 1 and Minor 2 to testify.

In Camera Hearing – Testimony of Minor 1

Minor 1 testified as to her birthdate. (R. p. 27, lines 19-21; Supplemental List of Redacted Identifiers.) When she was about seven years old, she used to be taken care of by a babysitter, named Angelica, in Angelica's family home. When Minor 1 started going to Angelica's, Angelica lived in a trailer, but she later moved into a house. (R. p. 28, lines 2-6; p. 28, lines 18-23.) Angelica had two daughters, Minor 3 and her younger sister. Living with Angelica's family was a man, who was a friend of her husband. (R. p. 28, lines 7-13.) Minor 1 testified that she did not go to Angelica's anymore because Angelica's husband hurt her. (R. p. 28, lines 14-17.) The first time he hurt her was in the

trailer, and he hurt her more than once in the trailer. (R. p. 28, line 21 – p. 29, line 3.)

Asked to tell the judge about one time he hurt her in the trailer, Minor 1 said that one day while she and Minor 3 were playing outside, Minor 3 talked about getting a PSP, which is a little portable game. Minor 1 then went inside to get her PSP. (R. p. 29, lines 4-14.) Her brother was sleeping on the couch in the living room, and she went into Minor 3's room because that is where she had left her PSP. (R. p. 29, lines 14-17.) As she was sitting on the bed, she was grabbed and taken into the closet. Once inside, without saying anything to her, he put his hands under her clothes and "stuck" his finger inside of her "front private," which she uses to go to the bathroom. (R. p. 29, line 17 – p. 30, line 9.) He let her go and she ran outside to Minor 3 and her younger sister. (R. p. 30, lines 10-13.)

On another occasion, Minor 1 and her two year old brother were inside the trailer. Her brother was sleeping, and Minor 1 was trying to go to sleep. (R. p. 30, lines 14-25; p. 32, lines 7-8.) Minor 3, her younger sister, and their brother went outside to visit the food truck to buy some food. (R. p. 30, line 25 – p. 101, line 4.) Minor 1 then went to get her PSP from the bedroom farthest from the front door when he grabbed her and took her into the closet. Without saying anything, he put his hand under her clothes and touched her on her "behind private." (R. p. 31, lines 7-23; p. 32, lines 9-13.) Frightened, Minor 1 pushed her way out of the closet and ran into the living room to her brother. (R. p. 32, lines 1-6.)

One day, after Angelica's family had moved from the trailer to the house, Minor 3 and her younger sister were playing – doing Karaoke or acting famous – as if they were superstars. Minor 1 was sitting, but Minor 3 tried to convince her to go up to the

television and play along. Minor 1 refused. (R. p. 32, line 17 – p. 33, line 11.) He showed Minor 1 his “private.” (R. p. 33, lines 12-17.)

On another occasion at the house, Minor 1 and Minor 3 were playing with their PSPs when he asked one of them to help him fix the bathroom wall. Minor 1 went into the bathroom to help him. (R. p. 33, line 18 – p. 34, line 3.) He gave Minor 1 a bucket of nails to hold as he worked on the wall. When he finished, Minor 1 tried to leave but could not because he had locked the door. (R. p. 34, lines 4-9.) He then touched her on her breasts with his hands, and he bit her on one of her breasts leaving a little temporary mark. (R. p. 34, lines 9-19.)

On other occasions, he tried to touch her, but did not. (R. p. 34, lines 20-22.) One day, while all of the other children were outside, Minor 1 and her brother were inside. While her brother slept on Minor 3’s bed, Minor 1 lay on it watching the movie, “Toy Story.” He came home while she was watching the movie and chased her. To get away from him, she went under Minor 3’s bed where he could not reach her. (R. p. 34, line 23 – p. 105, line 18.) On another day, Minor 1 and Minor 3 were playing hide and seek. Minor 1, not realizing that he was in a closet, went in there to hide. (R. p. 35, line 19 – p. 36, line 4.) He grabbed her and, with his hands, he touched her, under her clothes, on her skin. (R. p. 36, lines 5-13.)

Eventually Minor 1 told her mother what had happened, and they went to the police station. (R. p. 36, lines 16-20; p. 41, lines 6-9.) An officer, Minna, showed Minor 1 some pictures and told her that one of the pictures was of the man. Minor 1, without anyone telling her which photo to pick, choose photo 3 and, on the back of the photo, wrote that she was “90 percent sure.” (R. p. 36, line 21 – p. 39, line 15.) When she

choose that photo, she said, "I'm pretty sure it's him, number three. He is the father of [Minor 3] and [her younger sister]. He is the babysitter's husband. I'm nine on a scale of ten, of one to ten that's him." (R. p. 39, lines 17-20.)

On cross-examination during the motion hearing, Minor 1 testified that after she went to the police station, she went to see Ms. Jessica. That meeting with Ms. Jessica was recorded on video; during that meeting, she spoke of everything that had happened to her. During her later meetings with Ms. Jessica, she worked on writing a story for her mother and stepfather about everything that had happened to her. (R. p. 39, line 21 – p. 40, line 18; p. 43, lines 19-24.) During one of her meetings with Ms. Jessica, Minor 1 was asked whether Appellant had ever put his finger inside of her and she replied that he had not. Minor 1 explained that she had said that because she was confused about which story Ms. Jessica was talking about. (R. p. 42, line 15 – p. 43, line 18.)

Minor 1 testified on cross-examination that she did not remember the first time she went to Angelica's house to be babysat, but she thought she was out of school and it was in the summer. (R. p. 44, lines 11-20.) Her mother would take her in the morning before she went to work, and her mother would pick her up at night at around 7:00 or 8:00. (R. p. 44, line 21 – p. 45, line 12.) Sometimes Appellant would be at work and not in the home while Minor 1 was there, but usually he came home from work at night before she left. (R. p. 45, lines 13-25.) The things that he did to her, he did after he came home from work. (R. p. 46, lines 1-4.) The second day she was in the home of Appellant and Angelica, Appellant put his finger inside her and started to touch her while they were in the closet. (R. p. 46, line 5 – p. 47, line 2.) He made no threats, and Minor 1 did not remember him making any promises to her. (R. p. 47, lines 3-11.) When this happened,

Minor 3 was outside with her younger sister, but Minor 1 did not know where Angelica was. (R. p. 47, lines 17-24.) The other man who lived in the home, Samuel, was at work. (R. p. 47, line 25 – p. 48, line 6.)

Minor 1 was unable to remember how much time passed between the first and second time Appellant assaulted her. (R. p. 48, line 22 – p. 49, line 7.) But on the second time, Minor 3, her younger sister, and her brother were outside at the food truck. Minor 1's brother was sleeping, and she was trying to sleep when she decided to retrieve her PSP from the family's bedroom. (R. p. 49, lines 8-14.) Appellant did not use any weapons, he did not threaten to use any weapons, and he made no threats to her. (R. p. 49, lines 17-23.) While Appellant sometimes bribed her with money, Minor 1 did not remember him doing so on this occasion. (R. p. 49, line 24 – p. 50, line 6.)

Minor 1 testified on cross-examination these were the only two incidents that happened in the trailer. (R. p. 50, lines 7-14.) She was not sure of the order in which the assaults took place in the house, but the worst thing that happened in the house was when she went in the bathroom to help Appellant and he bit her on her breast leaving a little temporary mark. (R. p. 50, line 13 – p. 51, line 11.) She did not tell her mother until at least a month after that incident. (R. p. 51, lines 12-14.)

She testified further on cross-examination about the incident involving Appellant showing her his private part. At that time, Minor 3 was sitting on the other side of the couch from where Minor 1 was sitting and her younger sister was playing in front of the television. (R. p. 51, line 22 – p. 52, line 12.) She also repeated that during the incident when Appellant was chasing her around the house, she went under Minor 3's bed. Appellant did not touch her on that occasion, but he frightened her. The other children

were outside. (R. p. 52, line 13 – p. 123, line 11.) On the occasion when Minor 1 and Minor 3 were playing hide and seek, she hid in the closet and the man, who was already in the closet, grabbed her. It was not Samuel. Minor 3 was looking for her, but Minor 1 did not know where Minor 3's sister or mother were. (R. p. 53, line 12 – p. 54, line 14.)

The last line of questioning pursued by the defense was about Minor 1's identification of Appellant from the photographic line-up. She testified that Ms. Minna told her that the man who did this to her was in one of the pictures she was going to see. (R. p. 54, lines 18-21.) She then read a form Ms. Minna gave her and initialed it before she was given the pictures to look through. Minor 1 said she identified someone in a picture about 10 minutes after she was given the form to read, and five minutes after she was given the photographs. (R. p. 54, line 22 – p. 56, line 14.) When Minor 1 made the identification, Ms. Minna asked her if she was sure that the man in the picture was the man who assaulted her. Minor 1 said she told Ms. Minna that she was "90 percent sure" that that was him. (R. p. 56, line 15 – p. 57, line 5.)

On redirect examination, Minor 1 explained that when she told the defense attorney that she was thinking about a different story she meant a different time. (R. p. 57, lines 16-19.) Minor 1 also said that Appellant did not go to work every day, that there were times when he was home all day, and she occasionally saw him on Saturdays. (R. p. 57, lines 20-25.) She also said that during the summer, she would be at Angelica's for the whole day. (R. p. 58, lines 1-4.) When asked to explain who she was referring to when she spoke of the man's closet, she said she was talking about Samuel and that the closet was his room. But she also said that the man who came into the closet was not Samuel; it was Appellant. She said that she did not know Appellant's name at the time;

she only recognized him by his face and she knew that he was Minor 3's father. (R. p. 58, lines 5-23.)

In Camera Hearing – Testimony of Minor 2

Minor 2, who was a few weeks shy of her 11th birthday when she testified, said she used to go to a babysitter whose name she cannot remember, but the babysitter had children including Minor 3. (R. p. 59, line 21 – p. 60, line 17.) Minor 2 does not go to that babysitter's anymore, but she does not know why. (R. p. 60, line 20 – p. 61, line 9). A long time after Minor 2 stopped going to that babysitter, she was in a store with her mother when she told her some bad things had happened to her at that babysitter's house, once in the room of another man who lived there and once in the living room. (R. p. 61, line 10 – p. 62, line 16.)

Testifying about one of the occasions, Minor 2 said she was in the living room watching High School Musical Three, and she fell asleep. The man came up behind her and touched her in her front private, but she did not remember if it was on top of or under her clothes. The man said nothing to her. (R. p. 62, line 17 – p. 63, line 13.) On another day, when Minor 2 was in the room by the kitchen at the babysitter's house, the man touched her in her "front privates" and her "back privates." He did not say anything to her, and she did not say anything to him. (R. p. 63, line 18 – p. 64, line 7.) On another occasion, Minor 2 was in the wife's bedroom at the babysitter's house when the man told her that, if she told anyone, he would keep being mean to her, and, if she did not tell anyone, he would stop being mean to her. Minor 2 told no one until she told her mother in the store. (R. p. 64, lines 8-21.)

After telling her mother, Minor 2 and her mother went to a police station and a

police officer showed her some photographs. (R. 64, line 22 – p. 65, line 18.) Before showing her the pictures, a police officer gave her a form. Minor 2 could not read it so the police officer explained what the form said. (R. p. 65, line 6 – p. 66, line 4.) No one told Minor 2 which photo to select. (R. p. 66, lines 5-15.) After looking at the pictures, Minor 2 identified picture four as being of the man who hurt her, and when she identified him she was sure that it was him. (R. p. 66, line 16 – p. 68, line 6.)

On cross-examination, Minor 2 said that she knew that Minor 1 was in court because she says Appellant also did some things to her, but she does not know what she says he did. (R. p. 68, lines 11-25.) Minor 2 said she had not talked to Minor 1 about what Appellant did to her, and did not remember saying anything, about what Minor 1 was saying Appellant had done to her, during her recorded interview at the Lowcountry Children's Center (LCC). (R. p. 69, lines 1-18.) Minor 1 reported what happened to her before Minor 2 ever told anyone what had happened to her. She said that when her mother had asked her if anything had happened to her, she had said no. She did not tell her mother until sometime later, when she was in a grocery store and upset with her mother. (R. p. 69, line 19 – p. 71, line 17.)

Minor 2 was cross-examined extensively about her recorded LCC interview. While she could not remember some of what had happened during the interview and what she had said, she did remember saying that Appellant had touched her more than once, she thought Appellant was in love with her, one time he waited for her to arrive from school, one time his wife was outside, and that one incident occurred in another man's room. She also testified that during the LCC interview she said that one time, at around 1:00 in the middle of the day, Appellant put his penis inside her butt and then he went up

and down once he was inside her. (R. p. 71, line 18 – p. 76, line 14.) Minor 2 said that, during her LCC interview, she said Appellant threatened her to get her to go into the room with him on that occasion, but that he did not threaten her with a knife. She did not remember saying, during her LCC interview, that he used a knife and she could not remember what he threatened her with. (R. p. 75, lines 7-19.) Minor 2 could not remember who was in the house when this happened and thought she was alone in the house with Appellant. But she testified she remembered saying during her LCC interview that other people – the babysitter and her children – were there, but that they were sleeping. (R. p. 76, line 15 – p. 77, line 18; p. 79, lines 14-24.) Minor 2 did not scream out loud when this happened, but cried in silence. (R. p. 77, lines 19-23.)

Minor 2 testified that she did not say anything during her LCC about Appellant bribing her with anything or biting her. Appellant did not bite her on her breast. (R. p. 77, line 24 – p. 78, line 13.) Minor 2 testified that, in addition to the other things she already testified about, Appellant had touched her one day when she was helping him fix a doorknob. (R. p. 80, line 21 – p. 81, line 18.) Appellant did not do anything to her when she was playing games with another child. (R. p. 80, lines 17-20.)

Minor 2 testified a man and a woman showed her the photo line-up, but she did not remember their names. When they showed her the photos, they told her to find the man who had done something wrong to her. She could not remember how long it took or what she said when she identified the man. (R. p. 78, line 25 – p. 78, line 12.)

On redirect, Minor 2 testified that no one else was in the room when Appellant did these things to her. When she said 1:00, she meant when it was light outside. She understood a.m. to be nighttime and p.m. to be in the morning. (R. p. 81, line 25 – p. 82,

line 10.)

In Camera Hearing – Argument and the Trial Court's Ruling

After Minor 1 and Minor 2 testified, the trial court asked the State for the time frame as to when Angelica babysat the two girls. The State informed the court that Minor 1 began going to Angelica's in December 2009 until July 2010, and Minor 2 was at Angelica's from May 2010 to the beginning of July 2010. (R. p. 82, line 18 – p. 83, line 19.)

Defense counsel then told the trial court there were a lot of inconsistencies between Minor 2's testimony during the in camera hearing and what she had said previously. (R. p. 84, lines 4-17.)

- When asked during the hearing if she recalled any of the bad things that Minor 1 had said Appellant had done to her, Minor 2 said no. (R. p. 84, lines 22-25.)
- When asked if she mentioned anything in the LCC interview about things that happened to Minor 1, Minor 2 said no. (R. p. 85, lines 1-3.)
- When asked if she said during the interview that Minor 1 may have been raped by Appellant, Minor 2 said she might remember that. (R. p. 85, lines 4-7.)
- During the LCC interview, Minor 2 said she believed she had been raped by Appellant, but during her in camera testimony she only said that he touched her front and back parts while she was on the bed. (R. p. 85, lines 8-14.)

At that point, the trial court interrupted and said that the State had agreed not to go into that, and the State said that it purposely did not ask Minor 2 about that. (R. p. 85, lines 15-19.) Defense counsel continued to set out what they saw as inconsistencies in Minor 2's testimony.

- When asked if she had ever been threatened in any way, Minor 2 said no, but in the taped LCC interview Minor 2 said that, when Appellant actually penetrated her with his penis, he had a knife in his pocket and used it to threaten and force

her to come into the room. (R. p. 85, line 20– p. 86, line 5.)

- While it may have been cleared up during her *in camera* testimony, Minor 2 was inconsistent about the time of day. In the taped interview, she gave the impression that it happened at night. (R. p. 86, lines 6-10.)

At that point, the State interceded and explained that Minor 2 did not know “a.m.” from “p.m.,” and she thinks “p.m.” means nighttime, but that she does say it happened during daylight so that it is clear that it was 1:00 p.m. (R. p. 86, line 11 – p. 87, line 8.)

Defense counsel continued with their recitation of inconsistencies between Minor 2’s *in camera* testimony and the taped LCC interview.

- When asked during the hearing if she had cried out or screamed, Minor 2 said no and that she had just cried in silence. In the taped interview, she says she screamed out for help and, when asked by the interviewer why no one responded, she said she thought everyone was sleeping. (R. p. 87, lines 10-17.)
- During the hearing, she says she thought she was alone in the house with Appellant, but in the recorded LCC interview she said other people were there, but she thought everyone was sleeping. (R. p. 87, line 18 – p. 88, line 2.)

Defense counsel argued that these inconsistencies, the lack of physical evidence that anything had happened to Minor 2, the delay in reporting, and initial denials showed that the State had not established, by clear and convincing evidence, that Minor 2 had been assaulted by Appellant. And, even if the State had established by clear and convincing evidence that Appellant had committed the acts of Minor 2, defense counsel contended that the evidence was not admissible under Rule 404 (b), SCRE, as evidence of a common scheme or plan because while the evidence may establish that Appellant engaged in inappropriate touching or sexual conduct with the two girls he went about it differently in regard to each. There is no evidence that he pursued the girls or engaged in the improper conduct in the same way or that the conduct itself was even similar. Defense

counsel said that because the ways in which the conduct was allegedly committed were different, the evidence of Minor 2 was improper and inadmissible propensity evidence. (R. p. 88, line 4 – p. 89, line 3; p. 90, line 12 – p. 95, line 3.) The trial court ruled the State had established that Appellant had committed the acts upon Minor 2, which she testified to, by clear and convincing evidence. The trial court said the question was whether the evidence was admissible under Rule 404 (b). (R. p. 92, lines 9-20.) In response to defense counsel's argument, the trial court questioned whether the evidence had established a pattern of conduct – the pattern of abusing girls his wife was babysitting. (R. p. 93, lines 12-19.)

The State responded to the defense's argument as follows.

THE COURT: I was explaining a pattern of availability and taking advantage of the availability of the children. He thinks it's got to be a pattern of actual behavior.

[STATE]: I do not think it is. I think the Wallace case, which is the most recent case, lists several things to look at; the age of the victims – I do have a chart that –

* * *

[STATE]: Your Honor, that's the chart I have, but the one thing as far as the Tutton case, the Wallace case, which is the South Carolina Supreme Court case from 2009, distinguishes and talks about Tutton. If I may, it says, the Court of Appeals in Tutton which appears to require a connection be on a degree of similarity in the details of the crime charged and the bad act evidence we find this interpretation to be an overly restricted view of our case law requiring a connection between the crime charged and the bad act. Evidence is simply that the two be factually similar and do no – and does not add any additional layer of analysis.

So they say that Tutton went too far.

THE COURT: Factually similar is what they say?

[STATE]: They say factually similar, and they list in the Wallace case age, the relationship between the victim and the perpetrator, the location where the abuse occurred, the use of coercion, the manner of occurrence, which is the type of battery.

The Wallace case, like this case, one of the victims there was sexual intercourse, and that was the Lyle victim, and the way the Court said to handle that was to redact the part that had to do with the more egregious behavior, which is why I purposely did not ask this child about the intercourse.

In this case, we have they were both eight and Minor 1 had been nine for about a month. It was the babysitter's husband, so it was the same relationship between the victim and the defendant. It happened in his home in several different areas in his home, the same general time frame. Minor 2's time frame is inclusive in Minor 1's time frame. At different places in his house.

They were both described being fondled on the top and the bottom and Minor 1 described digital penetration. They both – one was watching a Toy Story and one was watching High School Musical and they were laying down and he approached them. It was over and under their clothing. They were both there during this time frame. The relationship was the same.

And, Your Honor, I think that it is extremely similar and for it to be – just to address the propensity argument. If we were trying to get in, for example, a 16 or a 15-year-old girl that he met and assaulted in a different location, or a male that he assaulted, say, that was 13 years old, or if we were trying to get in an assault that occurred from a different relationship at a different time, those would be simply for propensity but this is –

... I have a chart.

* * *

[STATE]: But I think that the Wallace –

THE COURT: So in short, in answering my question about conduct or situations is taking the total circumstances and the similarity in all the circumstances involved in both alleged crimes.

[STATE]: I think you look at all the similarities. The Wallace case listed a few but it said obviously this is not the entire list but those were something to go by.

One of the cases that I described in my brief there were, I think four foster children, and it was a different – lots of different assaults that went on and the Court allowed all of those in because he was the same relationship to those kids. They were there because he was the foster father, and this is very similar in that they were there because this was the babysitter's husband.

THE COURT: Okay.

[STATE]: And there were some differences in the batteries in the Hallmon case also but by and large they were very similar, enough to have shown a pattern, and the case says that similarity establishes the required connection between the two acts.

(R. p. 95, line 4 – p. 98, line 24.)

Defense counsel responded by discussing the five factors set out in the *Wallace* case that the trial court is to consider when deciding the admissibility of other bad acts evidence. Conceding that three of the five factors – age of the victims, the relationship between the victims and perpetrator, and location of the abuse – weigh in favor of the State, defense counsel argued that the use of coercion or threats was not the same with the two girls. Defense counsel also argued the manner of occurrence was not the same because, even though the State was not introducing the act involving intercourse with Minor 2, the manner of the touching of the two girls was different and how Appellant gained access to the girls was different. (R. p. 99, line 13 – p. 101, line 13.)

The State then responded to the defense's argument as follows.

[STATE]: Just to address some of the issues. I think that one of the things I didn't have on the chart because I didn't know that he had actually asked her to help him one time with doing something and touched her vagina. I never

asked her directly as Christina did so I didn't know that but that would be another similarity.

And as far as manipulating Minor 1, most of the time she talked about he didn't manipulate her. He just happened to be there. She says she went in to get her PSP from the bedroom and he was there. Another time she was falling asleep watching a movie. As Minor 2 says, she had fallen asleep watching High School Musical, with Minor 1 it was Toy Story. The other time Minor 1 talks about there was no him manipulating her she went into the closet to hide and he came there.

I think those are similar in that what he did was just take advantage of each situation. I don't know that there was, I'm going to get her in this room. She's in that room and I'm going to take advantage of this, or the other one may be in the room and I'm going to take advantage of this.

I don't think there was this set, you know, getting one alone and not the other. But he did, both of them say, that he touched them on the top and on the bottom privates. And they both say that he touched them on their privates inside of their clothes, and on the outside of their clothes.

The part that is not similar is the -- the extent of one, which I think Wallace addresses clearly on how the Court is to handle that, just to not -- just to redact that, and that's all I have.

* * *

...What the case law points out is that what you look to decide whether it is more probative than prejudicial is the degree of similarity. The more similar the more probative, and I think that State v. McClellin [sic] talks about courts must weigh probative value of evidence of prior bad acts against the prejudicial effect. Such evidence is inadmissible unless the close similarity of the crimes charged and the previous act enhances the probative value by their similarities.

* * *

...There is a case that says it doesn't have to be necessary, I have that cite, in order for it to be admitted. And I think that it really is -- State v. Sweat says to establish material fact or element it need not be necessary to the case in order to be admitted.

It isn't absolutely necessary but my feeling is that when the jury hears that he's babysitting all these children

and they hear from one of them and hear about the other children they are going to make the assumption that there was no other victim, which is an incorrect assumption. It's kind of like a falsity to the jury.

And the case law says that if it is similar then you can use it to prove it. As an example, if he tries to maybe through testimony elicit the fact that this man was always at work so he could not have done these crimes, well that helps

THE COURT: Couldn't you reply to that?

[STATE]: Well, not unless he does it in the closing argument I couldn't.

THE COURT: Okay. All right.

[STATE]: But that's kind of been inferred, and it is probative. It helps in the -- to paint the scene, and I guess that's why this line of case law has developed and established because the degree of similarity between one assault and another heightens the probative value of it such that it becomes credible evidence, and I know that it's prejudicial and that is what we have to weigh, and what the courts have said is you weigh that by looking at the similarities.

(R. p. 101, line 25 -- p. 105, line 15.)

Defense counsel countered by arguing that the evidence of the other bad acts was unfairly prejudicial because it was not needed by the State to prove its case, it would improperly bolster the State's case, it would introduce an improper emotional element to the case because there would be two young girls coming forward, and it would have an undue tendency to suggest a verdict on an improper basis. Defense counsel stated the defense was that the acts never happened, and that the victim is making it up. Appellant would testify he did not do any of the acts alleged. Defense counsel said that the defense was willing to agree not to make an argument that no other children had been abused or made allegations of abuse. The defense concluded by stating that the evidence heightened the prejudice against Appellant and his ability to get a fair trial. (R. p. 105, line 24 -- p.

107, line 22.)

The next morning, the trial court ruled that the proffered evidence, excluding any evidence of Appellant's actual intercourse with Minor 2, would be admissible. The trial court found that, as required by *State v. Wallace*, 384 S.C. 428, 683 S.E.2d 275 (2009), and as set out by the prosecution in their chart marked as Court's Exhibit 1, there was a close similarity between the bad acts against the two girls, the ages of the victims, the relationship between the victim and the perpetrator, the location where the abuse occurred, and the manner in which the abuse occurred such as the type of sexual battery (even if the coercion and threats were not necessarily similar). The court further found that, due to the similarity of the acts, the probative value outweighed the prejudicial effect under Rule 403, SCRE. The trial court said that it would give a limiting instruction as requested by defense counsel. (R. p. 113, line 17 – p. 115, line 25.)

Trial Testimony of Minor 1 and Minor 2¹

Minor 1 testified that back in 2010, when she was nine, she and her one or two year old brother were taken care of by a babysitter, Angelica, at Angelica's home after school and in the summer. When they first started going to Angelica's, Angelica lived in a trailer but she later moved into a house. Living with Angelica in the home were Appellant,² their children, Minor 3 and her siblings, and another man, Samuel. Angelica also took care of other children in the home, most of whom were younger than Minor 1. There was one other girl, Minor 2, who was around the same age as Minor 1. (R. p. 133,

¹ In this section, only their testimony related to the incidents with which Appellant was charged and the other bad acts evidence, including their interviews by law enforcement and the LCC, have been included.

² Minor 1 testified that when Angelica babysat her she was younger and did not know Appellant's name, but she knew it at the time of the trial. (R. p. 137, line 23 – p. 138, line 3.)

line 25 – p. 135, line 9; p. 135, lines 17-21; p. 136, lines 8-12; p. 137, line 20 – p. 138, line 7; p. 139, lines 6-10.) Although Appellant had a job, sometimes he was at home when Minor 1 was there. (R. p. 135, lines 10-18.) Minor 1 testified that she stopped going to Angelica's because her husband hurt her. (R. p. 139, lines 1-5.)

Minor 1 testified that one day at Angelica's trailer, when she went inside the trailer to get her PSP from off the bed in the bedroom shared by Angelica, Appellant, and their two children. (R. p. 136, lines 13-20; p. 139, line 11 – p. 140, line 7.) She did not know that Appellant was in the room until he grabbed her and took her into the closet. Once in the closet, Appellant put his hand under Minor 1's clothes and stuck his finger inside her. It felt awkward. (R. p. 140, line 9 – p. 141, line 15.) On another occasion, Minor 1 and her little brother were inside the trailer while Minor 3 and her younger sister were outside at the food truck. Minor 1 went to get her PSP from the bedroom, and Appellant grabbed her again and took her into the closet where he touched her front and her bottom. (R. p. 141, line 23 – p. 143, line 6.) When it was over, Minor 1 returned to the living room to stay with her little brother, who was sleeping. (R. p. 143, lines 4-6.)

Minor 1 testified that she was sure that it was Appellant, Minor 3's father, who did these things to her. It was not Samuel. (R. p. 146, line 5 – p. 217, line 1.)

Minor 1 testified that, after Angelica and Appellant moved from the trailer into a house, something happened to her there more than one time. (R. p. 147, lines 15-20.) One time Minor 3 and her younger sister were playing as if they were superstars or famous. Minor 1 sat on one side of the couch, Minor 3 sat on the other, and Minor 3's younger sister was in front of the television. Appellant, who was standing near a divider wall where only Minor 1 could see him, stuck out his private. (R. p. 147, line 21 – p.

149, line 18.) On another occasion, Appellant asked her and some of the other kids to help him while he worked on the wall in the bathroom. Minor 1 went to help and he had her hold a bucket of nails. When he finished, Minor 1 tried to leave the room but Appellant had closed and locked the door. Appellant then touched her on her breasts with his hands and mouth; he pulled her blouse up and bit her on her breast. He also used his hands to touch her "front," which is what she uses to go to the bathroom. (R. p. 150, line 1 – p. 151, line 25.) Minor 1 also testified about another time when she, Minor 3, and Minor 3's sister were playing hide and seek. Minor 1 hid in the closet in Samuel's room without realizing that Appellant was inside. Appellant touched her, under her clothes, on her front and her bottom with his hands. She eventually was able to open the door and escape. (R. p. 152, line 9 – p. 154, line 2.) The last abusive act she testified about was one that occurred when everyone except Minor 1 and her brother were outside. While her brother slept, she was watching a movie, "Toy Story." Appellant came into the house and chased her. Minor 1 went under the bed on which her brother was sleeping where Appellant could not reach her. (R. p. 154, line 9 – p. 156, line 4.) Minor 1 said that sometimes Appellant would bribe her by offering her money if she would let him keep touching her, but she never asked for money and he never gave her any money. (R. p. 156, lines 5 – 22.)

After Minor 1 finally told her mother what Appellant had done, she went to the police station where she picked out a photograph of Appellant. Because she did not know his name then, she simply said that that was him and that she was 90% sure that the photo was him, the babysitter's husband and the father of Minor 3 and her younger sister. (R. p. 157, line 15 – p. 161, line 17).

On cross-examination, Minor 1 said that she began going to Angelica's when she was eight, but that she turned nine shortly thereafter. (R. p. 164, line 19 – p. 165, line 3.) She was questioned about who she spoke to about what Appellant did and what she said, differences in what she has said in court, during her interviews, and in her story about what Appellant did. (R. p. 167, line 25 – p. 174, line 22; p. 176, line 2 – p. 179, line 16; p. 180, line 21 – p. 184, line 22.)

Minor 2 testified that she was ten years old. (R. p. 229, lines 19-22.) She said that she used to go to a babysitter's house; in that house, the babysitter lived with her husband, and two daughters. One of the daughters was Minor 3. (R. p. 232, lines 3-18.) When she was at the babysitter's, the husband was home sometimes; sometimes, the babysitter would leave while Minor 2 was there. (R. p. 232, line 22 – p. 233, line 7.) The babysitter's husband touched her in one of the bedrooms in the house, the room near the kitchen that was the other man's room. Minor 2 was on the bed and the man was on top of her; he touched her on her skin – on her "top privates" and her "bottom privates." (R. p. 233, line 8 – p. 235, line 7.) Minor 2 did not say anything to the man, but cried in silence. (R. p. 235, lines 8-13.) On another occasion, she fell asleep on the couch in the living room watching "High School Musical" on television, and the man came from behind and touched her. He touched her on her "top private." He did not say anything and she did not say anything. When he walked away, she got up and went outside. Minor 2 did not know where the babysitter or Minor 3 were when this happened. (R. p. 235, line 16 – p. 237, line 19.)

Minor 2 said that she did not tell her mother what had happened because she was afraid her mother would be angry with her and that the man would do something bad to

her. In the babysitter's room, the man had told her that if Minor 2 told anyone he would do something bad to her, but that if she did not tell anyone, he would leave her alone. (R. p. 238, line 4 – p. 239, line 6; p. 248, lines 10-14.) Minor finally told her mother a year or so later when they were in a store. (R. 239, lines 7-18; p. 248, lines 17-19.)

On cross-examination, Minor 2 testified that she was eight years old when Angelica babysat her. (R. p. 241, lines 23-25.)

At the conclusion of Minor 2's testimony, the trial court gave the jury a limiting instruction on their use of her testimony. The instruction told the jury that they could consider the Minor 2's testimony solely on the issue of common scheme or plan, and that they "must not consider [it] as evidence of the commission of another bad act not the subject of the conviction as proof of the defendant's guilty of the charge we are trying today." (R. p. 249, lines 1-15.)

Argument

On appeal, Appellant contends the trial court erred in admitting the evidence of bad acts committed by Appellant against Minor 2 because there was no evidence of a common scheme or plan to support admission of the other bad acts evidence under Rule 404(b), SCRE. The State strongly disagrees. The other bad act evidence was properly admitted because the evidence supports the trial court's conclusion that there was a close degree of similarity between the crimes charged and the bad act evidence, and that those similarities outweighed the dissimilarities.

There are several steps in the analysis of the admissibility of bad act evidence. The first is that the evidence must be relevant as required by Rule 401, SCRE. *State v. Wallace*, 384 S.C. 428, 433, 683 S.E.2d 275, 277 (2009). The requirement of relevance

means that the evidence must tend to make any fact of consequence more or less probable than it would be without the evidence. Rule 401, SCRE. While evidence of other crimes, wrongs, or bad acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith, it may be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent. Rule 404(b). See also *State v. Lyle*, 125 S.C. 406, 118 S.E.803 (1923). Evidence of a common scheme or plan “is relevant because proof of one is strong proof of the other.” *State v. Wallace*, *supra*.

Where the bad act did not result in a conviction, the State must present clear and convincing evidence of the bad act. *State v. Gaines*, 380 S.C. 23, 29, 667 S.E.2d 728, 731 (2008). An appellate court is bound by the trial court’s factual findings related to the existence of clear and convincing evidence of the bad acts unless they are clearly erroneous. *State v. Clasby*, 385 S.C. 148, 155, 682 S.E.2d 892, 895 (2009). In this case, Appellant has not challenged on appeal the trial court’s ruling that the State presented clear and convincing evidence of the bad acts. That ruling is thus the law of the case on that point. See *Kinard v. Richardson*, Op. No. 5192 (S.C. Ct. App. January 29, 2014); *State v. Fripp*, 396 S.C. 434, 441, 721 S.E.2d 465, 468 (Ct. App. 2012).

The next step in the analysis of the admissibility of bad act evidence offered to show the existence of a common scheme or plan is an analysis of the similarities and dissimilarities between the crime charged and the bad act evidence to determine if there is a close degree of similarity. *Id.*; *State v. Clasby*, 385 S.C. at 155, 682 S.E.2d at 896; *State v. Adams*, 332 S.C. 139, 504 S.E.2d 124 (Ct. App. 1998); *State v. Blanton*, 316 S.C. 31, 32, 446 S.E.2d 438, 439 (Ct. App. 1994); *State v. McClellan*, 283 S.C. 389, 392, 323

S.E.2d 772, 774 (1984). “When the similarities outweigh the dissimilarities, the bad act evidence is admissible under Rule 404(b).” *State v. Wallace*, 384 S.C. at 433, 683 S.E.2d at 278; *State v. Clasby*, *supra*.

In *State v. Wallace*, *supra*, the Supreme Court set out a non-exclusive list of five factors to be considered by a trial court in determining whether there is a close degree of similarity between the charged crime(s) and the bad act. Those factors are the:

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

Id., 384 S.C. at 433-434, 683 S.E.2d at 278. A close degree of factual similarity between the charged crime(s) and the bad act provides the required connection between the two and no further connection is necessary.³ *Id.*, 384 S.C. at 434, 683 S.E.2d at 278.

Here, the similarities, from both the *in camera* hearing and the testimony in front of the jury, are as follows:

Factor	Minor 1 (Charged Crimes)	Minor 2 (Bad Act Evidence)
Age	8-9	8
Gender	Female	Female
Relationship of Appellant	Babysitter’s Husband	Babysitter’s Husband
Location	Appellant’s Home; Bedroom, Bathroom, and Closet/Bedroom	Appellant’s Home; Bedroom
Setting	When Alone; While Watching Movie, Helping Appellant, or	When Alone; While Watching Movie, Helping Appellant, or

³ To the extent that this Court, in *State v. Tutton*, 354 S.C. 319, 580 S.E.2d 186 (Ct. App. 2003) – upon which Appellant heavily relies – has held that there must be some connection beyond a simple finding of factual similarity in the details of the crime(s) charged and the bad act, that holding has been specifically rejected by the Supreme Court in *State v. Wallace*, 384 S.C. at 434, n. 5, 683 S.E.2d at 278, n. 5.

	Playing; When Caretaker Not Present	Playing; When Caretaker Not Present
Time	Various Times of Day; When child separated from other children (or other awake children)	Various Times of Day; When child separated from other children (or other awake children)
Sex Acts/Type of Battery	Fondling/Digital Penetration	Fondling/Intercourse
Fondling	Over and Under Clothes	Over and Under Clothes
Care Giver	In care of Appellant's Wife when occurred	In care of Appellant's Wife when occurred
Timeframe	March 1, 2010 – July 10, 2010	May 1, 2010 – July 1, 2010
Friends	Friends or Friendly with Appellant's Oldest Daughter	Friends or Friendly with Appellant's Oldest Daughter
Coercion	Bribery Mentioned	Threatened with Knife; Threatened with Continuation of Bad Things

There are similarities in the age of the victims when the abuse occurred, the relationship between the victims and Appellant, the location and setting of the abuse; and the types of sexual battery that far outweigh any dissimilarity. The trial court properly admitted the bad act evidence.⁴ *State v. Scott*, 405 S.C. 489, 748 SE.2d 236 (Ct. App. 2013) (both victims around eight years old when abuse started, abuse occurred when Scott was only adult present, abuse occurred when child spent night at Scott's residence, abuse occurred when one child separated from others for extended period, and abuse occurred at bath time); *State v. Atieh*, 397 S.C. 641, 725 S.E.2d 730 (Ct. App. 2012) (similarities, which

⁴ The last step in the analysis on the admissibility of bad act evidence is under Rule 403, SCRE – whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. Here, while Appellant argued before the trial court that the evidence failed to survive this test, he has not challenged the trial court's adverse ruling on appeal. The trial court's ruling that the bad act evidence survived the Rule 403 analysis is thus the law of the case on that point. See *Kinard v. Richardson*, *supra*; *State v. Fripp*, *supra*. In addition, the limiting instruction given by the trial court minimized the possibility of any undue prejudice to Appellant. (R. p. 249, lines 1-15.)

far outweighed the differences, included both victim were female, they were aged 16 and 17-18 when the inappropriate touching occurred, both victims were employees of Atieh, the touching all took place at the restaurant primarily around the sink or cooler, no direction coercion or threat, touching for both included similar conduct); *State v. Wallace, supra* (similarities between acts include perpetrator's relationship to victims, abuse beginning at about same age, abuse occurring in family home when mother was absent, and admonishment not to tell because no one would believe them); *State v. Blanton*, 316 S.C. 31, 446 S.E.2d 438 (Ct. App. 1994) (all victims were female, all were approximately same age, each subjected to requests for same type of sex acts, all acts occurred either in Blanton's house or his vehicle, and Blanton took advantage of relationship each victim for sexual gratification); *State v. Hallman*, 298 S.C. 172, 379 S.E.2d 115 (1989) (all victims were foster children of similar age and types of sexual batteries were similar); *State v. McClellan*, 283 S.C. 389, 323 S.E.2d 772 (1984) (both victims were McClellan's daughters, were same age at time of initial abuse, and McClellan gave same explanation for actions).

II.

The trial court did not err in prohibiting the defense from questioning Ms. M, the mother of Minor 2, about her immigration status and U visa application because it was irrelevant. (Issue II)

During the *in camera* hearing on motions held at the beginning of the trial, the defense told the trial court that they had a motion to be allowed to question the victim's mother about her application for a U visa and the prosecution's involvement in that process. (R. p. 109, line 8 p. 110, line 2.) The following colloquy then occurred.

THE COURT: When would it come up, [defense counsel]? Do I need to go ahead and call the mother and let's go into it now, or is she here?

[STATE]: The mother is here but I also have the victim advocate that actually told the mother about the process, and she is here to explain how that occurred, if the Court wants to hear it.

[DEFENSE]: I think it's undisputed that they go a U-Visa.

[STATE]: Right.

THE COURT: Right.

[STATE]: I don't think they have it yet. They've applied.

[DEFENSE]: And that they are applying for it and [the prosecutor] has wrote a letter to help them.

THE COURT: From what you all told me when we had a bench conference my inclination was it's going to be admissible, it goes to the weight of it, and I don't have any problem with it coming in. You just have to respond to it however you think is appropriate.

...My inclination is to let it in. I mean, from what I understand what you all told me at the bench conference was that when there's a crime being committed they can apply for a visa and it can be granted if the prosecutor request it, that certain requirements got to be met. Your people explained that to the mother and then she applied for the visa and got it.

[STATE]: It wasn't quite that. She didn't want to get it, and the victim advocate kept explaining to her why it was

necessary and even took her to help state the process because she did not want it, but eventually she did. You're right.

THE COURT: And his argument was that's the reason they prosecuted the case, but they didn't know about it then after the case started – but that could be a reason they proceeded with the case. So I think it goes to the weight and sufficiency. I think it's probably admissible and I'll allow it in.

* * *

THE COURT: I'm going to rule that it's admissible, assuming I hear something during the trial, you know, unless something changes. ?

[DEFENSE]: All right.

(R. p. 110, line 3 – p. 112, line 3.)

Testimony of Mrs. J., the Mother of Minor 1, in the Presence of the Jury

Thereafter during the trial, the State called Mrs. J., the mother of Minor 1, as a witness. She testified that, beginning in April 2010, Minor 1 and her brother began going to the home of a babysitter, Angelica, when Mr. and Mrs. J. were working. Mrs. J. had met Angelica because she was a customer of the store in which Mrs. J. worked. (R. p. 201, lines 8 – 25; p. 203, lines 11-23.) At the time Minor 1 began going to Angelica's, Angelica lived in a trailer with her husband, her two daughters, and someone who was visiting with them. (R. p. 202, lines 1 – 17.) One of Angelica's daughters, was the same age as Minor 1 and the two of them got along very well. (R. p. 202, lines 7-14.) Angelica took care of other children in her home, including another girl, Minor 2, who was basically the same age as Minor 1 and Angelica's daughter. (R. p. 202, line 23 – p. 203, line 10.) At some point, Angelica and her family moved from the trailer into a house. (R. p. 202, lines 21-22.)

Sometimes when she dropped the children off at Angelica's and when she would

pick them up, Angelica's husband would be there. Mrs. J. saw him more often when she picked her children up. (R. p. 203, line 23 – p. 204, line 22.)

Minor 2's mother worked with Mrs. J. and she started taking her children to Angelica's after she found out about Angelica from Mrs. J. (R. p. 205, lines 1-12.) One day, when dropping off Minor 1 and her brother, Mrs. J. noticed that Minor 2 was not at Angelica's. When she asked, Minor 2's mother said they were not going there anymore because of "the kids' lies or something in their head." (R. p. 205, lines 13-24.)

Minor 1 stopped going to Angelica's because of a conversation that Mrs. J. had with her on a Sunday afternoon about something happening. (R. p. 206, line 12 – p. 277, line 19.) Mrs. J. asked Minor 1 if someone had touched her, and Minor 1 told her about assaults that had occurred at the babysitter's at different times at different locations at the babysitter's. When Mrs. J. asked Minor 1 why she had not said anything earlier, Minor 1 replied that she was afraid. (R. p. 207, line 20 – p. 208, line 15.)

Mrs. J. testified that before this conversation, she had noticed a change in Minor 1's behavior. She had always been an honor student, but her grades went down "really bad." She was distracted and was not finishing her homework as she had before. She began asking Mrs. J. to sleep with her at night, and she began grinding her teeth such that it could be heard. (R. p. 209, line 14 – p. 210, line 2.)

The day after Minor 1 told Mrs. J. she had been assaulted, Mrs. J. took her to talk to the police. A member of the North Charleston Police Department took them to the Lowcountry Children's Center. (R. p. 210, lines 12-23.) There, Minor 1 was examined by a doctor and then interviewed. (R. p. 210, line 24 – p. 281, line 1.) When they were finished at the Children's Center, they returned to the North Charleston Police

Department so that Minor 1 could look at a photo lineup or pictures. (R. p. 211, lines 7-15.)

Mrs. J. also took Minor 1 to several sessions of counseling with Jessica Credeur, at the Children's Center. (R. p. 211, lines 16-20.) As part of that counseling, Minor 1 prepared a narrative for Mrs. J. Minor 1 kept the narrative in her bedroom for a while, but later gave it to Mrs. J. to keep. (R. p. 211, line 21 – p. 212, line 5.)

At some point in time, Minor 2's mother left a message for Mrs. J. with another employee at the store. When the employee called Mrs. J. with the message, Mrs. J. told her that they would have to go to the police. (R. p. 212, lines 6-18.)

At some point, Mrs. J. went to tell Minna, the North Charleston Police Department victim advocate with whom she had been working that they were planning on moving from the area. At that time, Minna told her about U visas, which were available for victims of crime. (R. p. 212, line 19 – p. 213, line 11.) Mrs. J., who had previously not known about U visas, testified that she did not want to think that she would be gaining anything as a result of what had happened to Minor 1. (R. p. 213, lines 12-18.) However, Minna took her to see a lawyer, and the lawyer explained about how U visas worked and why U visas were allowed. (R. p. 213, lines 19-24.) When asked if she ended up going through with a U visa, Mrs. J. testified, "Yes. We did it. We filed an application later on." (R. p. 213, line 24 – p. 214, line 1.)

On cross-examination, Mrs. J. was questioned in more detail about Minor 1's grades. She said that Minor 1 was distracted and had difficulty in finishing her homework, and they worked really hard to bring her grades back up. (R. p. 214, line 18 – p. 219, line 23.) In response to specific questions from defense counsel, Mrs. J. also

testified that she loved Minor 1, wanted to protect her, did not witness "any of this," and believed her. (R. p. 219, line 24 – p. 220, line 7; p. 228, lines 15-21.)

Mrs. J. was also cross-examined about her entry into the United States and U visas. She testified that she illegally entered the United States in 2000 and, without a U visa, she was subject to deportation. She testified that, with a U visa, she is allowed to stay in the United States. She is also allowed to receive and does receive food stamps. (R. p. 220, line 8 – p. 222, line 3; p. 227, line 17 - p. 228, line 13.)

**Testimony of Mrs. M., the Mother of Minor 2:
In Front of the Jury and In Camera Proffer**

The State also presented the testimony of Mrs. M., who is the mother of two daughters, including Minor 2, and a son. (R. p. 251, lines 18-23.) At the time of the trial, Minor 2 was about to be 11 years old and the younger daughter was about to be six years old. (R. p. 251, line 24 – p. 252, line 2.)

Mrs. M. testified that in 2010 she worked five days a week. Because her husband also worked, her children went to stay with a babysitter, Angelica, in her home. (R. p. 252, lines 9-23; p. 253, lines 14-25.) At that time, in the home with Angelica were her husband and her two daughters. (R. p. 252, lines 24-25.) When Mrs. M. first began taking her children to Angelica's, Angelica lived in a trailer, but later moved into a house. (R. p. 253, lines 9-13.) Mrs. M.'s children went to Angelica's all summer, but stopped because they had bugs in their scalps. (R. p. 253, line 24 – p. 254, line 6.) Sometimes, Mrs. M. saw Angelica's husband in the home. (R. p. 253, line 19 – p. 254, line 4.)

Mrs. M. testified that, at some point after Angelica's husband was arrested, Minor 2, while crying, told her that he had done something to her. She did not want to tell her parents about it. (R. p. 255, lines 5-24; p. 256, lines 5-15.) Prior to this disclosure, Mrs.

M. had noticed a change in Minor 2's behavior – she would become angry easily. (R. p. 255, line 25 – p. 256, line 4.)

On cross-examination, Mrs. M. testified about working with Mrs. J. (R. p. 257, line 15 – p. 258, line 12.) She said that she left a message for Mrs. J. at the store in an attempt to speak to her about what had happened to Minor 1, but that call was made a year afterwards. (R. p. 258, lines 13-25.) Minor 2's disclosure to Mrs. M. took place a little more than a year after the events occurred. (R. p. 259, lines 14-17.)

The following then occurred.

Q. Ma'am, do you have legal status to be in this Country?

A. No.

(R. p. 259, lines 23-25.) At that point, the trial court *sua sponte* called the attorneys up to the bench during which the following colloquy occurred.

THE COURT: I let you go into the visa and the legal status because she was the mother of the victim. I'm not going there with this witness. That has nothing to do with this case. I don't think it has anything to do with bias or anything and we're not going there, okay? I allowed you to do it with the other witness but there's no reason. I'm not going there with this witness, okay?

(WHEREUPON, the sidebar was concluded.)

THE COURT: Please disregard that statement about whether she's legal or illegal in this Country. ...

[DEFENSE COUNSEL]: I have not further questions. Thank you very much.

THE COURT: Now, at the appropriate time if you want to proffer some evidence I'll allow you to do it.

[DEFENSE COUNSEL]: Thank you, Your Honor.

(R. p. 260, lines 3-20.)

On redirect examination, Mrs. M. testified that she tried to reach Mrs. J. at the

store after Minor 2 made her disclosure. (R. p. 260, line 23 – p. 261, line 3.)

After Mrs. M. left the stand, the jury was excused so that the defense could make a proffer of their cross-examination of Mrs. M. on the U visa and her immigration status.

(Rr. p. 261, line 4 – p. 263, line 6.) The following proffer and ruling was then made.

Q. Ms. Maldonado, you've already stated that you don't have legal status to be in this Country?

A. No, I don't have.

Q. Does this mean that you are a risk for deportation or removal?

A. Yes.

Q. And so you have what a U-Visa is?

A. Yes.

Q. And that's a visa that's given to certain victims of crimes or family members?

A. I just heard about this recently. I didn't know before about this kind of visa.

Q. Did someone with the solicitor's office put you in touch with an attorney who was going to help speak to you about this visa?

A. From the solicitor's office, no.

Q. But you were put in touch with someone that was going to help you apply for one of these visas?

A. Yes.

Q. Was it maybe a victim advocate or helper that put you in touch with that attorney?

A. No.

Q. Do you remember how you came across the name of this attorney that is helping you?

A. Can you repeat the question?

Q. Yes, ma'am. Do you remember how you came across the name of the attorney that is helping you apply for this visa?

A. Yes.

Q. And how is that?

A. When we went for her to have her questioning and exam they gave us several information sheets and that was one of them.

Q. And have you applied then for this U-Visa?

A. Yeah, because they recommended that we do it.

Q. Have you applied for any other government benefits like food stamps since you applied for this U-Visa?

A. No.

[DEFENSE COUNSEL]: Your Honor, that's all the questions that I have. That's the only testimony I'd proffer on this?

* * *

THE COURT: Okay. For clarification of the record, during the course of cross-examination the defense counsel asked the question about whether or not the witness was legally in the country or not, illegally in the country, and the Court stopped that testimony based on Rule 403, Rule 611, State vs. Jennings, 474 S.E.2d 812, 1996.

I do not think it has anything to do with this particular witness because there's been no testimony about any charges against her daughter, and I don't think it's -- even if it's relevant, it's marginally relevant as to this particular witness. And I allowed you [to] do it with the mother, the victim who is charged in this case but not with this witness.

(R. p. 263, line 9 – p. 265, line 18.)

Testimony of Minna Hosseini

In the presence of the jury later during its case, the State presented the testimony of Minna Hosseini, a Victim Advocate with the North Charleston Police Department. (R. p. 290, lines 2-11.) After testifying as to how she assisted Detective Lacher in this case by showing a photographic line-up to Minor 1 on July 14, 2010 (R. p. 290, line 15 – p. 296, line 5; p. 296, lines 22-23), Ms. Hosseini said that she continued to work with Minor 1 and her family because she assisted with translation and because she explained, among

other things, court procedures and other services provided. (R. p. 296, lines 6-12.)

Ms. Hosseini explained to the jury that a U visa is immigration relief that an undocumented person can apply for, with the assistance of a law enforcement or prosecuting agency, if they are a victim of a designated violent crime. She said that a U visa is not permanent, but has the potential to become permanent; she added that the purpose of a U visa is to ensure that a victim will be around for court. (R. p. 297, line 16 – p. 298, line 4.) Ms. Hosseini testified that Mrs. J. was referred about a U visa on January 21, 2011, and that she spoke to her about it on January 24, 2011. (R. p. 296, line 13 – p. 297, line 3.) She said that she talked to Mrs. J., who did not appear to know about U visas, about the visa because it was Mrs. J.'s right to know about it. (R. p. 297, lines 1-9.) Ms. Hosseini testified that Mrs. J. reacted very emotionally to the idea of a U visa because she did not want to benefit from what had happened to Minor 1, but that Ms. Hosseini encouraged her to apply by telling her that they needed her to be present if Minor 1 was going to be part of the case. Ms. Hosseini also took Mrs. J. to her appointment. (R. p. 297, lines 10-15; p. 298, lines 5-15.)

On cross-examination, Ms. Hosseini was questioned about the absence of any reference in her case notes to Mrs. J. being reluctant to get a U visa. (R. p. – p. 370, line 25.) She then testified that getting a U visa would not automatically result in a person getting a U.S. passport or permanent residency in the United States, but it is a step in the right direction. (R. p. 301, lines 1-14.) Ms. Hosseini explained that, to get a U visa, a person has to submit several pieces of documentation to Homeland Security, including recommendation letters and the certified signature of someone with either a law enforcement agency or prosecuting agency. The signature of a law enforcement agency

or prosecuting agency is required; it helps in the application process, but does not guarantee that a U visa will be issued. The ultimate decision is made by Homeland Security. (R. p. 301, line 15 – p. 302, line 6.)

On redirect, Ms. Hosseini testified that she checked in with Mrs. J. about going to talk to someone about a U visa on January 24, 2011, but that Mrs. J.'s appointment with the attorney to discuss the U visa was not until March 3, 2011. (R. p. 302, lines 15-25.) Ms. Hosseini also testified that her notes of Mrs. J.'s March 3 meeting with the attorney indicate that Mrs. J. was very emotional. (R. p. 303, lines 1-16.)

Argument

Appellant contends the trial court erred in refusing to allow him to question the mother of Minor 2 about her immigration status and the circumstances surrounding her application for the U visa.⁵ The State disagrees. The trial court exercised sound

⁵ The U nonimmigrant status (U visa) was created by Congress in 2000 to strengthen the ability of federal, state, and local governments to investigate and prosecute certain designated crimes (including rape, sexual assault, and abusive sexual contact), to protect victims of those crimes who have suffered substantial mental or physical abuse as a result and who are willing to assist with the investigation and prosecution of the crimes; and (3) to assist law enforcement agencies in better serving victims of crime. <http://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-criminal-activity-u-nonimmigrant-status/victims-criminal-activity-u-nonimmigrant-status> (last viewed February 17, 2014). To apply for U nonimmigrant status, the required form must be submitted by the victim or someone petitioning on the victim's behalf. A valid petition must include the certification, of a federal, state or local government agency investigating or prosecuting a qualifying criminal activity, that the victim has been, is being, or will likely be helpful in the investigation or prosecution of the criminal activity of which he or she was a victim. [http://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-criminal-activity-u-nonimmigrant-status/victims-criminal-activity-u-nonimmigrant-status#Applying for U Nonimmigrant Status \(U Visa\)](http://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-criminal-activity-u-nonimmigrant-status/victims-criminal-activity-u-nonimmigrant-status#Applying%20for%20U%20Nonimmigrant%20Status%20(U%20Visa)) (last viewed on February 17, 2014). A petition may also be submitted for eligible family members to obtain U nonimmigrant status. <http://www.uscis.gov/archive/archive-news/questions-and-answers-qualifying-family-members-u-visa-beneficiaries-may-obtain-lawful-permanent-residence> (last viewed on February 17, 2014). A U visa holder may be eligible to apply for a Green Card if he or she meets certain requirements,

discretion in not allowing the questioning because it was irrelevant.

Evidence must be relevant to be admissible. Rule 401, SCRE. The requirement of relevance means that the evidence must tend to make any fact of consequence more or less probable than it would be without the evidence. *Id.*

“Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness *or by evidence otherwise adduced.*” Rule 608(c), SCRE (emphasis added). “Proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness’ testimony.” *State v. Pipkin*, 359 S.C. 322, 327, 597 S.E.2d 831, 833 (Ct. App. 2004) (quoting *U.S. v. Abel*, 469 U.S. 45, 52, 105 S. Ct. 465, 469, 83 L. Ed. 2d 450 (1984)). Rule 608(c), SCRE, “preserves South Carolina precedent holding that generally, ‘anything having a legitimate tendency to throw light on the accuracy, truthfulness, and sincerity of a witness may be shown and considered in determining the credit to be accorded his testimony.’ ”

(Emphasis in original.) *State v. McEachern*, 399 S.C. 125, 140-141, 731 S.E.2d 604, 611-612 (Ct. App. 2012). However, evidence that is relevant is still subject to exclusion if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. Rule 403, SCRE.

The jury was told that U visas are available for illegal immigrants who are victims of crime. Appellant was fully allowed to cross-examine the mother of Minor 1, the victim in this case, about her application for a U visa. The jury was not told of any

including being physically present in the United States for a continuous period of at least three years while in U nonimmigrant status and not having unreasonably refused to provide assistance to law enforcement since receiving the U visa. [http://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-criminal-activity-u-nonimmigrant-status/victims-criminal-activity-u-nonimmigrant-status#Applying for U Nonimmigrant Status \(U Visa\)](http://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-criminal-activity-u-nonimmigrant-status/victims-criminal-activity-u-nonimmigrant-status#Applying for U Nonimmigrant Status (U Visa)) (last visited on February 17, 2014).

charges related to Minor 2. Thus the questions pertaining to Minor 2's mother's immigration status and her application for a U visa were irrelevant, and would actually have introduced confusion into the trial.⁶ The trial court properly disallowed the cross-examination under Rules 401 and 403.

The case relied upon by Appellant, *State v. Valle*, 298 P.3d 1237 (Or. Ct. App. 2013), is factually distinguishable in that the witness in that case the defense sought to question about the U visa was the *actual* victim of the criminal act, (sexual abuse) being prosecuted.

Moreover, the record reveals that Appellant's trial counsel thoroughly cross-examined Minor 1, Minor 2, and their mothers. They brought inconsistencies in what the witnesses had said at different time to light. There was, therefore, other impeachment evidence presented by the defense and, if there were any error in the exclusion of this line of questioning, it would be harmless beyond a reasonable doubt.

⁶ And for this reason, this limitation of cross-examination did not unfairly prejudice Appellant and does not constitute reversible error. See *State v. Brown*, 303 S.C. 169, 399 S.E.2d 593 (1991).

III.

Inasmuch as the Record on Appeal clearly establishes the sentence in this case was not based upon Appellant's exercise of his right to trial by jury, but upon the trial court's proper consideration of the crimes of which Appellant was convicted and the evidence presented, there was no error in the sentences issued.

(Issue III)

The jury returned their verdict finding Appellant guilty of lewd act upon a minor, not guilty of first degree criminal sexual conduct with a minor, and, as a lesser-included offense of first degree criminal sexual conduct with a minor, guilty of assault and battery of a high and aggravated nature. (R. p. 535, line 14 – p. 536, line 7; p. 537, lines 11-19.)

Thereafter, the defense argued for a sentence of time served (918 days) was appropriate given:

- the lack of prior criminal record,
- the fact that this conduct was so contrary to his past conduct,
- the fact that he was a hard worker and has worked hard to provide for his family,
- the fact that he and his children love and will miss each other,
- the fact that he was a family man who put his concern for his friends and family above his own,
- the fact that he has carried himself well and showed a great deal of restraint, self-control and kindness since his arrest,
- his imminent deportation back home to Mexico as a result of the convictions,
- the risk of harm to which he will be subjected in prison as a convicted child molester, and
- the fact that Appellant's beautiful family would be wrecked by his conviction and sentence.

(R. p. 540, line 21 – p. 546, line 9; p. 550, lines 6-24.) Defense counsel also argued that,

because there were no specific findings by the jury, the trial court should, under *Apprendi v. New Jersey*, assume the jury only found the least serious possible acts necessary to convict Appellant of lewd act upon a minor to have been proved. (R. p. 546, lines 10-24.)

The trial court then heard from Mrs. J., who spoke about the impact Appellant's assaults upon her daughter and her. She talked about Minor 1's nightmares and counseling, as well as about her guilt over not only placing Minor 1 in Appellant's home where she was assaulted and her failure to see what was going on, but also her guilt about recommending Angelica and another little girl being assaulted as a result. (R. p. 551, line 5 – p. 552, line 2.) The Assistant Solicitor then addressed the trial court. Telling the Court that Minor 2's family did not wish to speak, she said that Appellant was already receiving an extreme advantage because she would be dismissing the first degree criminal sexual conduct with a minor and lewd act indictments involving Minor 2 because she was not capable of testifying about those acts at another trial. (R. p. 552, lines 5-13.) The Assistant Solicitor then asserted that, while the defense had spoken about the possibility that Appellant might be harmed if sent to prison, Appellant had taken advantage of very vulnerable, young children and had showed them no mercy. She stated that, in terms of lewd acts, this case involved very serious acts – acts that were repetitive and involved a lot more in terms of the ABHAN and indecent liberties. While she expressed her sorrow for Appellant's family, the Assistant Solicitor pointed out that their suffering was the result of Appellant's behavior. (R. p. 552, line 14 – p. 553, line 5.) The Assistant Solicitor ended her argument on sentencing by asking the trial court to impose consecutive sentences to reflect the repetitive and long-term nature of the crimes. (R. p.

552, line 25 – p. 553, line 3.)

After clarifying the maximum sentence on each charge, the Court sentenced Appellant to 15 years on the conviction for lewd act on a minor and a consecutive 10 years on the conviction for assault and battery of a high and aggravated nature. (R. p. 553, line 6 – p. 554, line 5.) The following colloquy then occurred.

[DEFENSE COUNSEL]: Your Honor, one more matter. I normally don't bring this up but given the sentence we would object to it as being vindictive.

THE COURT: I'm sorry, what now?

[DEFENSE COUNSEL]: We object to the sentences being run consecutively as being vindictive and punishing [Appellant] for going to trial. I think there were – and this is where I'm a little reluctant to go into detail but we did have – I think I have to, to preserve [Appellant]'s rights to make the record clear. We did have an in-chambers conference where we talked about potential pleas –

THE COURT: I didn't have an in-camera conference. I was talking to the two of you unofficially, off the record trying to work out a plea. Now, if you want to put that on the record I'll put that on the record.

I very clearly told you that if I was trying this case nonjury I would find him guilty of lewd act and high and aggravated. If you wanted to enter a plea I would do away with the high and aggravated and let him plead to the lewd act and give you a range of 10 to 15.

[DEFENSE COUNSEL]: Yes, sir.

THE COURT: That's what I told you.

[DEFENSE COUNSEL]: Yes, sir.

THE COURT: Now, if you want to take exception to that, that's fine. That was an informal conference where I was trying to assist you and the solicitor in dismissing the case. Is that what you were doing?

[DEFENSE COUNSEL]: Yes, sir.

THE COURT: Because if it is it's the last time I will speak with you without a court reporter present.

[DEFENSE COUNSEL]: I apologize. But, yes, sir. I think I have to.

THE COURT: Pardon? It was not an in-camera hearing. I was trying facilitate the disposition of this case.

[DEFENSE COUNSEL]: I apologize if I mischaracterized a hearing. You are correct. It was unofficial. It was off the record, but that was what was said.

THE COURT: Pardon?

[DEFENSE COUNSEL]: That's an accurate summary of what was said.

THE COURT: Okay. Now, do you want to make a motion on that, what I put on the record?

[DEFENSE COUNSEL]: Yes, sir.

THE COURT: What's your motion?

[DEFENSE COUNSEL]: That running these sentences consecutively is punishing [Appellant] for his right to go to trial.

THE COURT: Motion is denied. This Court is of the opinion that the little girl was abused. This Court is also of the opinion that there was penetration, digital penetration based upon her sworn testimony. The jury has found her not guilty.

The Court's of the opinion he's guilty of all the charges from the testimony I've heard. So it's not any abuse in giving him the consecutive. You understand?

[DEFENSE COUNSEL]: Yes, sir.

THE COURT: All right. Motion denied....

(R. p. 554, line 7 – p. 556, line 14).

On appeal, Appellant argues that the sentence imposed by the trial court was vindictive, constituted evidence of bias against Appellant, and violated Appellant's due process rights. The State strongly disagrees.

In *State v. Hazel*, 317 S.C. 368, 453 S.E.2d 879 (1995), this Court held that a trial judge abuses his discretion in sentencing when he considers the fact that the

defendant exercised his right to a jury trial. *See also State v. Follin*, 352 S.C. 235, 573 S.E.2d 812 (Ct. App. 2002). In this case, the record clearly demonstrates that the trial court did not consider the fact that Appellant exercised his right to a jury trial. Instead, the court in sentencing Appellant took into account the evidence that had been introduced throughout the trial – not all of which was available when counsel talked to the parties about a plea involving *only one* charge and a possible sentence on that *one* charge. The fact that the trial court referred to evidence that would have supported a jury verdict on the original indictment for criminal sexual conduct with a minor in the first degree does not change this fact. The Court is allowed, in sentencing a defendant within the proper sentencing range – as Appellant does not dispute it did in this case – is allowed to consider the evidence presented during the course of the trial and the information provided at time of sentencing by the parties.

The record clearly establishes that the sentences were not punishment for Appellant exercising his constitutional right to a jury trial. It establishes that they were not based on any improper considerations. The jury convicted Appellant of engaging in improper conduct with Minor 1 – he took advantage of a position of trust, he took advantage of a young child, and he did not commit the abuse just once, but several times. The sentences are within the appropriate range and fairly based on the evidence presented. There was no error.

CONCLUSION

For the foregoing reasons and any other appearing in the Record on Appeal (as provided for in Rule 220, SCACR), this Court should affirm the judgment of the circuit court.

Respectfully submitted,

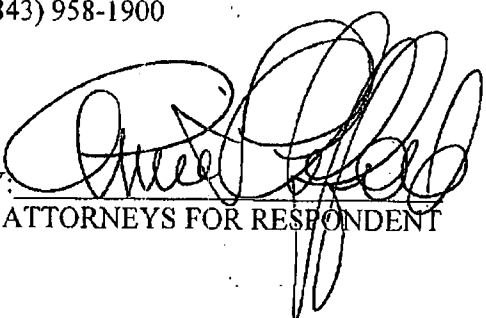
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ATTORNEYS FOR RESPONDENT

July 3, 2014

Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

ORIGINAL

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions

RECEIVED

JUN 10 2014

J. C. Nicholson, Circuit Court Judge

SC Court of Appeals

2010-GS-10-07730
2010-GS-10-07731
Appellate Case No. 2013-000179

State of South Carolina Respondent,

v.

Venancio Diaz Perez Appellant.

FINAL REPLY BRIEF OF APPELLANT

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REPLY

The Respondent does not address several salient points of Appellant's arguments for reversal. It does not address Appellant's assertion of Lyle in Appellant's Issue/Argument I. It does not establish how the bias evidence of Appellant's Issue/Argument II is irrelevant. Finally, it sidesteps addressing the allegations and arguments of Appellant's Issue/Argument III regarding the impropriety of the trial court's sentence. This Court must reverse the court below and remand for a new trial.

I. The Respondent has not proved how Lyle allows the admission of prior bad acts under the facts of this case.

Rule 404(b), SCRE, and State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923) are still valid law in this state. While the Respondent cites this law in its brief, it does not analyze the facts of this appeal using them; if it had, it would find that the testimony of Minor 2 should have been excluded.

The testimony of Minor 2 was admitted as evidence of a "common scheme or plan" under Rule 404(b), SCRE. (R. p. 249).¹ Under Lyle, a "common scheme or plan" is: "...a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others..." Lyle, 118 S.E. at 807. While Rule 404(b), SCRE, uses the shorter "common scheme or plan" in the text of the rule, the notes to this rule clarifies that "...the South Carolina rule [404(b)] limits the use of evidence of other crimes, wrongs, or acts to those enumerated in State v. Lyle..." Rule 404, SCRE, Notes (2014) (emphasis added).

¹ The Appellant would note that in its curative instruction the trial court did not explain to the jury what a "common scheme or plan" was in this context.

In Lyle, the defendant (Lyle) was accused of issuing a forged check at a bank in Aiken. Lyle, 118 S.E. at 805. Lyle's defense was alibi, and the State sought to admit five other forgeries. Id. at 805-6. Two of the forgeries occurred in Aiken on the same day as the charged crime. Id. Three of the forgeries occurred in Georgia in a span ranging from nine days to eight weeks before the crime. Id.

The court ruled that the two Aiken forgeries were admissible under the common scheme or plan exception, but the three Georgia forgeries were not admissible. Id. at 808-11. The court did not refuse to admit the Georgia forgeries because they were dissimilar, but because they failed the threshold question of what they were being offered to prove. The Aiken forgeries were admitted as a common scheme or plan because they established identity. Id. at 808. The court then posited several reasons the similar Georgia crimes could be admitted. It first asked if the Georgia forgeries were relevant to prove identity. Id. Even though "the Georgia crimes were similar," the court concluded they did not bear on the issue of identity. Id. The court then asked if the evidence bore on the question of intent and concluded they did not. Id. at 810-11.

Finally, the Lyle court asked if a plan or system was "an essential ingredient of the crime charged." Id. at 811. The court concluded it was not. Id. The court stated its rationale:

Proof of a common plan or system, therefore, in this connection is merely an evidential means to the end of proving identity or guilty intent, and involves the establishment of such a visible connection between the extraneous crimes and the crime charged as will make evidence of one logically tend to prove the other as charged. If, as we have seen, no such connection was shown to exist between the separate Georgia offenses and the Aiken crime as would constitute them practically "a continuous transaction" or as would otherwise render this evidence relevant to prove identity, and if, as we have held, the evidence was not competent on the

question of intent, it follows that it was not admissible merely to show plan or system.

Id. (citations omitted). See also People v. Molineux, 61 N.E. 286, 306 (N.Y. 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.").²

Lyle has not been overruled. The Respondent has not made a showing that the testimony of Minor 2 is evidence of "a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others" under Lyle.³ Minor 2's allegations are analogous to Lyle's alleged Georgia forgeries, which were ruled inadmissible by the South Carolina Supreme Court. The testimony of Minor 2 (as edited by the trial court) may present a similar alleged bad act, but it does not present evidence of a scheme or plan. Proof of any bad acts with Minor 2 provides no proof whatsoever that the Appellant engaged in any inappropriate acts with Minor 1. Minor 2's testimony is pure propensity evidence, and it was wrongly admitted.⁴ This Court must reverse and remand for a new trial.

² The Lyle court's opinion was based in part on Molineux.

³ State v. McClellan, 283 S.C. 389, 323 S.E.2d 772 (1984) and State v. Weaverling, 337 S.C. 460, 523 S.E.2d 787 (Ct.App.1999) (cited in Appellant's Brief) stand as examples of the proper application of Lyle in the context of alleged sexual abuse.

⁴ The Respondent contends that the Appellant has not challenged the trial court's finding that the Respondent found clear and convincing evidence of bad acts, and that the Appellant has not challenged the trial court's finding that the probative value of the bad acts evidence outweighs its prejudice. (Resp. Brief Sec. I). This argument is hypertechnical and incorrect. See Toole v. Toole, 260 S.C. 235, 240, 195 S.E.2d 389, 390-91 (1973) ("an exercise in semantics without any significance of substance"). The Appellant has argued that the trial court has ruled in error, and has specifically cited the prejudicial effect of the admission of Minor 2's testimony. His objections are preserved and properly asserted, and to rule otherwise is a return to a "...primitive stage of formalism, when the precise word was the sovereign talisman and every slip was fatal." Wood v Duff-Gordon, 222 N.Y. 88, 91, 118 N.E. 214 (N.Y. 1917) (Cardozo, J.).

II. The Respondent does not establish how the excluded bias evidence was somehow irrelevant.

A possible *quid pro quo* exchange of favorable testimony for legalized immigration status is evidence of bias that a criminal defendant has a constitutional right to explore and expose. The Brown case, cited by the Respondent, clearly sets forth this right: "The Confrontation Clause guarantees a defendant the opportunity to cross-examine a witness concerning bias. Considerable latitude is allowed in the cross-examination of an adverse witness for the purpose of testing bias." State v. Brown, 303 S.C. 169, 171, 399 S.E.2d 593 (1991) (citations omitted). The fact that Minor 2 was not an alleged victim of a crime (because the Respondent refused to pursue charges) is irrelevant to whether a court admits bias evidence. The United States Constitution and Rule 608, SCRE, provide that bias of a *witness* (not just an alleged victim) may be explored by a defendant, and the existence of criminal charges has no bearing this analysis. Respondent's attempt to distinguish State v. Valle, 298 P.3d 1237 (Or. Ct. App. 2013) falls flat for this very reason.

Further, Respondent's argument that the bias evidence was somehow irrelevant is also without basis:

Proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony. Rule 608(c), SCRE, preserves South Carolina precedent holding that generally, anything having a legitimate tendency to throw light on the accuracy, truthfulness, and sincerity of a witness may be shown and considered in determining the credit to be accorded his testimony.

State v. McEachern, 399 S.C. 125, 141, 731 S.E.2d 604 (Ct. App. 2012) (citations and quotations omitted, emphasis added). Respondent does not specify the “confusion” that exploring the bias of the mother of Minor 2 would create because there would be none.

Finally, the assertion the introduction of “other impeachment evidence” and “inconsistencies” during cross examination somehow renders harmless the exclusion of bias is without merit. (Resp. Brief Sec. II). The implication of a *quid pro quo* exchange of testimony for visa cannot be “otherwise adduced” from the testimony that the mother of Minor 2 presented to the jury. (R. pp. 251-261). If the testimony of Minor 1 and the testimony of Minor 2 are as similar as the Respondent contends, then the jury must know that the mother of each minor also received a similar reward for it. This Court must reverse the trial court and remand for a new trial.

III. The Respondent does not address the Appellant’s allegations or authority regarding vindictiveness in sentencing.

In addressing Appellant’s third issue on appeal (vindictiveness in sentencing), the Respondents focus on the arguments made by trial counsel, but not on the statements made on the record by the trial court in support of the sentence. The Respondent apparently does not dispute, or cannot dispute, Appellant’s assertion that the grounds set forth by the trial court (R. pp. 554-56) were not supported by “relevant, reliable and trustworthy” evidence, and that they were evidence of partiality, prejudice, or pressure. See State v. Gullledge, 326 S.C. 220, 229, 487 S.E.2d 590, 594 (1997); Garrett v. State, 320 S.C. 353, 356, 465 S.E.2d 349, 350 (1995).

Respondent does not address Appellant's supplemental authority, Lindsay v. United States, __ A.2d __, 12-CM-1211 & 12-CM-1336 (D.C. Issued January 30, 2014)⁵ and Appellant's assertion that the off-the-record plea negotiation by the judge is a violation of the principles of Lindsay and ABA Standard 14-3.3(f). Both of these authorities speak to the dangerous coercive effect judicial participation in plea negotiations can create, and Lindsay is an example of how judicial participation in plea negotiations can require re-sentencing. Because the Respondent has not addressed these arguments, this Court may treat the failure to respond as a confession that the Appellant's position is correct. Turner v. South Carolina Dep't of Health and Envtl. Control, 377 S.C. 540, 661 S.E.2d 118 (Ct. App. 2008).

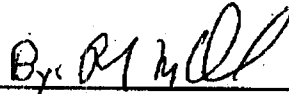
Finally, the majority of Respondent's arguments in response to Appellant's third issue fail to cite any legal basis for their positions, and thus should be considered abandoned and treated as a confession that the Appellant's positions are correct. Id.; State v. Colf, 332 S.C. 313, 322, 504 S.E.2d 360, 364 (Ct. App. 1998) (finding a conclusory, two-paragraph argument that cited no authority other than an evidentiary rule was abandoned).

As the Respondent has not adequately responded to the Appellant's third issue on appeal, this Court must reverse and remand for a new sentencing hearing.

⁵ Pursuant to Rule 208(b)(7), SCACR, Appellant's attorneys served Respondent with this supplemental authority on February 5, 2014, well over a month before the Respondent submitted its initial brief.

CONCLUSION

For the argument set forth above, the Appellant asks this Court to reverse the trial court and remand for a new trial, or in the alternative to reverse the trial court's sentence and remand for a new sentencing hearing before a new judge.



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February 4, 2015

Via U.S. Mail and Email

Jenny Abbot Kitchings
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RE: State of South Carolina v. Venancio Diaz Perez
Court of Appeals Case No.: 2013-000179
Our File No.: 79-915

Dear Ms. Kitchings:

Pursuant to Rule 208(b)(7), SCACR, please find attached the following supplemental authority: Rauch Wise, *Roland B. Molineux and his Illegitimate Offspring: The History and Mystery of 404(b)*, 38 Champion 28 (July/August 2014). This citation bears upon Issue I and Argument I in Appellant's Brief. It is provided now because it was not available at the time the Appellant's Briefs were prepared and Appellant's counsel only obtained a copy today.

Should you have any questions or require further information, please do not hesitate to contact me.

With kind personal regards I remain

Sincerely yours,

SEIBELS LAW FIRM, P.A.



Jason Scott Luck

/JSL
Enclosures

cc: Salley Elliott, counsel for Respondent (w/enc) (via U.S. Mail and email)
Robert Dudek, co-counsel for Appellant (w/enc) (via U.S. Mail and email)

79-915

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February 5, 2015

VIA EMAIL (jkitchings@sccourts.org) AND HAND DELIVERED

The Honorable Jenny Abbot Kitchings
Clerk of the South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: *State v. Venancia Diaz Perez*
Appellate Case No. 2013-000179
Oral Argument Date: February 5, 2015

Dear Ms. Kitchings:

I am writing in regard to the above-referenced case in which oral argument is scheduled at noon today. The State hereby submits, pursuant to Rule 208 (b)(7), the following additional authority in reference to Issue/Argument II is this case.

1. *Commonwealth v. Sealy*, 467 Mass. 617, 6 N.E.3d 1052 (2014); and
2. *State v. Buccheri-Bianca*, 233 Ariz. 324, 312 P.3d 123 (2013).

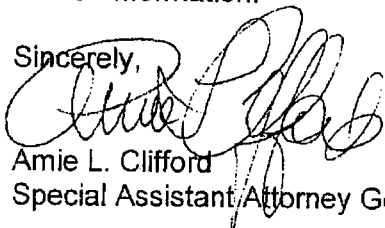
The State also hereby submits, pursuant to Rule 208 (b)(7), the following additional authority in reference to Issue/Argument I is this case.

1. *State v. McCombs*, 410 S.C. 90, 762 S.E.2d 744 (Ct. App. 2014).

A copy of each of these Courts' opinions is attached for the convenience of the Court. I talked to Appellant's counsel this morning and will be emailing him a copy of this letter and its attachments when they are emailed to you. I also told Mr. Luck that I would have a printed set to hand-deliver to him before the oral argument.

Thank you for your consideration. Please contact me if you have any questions or need further information.

Sincerely,



Amie L. Clifford
Special Assistant Attorney General

Enclosures

cc: Jason Scott Luck, Esquire, and Robert M. Dudek, Chief Appellate Defender
Counsel for Appellant

Assistant Deputy Attorney General Salley W. Elliott

(all with enclosures)

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Court of General Sessions

Honorable J.C. Nicholson, Jr., Circuit Court Judge
Trial Court Case No. 2010GS1007730, 2010GS1007731
Appellate Case No. 2013-000179

The State of South Carolina,

Respondent,

v.

Venancio Diaz Perez,

Appellant.

MOTION TO SEAL

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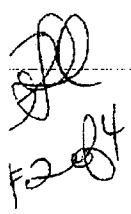
ATTORNEYS FOR RESPONDENT

The undersigned counsel respectfully asks this Court to seal the Record and all but the final briefs and opinion in this matter for the purpose of preventing disclosure to or use by any person other than the parties, counsel for the parties, and this Court and its staff for purposes of the resolution of this appeal. In support of this request, the undersigned counsel states as follows.

I.

This case is from convictions for lewd act upon a minor and assault and battery of a high and aggravated nature based upon the sexual assault of a minor. Presented at trial and included in the Record on Appeal is testimony related to that assault and testimony of the sexual assault of another minor that was admitted under Rule 404 (b), SCRE.

II.

 In an effort to comply with *Re: Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings*, Appellate Case No. 2013-002681 (Order issued April 14, 2014), the Record on Appeal was redacted to change the actual names of the minor victim, the minor 404 (b) witness, and another minor referenced to by name in the testimony to Minor 1, Minor2, and Minor 3.

III.

At trial, the mothers of the victim and the 404 (b) witness testified. The Record on Appeal contains the full names of both women.

IV.

This morning, the Court issued an unpublished opinion in this matter (Op. No. 2015-UP-217). While the victims are not identified by name in the opinion, the Court includes the full names of each of the minors' mothers and each woman is identified as the mother of one of the minors such that the identity of the minors is readily apparent.

V.

The undersigned counsel overlooked the significance of the full names being included in the Record on Appeal until this morning when she read the Court's opinion.

VI.

The undersigned counsel for the State has written a letter to the Clerk of Court requesting that the opinion be redacted to remove the full name of the mothers of both the victim and 404 (b) witness to ensure that the identity of the two minor children is protected.

VII.

Sealing the Record on Appeal and all documents, but the final briefs, and opinion of this Court will ensure that the identity of the minor children is protected.

WHEREFORE, for all of the foregoing reasons, the undersigned respectfully requests this Court to seal the Record on Appeal and all documents, but the final briefs and opinion of this Court; if the Clerk of Court cannot act upon Respondent's request for redaction of the opinion in this matter, that the Court redact the opinion to remove the full names of the two women; and for such other and further relief as this Court may deem just and proper.

Respectfully submitted,

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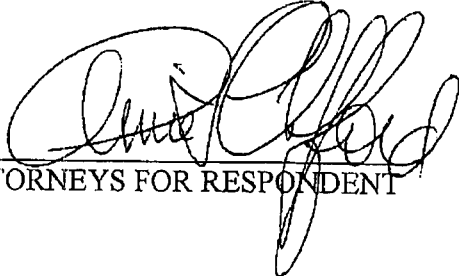
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April 29, 2015

Columbia, South Carolina

BY: 

ATTORNEYS FOR RESPONDENT


#484

The South Carolina Court of Appeals

The State, Respondent,

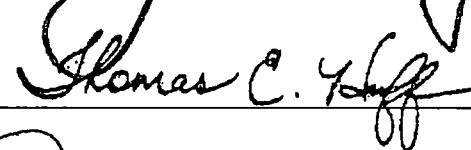
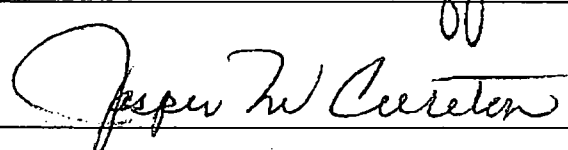
v.

Venancio Diaz Perez, Appellant.

Appellate Case No. 2013-000179

ORDER

Respondent filed a motion to seal the Record on Appeal and "all documents, but the final briefs and opinion of this Court." After careful consideration, we deny Respondent's motion to seal. We find that redacting the opinion to remove the names of the two victims' mothers affords adequate protection to the parties in this appeal. Accordingly, the attached opinion is substituted for the previous opinion, which is withdrawn.

 C.J.
 J.
 A.J.

Columbia, South Carolina

cc: Robert Michael Dudek, Esquire
Jason Scott Luck, Esquire
Amie L. Clifford, Esquire
Alan McCrory Wilson, Esquire

FILED

5-8-15 27

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Venancio Diaz Perez, Appellant.

Appellate Case No. 2013-000179

Appeal From Charleston County
J. C. Nicholson, Jr., Circuit Court Judge

Unpublished Opinion No. 2015-UP-217
Heard February 5, 2015 – Filed April 29, 2015
Withdrawn, Substituted, and Refiled May 8, 2015

**AFFIRMED IN PART, REVERSED IN PART, and
REMANDED**

Jason Scott Luck, of The Seibels Law Firm, P.A., of
Charleston, and Chief Appellate Defender Robert
Michael Dudek, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Special
Assistant Attorney General Amie L. Clifford, both of
Columbia; and Solicitor Scarlett Anne Wilson, of
Charleston, for Respondent.

CURETON, A.J.: Venancio Perez appeals his convictions for lewd act upon a minor and assault and battery of a high and aggravated nature (ABHAN), arguing the trial court erred in: (1) admitting evidence of prior bad acts; (2) limiting the cross-examination of a witness; and (3) issuing a vindictive sentence. We affirm the convictions but reverse for resentencing.

I. PRIOR BAD ACTS

Highlighting the differences among the two victims' testimony, Perez argues the trial court erred in admitting evidence of any alleged prior bad acts he committed against Minor 2 because there was no evidence demonstrating a common scheme or plan pursuant to Rule 404(b), SCRE. We disagree.

When determining whether evidence is admissible as common scheme or plan, the trial court must analyze the similarities and dissimilarities between the crime charged and the bad act evidence to determine whether there is a close degree of similarity. When the similarities outweigh the dissimilarities, the bad act evidence is admissible under Rule 404(b).

State v. Wallace, 384 S.C. 428, 433, 683 S.E.2d 275, 277-78 (2009) (internal citation omitted).

We find the trial court did not err as to this issue. Contrary to Perez's arguments, the evidence demonstrates Perez's conduct with both minors was substantially similar in nature. Here, as in *Wallace*, the similarities between the acts includes Perez's relationship to the victims (their babysitter's husband), abuse beginning at about the same age, abuse occurring at the babysitter's home, and abuse occurring while the victims played and Perez's wife attended to other children. *Id.* at 434, 683 S.E.2d at 278. Consequently, the similarities outweigh any dissimilarities; therefore, Minor 2's testimony was properly admitted. Moreover, the trial court redacted dissimilar details of sexual conduct—Minor 2's testimony regarding intercourse with Perez—to avoid unfair prejudice to Perez. Accordingly, the probative value of Minor 2's testimony as redacted substantially outweighs the danger of unfair prejudice. Rule 403, SCRE.

II. LIMITING CROSS-EXAMINATION

Perez argues the trial court erred in limiting his cross-examination of Minor 2's mother (Mother 2). We find the trial court erred; however, the error was harmless.

"The Sixth Amendment rights to notice, confrontation, and compulsory process guarantee that a criminal charge may be answered through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence." *State v. Mizzell*, 349 S.C. 326, 330, 563 S.E.2d 315, 317 (2002) (quoting *State v. Graham*, 314 S.C. 383, 385, 444 S.E.2d 525, 527 (1994)). "On cross-examination, any fact may be elicited which tends to show interest, bias, or partiality of the witness." *Id.* at 331, 563 S.E.2d at 317 (internal quotation marks and citation omitted).

A criminal defendant may show a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.

State v. Pradubsri, 403 S.C. 270, 276-77, 743 S.E.2d 98, 102 (Ct. App. 2013) (alteration in original) (quoting *Mizzell*, 349 S.C. at 331, 563 S.E.2d at 317). "The trial [court] retains discretion to impose reasonable limits on the scope of cross-examination." *Mizzell*, 349 S.C. at 331, 563 S.E.2d at 317. "Before a trial [court] may limit a criminal defendant's right to engage in cross-examination to show bias on the part of the witness, the record must clearly show the cross-examination is inappropriate." *Id.* "If the defendant establishes he was unfairly prejudiced by the limitation, it is reversible error." *Id.*

Here, the trial court erred in declining to allow cross-examination regarding Mother 2's immigration status and U visa application.¹ Despite the trial court's finding otherwise, there is no question Mother 2's veracity and potential bias was

¹ Federal law permits aliens or parents of minor aliens, who are the victims of certain crimes and assist law enforcement in investigating and prosecuting those crimes, to apply for a temporary "U nonimmigrant status (U visa)." See United States Department of Homeland Security, <http://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-criminal-activity-u-nonimmigrant-status/victims-criminal-activity-u-nonimmigrant-status> (last visited March 27, 2015).

an important issue. Any evidence showing Mother 2 applied for or obtained the visa because her daughter was a victim of abuse and they both assisted with the prosecution was relevant impeachment evidence. Mother 2's immigration status and possible visa application was relevant to any theory that the victims falsely alleged these crimes in an attempt to gain citizenship for their parents. Further, even accepting Minor 2's testimony as true, Mother 2's U visa testimony was relevant to establish bias by demonstrating Mother 2 agreed to participate in the investigation or encouraged Minor 2 to participate in order to obtain the visa.

However, we find the error was harmless beyond a reasonable doubt. Perez proffered no evidence Mother 2 knew about U visas before she reported Perez's acts against Minor 2. Without such evidence, Mother 2's undocumented status made it less likely she would falsely report a crime because this would bring her to the State's attention and possibly lead to her deportation. Moreover, nothing in Mother 2's proffered testimony suggests the State's recommendation that Mother 2 obtain a U visa was quid pro quo for her or Minor 2's testimony. Mother 2 denied someone from the solicitor's office put her in contact with an attorney to assist with the application. She also denied "a victim advocate or helper" put her in touch with an immigration attorney. She simply stated she found out about the attorney assisting with the application "[w]hen we went for [Minor 2] to have her questioning and exam[,] they gave us several information sheets and that was one of them." Also, unlike Minor 1's mother, Mother 2 denied having applied for other governmental benefits such as food stamps since she applied for the U visa. Therefore, Mother 2's proffered testimony does not suggest "[Mother 2] was receiving assistance from the State in exchange for her daughter's testimony," or that her "testimony against Perez was 'bought and paid for' by the State via U [v]isas" as Perez argues. *See Mizzell*, 349 S.C. at 334, 563 S.E.2d at 319 ("In determining whether an error is harmless, the reviewing court must review the entire record to determine what effect the error had on the verdict." (quotation marks and citation omitted)).

III. SENTENCING

Perez argues the trial court issued a sentence that was vindictive and violated Perez's due process rights. We agree and remand for resentencing.

"A [trial court] or other sentencing authority is to be accorded very wide discretion in determining an appropriate sentence, and must be permitted to consider any and all information that reasonably might bear on the proper sentence for the particular defendant, given the crime committed." *State v. Hicks*, 377 S.C. 322, 325, 659 S.E.2d 499, 500 (Ct. App. 2008). "A sentence will not be overturned absent an

abuse of discretion when the ruling is based on an error of law or a factual conclusion without evidentiary support." *In re M.B.H.*, 387 S.C. 323, 326, 692 S.E.2d 541, 542 (2010). A trial court abuses its discretion in sentencing when it considers the fact that the defendant exercised his right to a jury trial. *State v. Hazel*, 317 S.C. 368, 370, 453 S.E.2d 879, 880 (1995).

We find there is a reasonable likelihood the trial court sentenced Perez on the improper basis of Perez exercising his right to go to trial. Further, the record suggests a basis for the sentence was the fact that the trial court thought Perez was guilty of the first-degree criminal sexual conduct offense for which he was not convicted. The trial court's comments justifying the increased sentence do not convince us that the sentence was imposed free of an underlying punishment for Perez going to trial. Accordingly, we remand for resentencing. See *State v. Brouwer*, 346 S.C. 375, 388, 550 S.E.2d 915, 922 (Ct. App. 2001) ("[W]e believe the mere disavowal of wrongful intent cannot remove the taint inherent in the court's commentary, especially since the record fails to reflect an otherwise appropriate basis for Brouwer's disparate sentence.").

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

HUFF, J., concurs.

FEW, C.J., concurring: I agree with the majority's decision to affirm the first two issues raised by Perez. As for the sentencing issue, however, I would remand for the trial court to clarify the basis on which it sentenced Perez.

When the circumstances of a sentencing proceeding raise the question of whether the sentencing judge imposed a sentence on an improper basis—such as facts not proven by the State or charges for which the defendant was not convicted—but this court cannot determine from the record whether the sentence was improper, I believe the appropriate remedy is to remand to the sentencing judge to clarify the basis upon which the sentence was imposed. Here, one portion of the sentencing judge's comments raises the question of whether the sentence was imposed on an improper basis:

This court is . . . of the opinion that there was penetration, digital penetration based on her sworn

testimony. The jury has found [him] not guilty. The court [is] of the opinion he's guilty of all the charges.

Comparing these comments with others that indicate a proper basis for sentencing, it is unclear whether the judge imposed the sentence on an improper basis. Thus, I would remand the case to the sentencing judge for clarification as to whether the sentence was imposed on the basis of facts not proven by the State or charges for which the defendant was not convicted.

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Court of General Sessions

Honorable J.C. Nicholson, Jr., Circuit Court Judge
 Trial Court Case No. 2010GS1007730, 2010GS1007731
 Appellate Case No. 2013-000179

The State of South Carolina,

Respondent,

v.

Venancio Diaz Perez,

Appellant.

PETITION FOR REHEARING

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Pursuant to Rule 221, SCACR. Respondent respectfully petitions this Court for rehearing and reversal of its decision that the trial court's sentence was vindictive and violated Appellant's Due Process rights requiring reversal in part and remand. In support of this request, the undersigned counsel sets forth the following points of fact and/or law overlooked or misapprehended by this Court.

I.

In its opinion (2015-UP-217; originally issued on April 29, 2015; substituted opinion issued on May 8, 2015), this Court agreed with Appellant's claim of vindictiveness by the trial court in sentencing him.

We find there is a reasonable likelihood the trial court sentenced Perez on the improper basis of Perez exercising his right to go to trial. Further, the record suggests a basis for the sentence was the fact that the trial court thought Perez was guilty of the first-degree criminal sexual conduct offense for which he was not convicted. The trial court's comments justifying the increased sentence do not convince us that the sentence was imposed free of an underlying punishment for Perez going to trial. Accordingly, we remand for resentencing. *See State v. Brouwer*, 346 S.C. 375, 388, 550 S.E.2d 915, 922 (Ct. App. 2001) ("[W]e believe the mere disavowal of wrongful intent cannot remove the taint inherent in the court's commentary, especially since the record fails to reflect an otherwise appropriate basis for Brouwer's disparate sentence.").

State v. Perez, supra at 5.

II.

In reaching its decision on this issue, this Court overlooked or misapprehended the appellate record. Appellant was indicted for the offenses of lewd act on a minor, which carried a sentence of up to 25 years, and criminal sexual conduct with a minor in the first degree (hereinafter "CSC with a minor first degree"), which carried a sentence of up to 15 years. (R. p. 553, lines 6-10; see also S.C. Code Section 16-3-655).

Prior to the trial of the case (and prior to hearing the witnesses testify), the parties discussed a guilty plea with the trial court. During that discussion, inferably after a discussion of what evidence would be presented, the trial court told counsel that if he were to try Appellant without a jury, he would find him guilty of lewd act and assault and battery of a high and aggravated nature (hereinafter "ABHAN"). The trial court also indicated to counsel that if Appellant were to plead guilty on the indictment for lewd act (with the other charge being dismissed), the trial court would impose a sentence in the 10-15 year range. (R. p. 554, line 16 – p. 555, line 22.)

III.

This Court overlooked or misapprehended the circumstances surrounding Appellant's sentencing. At the conclusion of his jury trial at which the victim and others testified, Appellant was found guilty of lewd act on a minor and assault and battery of a high and aggravated nature, as a lesser-included offense of CSC with a minor first degree. (R. p. 535, line 2 – p. 536, line 12; p. 537, lines 11-19.)

Thereafter, the defense argued for a sentence of time served (918 days) and presented the following grounds as supporting such a sentence:

- Appellant's lack of a prior criminal record;
- the fact that the conduct at issue was so contrary to Appellant's past conduct;
- the fact that Appellant was a hard worker and has worked hard to provide for his family;
- the fact that he and his children love and will miss each other;
- the fact that he was a family man who put his concern for his friends and family above his own;
- the fact that he has carried himself well and showed a great deal of restraint, self-control and kindness since his arrest;
- his imminent deportation back home to Mexico as a result of the convictions and

how that may be considered punishment in and of itself;

- the fact that he, as a convicted child molester, will have a “rough time” in prison; and
- the fact that Appellant’s beautiful family would be wrecked by his conviction and sentence.

(R. p. 540, line 21 – p. 546, line 9; p. 550, lines 6-24.) Defense counsel also argued that, because there were no specific findings by the jury, the trial court should, under *Apprendi v. New Jersey*, assume the jury only found the least serious possible acts necessary to convict Appellant of lewd act upon a minor to have been proved. (R. p. 546, lines 10-24.)

The trial court then heard from the victim’s mother, who spoke about the impact Appellant’s assaults upon her daughter and her. She talked about Minor 1’s nightmares and counseling, as well as about her guilt over not only placing Minor 1 in Appellant’s home where she was assaulted and her failure to see what was going on, but also her guilt about recommending the daycare services of Appellant’s wife and another little girl being assaulted as a result of that. (R. p. 551, line 5 – p. 552, line 2.)

The Assistant Solicitor then addressed the trial court. She said that, while the defense had spoken about the possibility that Appellant might be harmed if sent to prison, Appellant had taken advantage of very vulnerable, young children and had showed them no mercy. She stated that, in terms of lewd acts, this case involved very serious acts – acts that were repetitive and involved a lot more in terms of the ABHAN and indecent liberties. While she expressed her sorrow for Appellant’s family, the Assistant Solicitor pointed out that their suffering was the result of Appellant’s behavior. (R. p. 552, line 14 – p. 553, line 5.) The Assistant Solicitor ended her argument on sentencing by asking the trial court to impose consecutive sentences to reflect the repetitive and long-term nature of the crimes. (R. p. 552, line 25 – p. 553, line 3.)

The trial court thereafter sentenced Appellant to a 15-year term of incarceration on the

lewd act conviction and a consecutive 10 year sentence on the ABHAN conviction. The trial court also ordered, on the lewd act conviction, that Appellant was to be placed on the Central Registry of Child Abuse and Neglect. (R. p. 553, line 6 – p. 554, line 5.)

IV.

This Court overlooked the fact that Appellant's *only* objection at trial to the sentences was to the fact that they were ordered to run consecutively. The objection was based upon the claim that the consecutive sentences were "vindictive and punishing [Appellant] for going to trial." In making the objection, defense counsel referred to the plea negotiations that occurred prior to the trial. (R. p. 554, lines 7 – p. 556, line 4.)

V.

This Court overlooked that "[a] trial judge is given wide discretion in determining what sentence should be imposed. Likewise, whether multiple sentences should run consecutively or concurrently is a matter left to the sound discretion of the trial judge. Absent partiality, prejudice, oppression, or corrupt motive, this Court lacks jurisdiction to disturb a sentence that is within the limit prescribed by statute." (Citations omitted.) *State v. Barton*, 325 S.C. 522, 531, 481 S.E.2d 439, 444 (Ct. App. 1997).

VI.

Without setting forth the factual basis, this Court concluded there was a reasonable likelihood the trial court sentenced Perez on the improper basis of Perez exercising his right to go to trial. In doing so, this Court has misapprehended the appellate record. The record is absolutely devoid of any evidence that the trial court based any part of its sentence on Appellant exercising his right to go to trial.

Rather than supporting a finding that the trial court acted with partiality, prejudice,

oppression, or corrupt motive in imposing the consecutive sentences, the record supports a finding that the trial court sentenced Appellant based upon what actually happened at his trial:

- guilty verdicts for both lewd act and ABHAN, *and*
- trial testimony from the victim as to what Appellant had done to her, *and*
- the oral victim impact statement of the victim's mother, *and*
- the defense's proffered mitigation and justification for lower sentences, *and*
- the State's proffered justification and request for high and consecutive sentences.

The appellate record also establishes the 15 year sentence imposed upon Appellant for his lewd act conviction *was within the 10-15 year range mentioned during plea discussions for that same offense*. Therefore, the fact the trial court imposed a 15-year sentence on the lewd act conviction clearly does not establish vindictiveness for Appellant's exercise of his right to trial.

This Court has overlooked the fact that the only "increase" in sentencing, from what was mentioned during plea discussions, was due to Appellant's conviction of an additional offense *not considered as part of the plea discussions*. For the second conviction – of ABHAN – the trial court imposed a 10 year consecutive sentence.

This Court has further overlooked the fact that the imposition of the consecutive 10 years on this second conviction does not, by itself, indicate any vindictiveness due to Appellant's exercise of his right to trial, there is nothing in the record upon which to base such a motive, and there is not and should not be a presumption of vindictiveness. *See Alabama v. Smith*, 490 U.S. 794 (1989) (because of greater amount of sentencing information that trial generally affords as compared to guilty plea, there is no basis for presumption of vindictiveness where second sentence imposed after trial is heavier than first sentence imposed after guilty plea). Instead, in addition to the evidence presented throughout the trial, the record reflects that circumstances in

both mitigation and aggravation were thoroughly presented by counsel prior to imposing sentence. (R. p. 540, line 21 – p. 553, line 3 *summarized in III above.*)

VII.

This Court also concluded there was a second improper basis for the trial court's sentence, *i.e.*, the trial court's belief that the victim was digitally penetrated by Appellant even though the jury convicted him of the lesser-included offense of ABHAN on the CSC with a minor first degree indictment. In reaching this conclusion, this Court, overlooking the context in which the statement was made, focused on a single comment made by the trial court after Appellant had been sentenced and when the trial court was ruling on Appellant's objection to the consecutive sentencing based on alleged vindictiveness.

This Court is of the opinion that the little girl was abused. *This Court is also of the opinion that there was penetration, digital penetration based upon her sworn testimony.* The jury has found her not guilty.

The Court's of the opinion he's guilty of all the charges from the testimony I've heard. So it's not any abuse in giving him the consecutive. You understand?

(R. p. 556, lines 5-12).

This Court has overlooked other reasonable interpretations of or explanations for this comment supported by the context within which it was made, and has instead chosen to conclude the trial court meant that, in sentencing Appellant on the ABHAN conviction, it took into account its own belief that Appellant was guilty of CSC with a minor first degree despite the fact the jury found Appellant not guilty of criminal sexual conduct and guilty of ABHAN. It is at least as reasonable, if not more reasonable, to conclude that the trial court was saying (1) it believed the victim was truthful in testifying that Appellant had digitally penetrated her, but that the jury had chosen to find him not guilty of the greater offense and guilty of the lesser, and (2)

the evidence supported the jury's guilty verdicts. Under this interpretation of the trial court's comments, they would not be improper.

And, assuming *arguendo*, the trial court's comment did mean that it considered its view of the evidence when imposing sentence on the ABHAN charge, such was not necessarily improper inasmuch as the consideration of evidence presented before it did not result in a sentence exceeding that allowed.¹ See *Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000) (any fact that *increases penalty beyond statutory maximum* must submitted to jury and proved beyond a reasonable doubt). Moreover, even if consideration of this evidence were to be improper, it would be immaterial or nonprejudicial if there were a sufficient basis in the record for the trial court's exercise of discretion in imposing the sentence it did. This Court overlooked that here, as

¹ As noted by the Michigan Supreme Court, the fact that a jury finds a defendant guilty of a lesser-included offense does not necessarily mean that the jury did not find the State had failed to prove the elements of the greater offense beyond a reasonable doubt.

Juries in criminal cases often find defendants not guilty or find persons who have committed the charged greater offense guilty of only a lesser offense in the face of the evidence for reasons satisfactory to them. 'The very essence of the jury's function is its role as spokesman for the community conscience in determining whether or not blame can be imposed.' *United States v. Dougherty*, 154 U.S.App.D.C. 76, 105, 473 F.2d 1113, 1142 (1972) (Bazelon, C.J., dissenting). The observation was made by the United States Supreme Court in *Duncan v. Louisiana*, 391 U.S. 145, 157, 88 S.Ct. 1444, 1451, 20 L.Ed.2d 491 (1968) that:

'the most recent and exhaustive study of the jury (Kalven and Zeisel, *The American Jury* (1966)) in criminal cases concluded that juries do understand the evidence and come to sound conclusions in most of the cases presented to them and that when juries differ with the result at which the judge would have arrived, it is usually because they are serving some of the very purposes for which they were created and for which they are now employed.'

People v. Chamblis, 395 Mich. 408, 426, 236 N.W.2d 473, 482 (1975), *overruled on other grounds*, *People v. Cornell*, 466 Mich. 335, 646 N.W.2d 127 (2002), and *People v. Stephens*, 416 Mich. 252, 330 N.W.2d 675 (1982).

the appellate record establishes, in addition to having presided over the trial and heard the complete and full presentation of evidence, the trial court had the benefit of counsel's sentencing requests and arguments. The grounds for high and consecutive sentences presented by the State, as summarized in III above, were legitimate, factually supported, and more than sufficient to justify the sentences imposed in this case.

VIII.

In addition, this Court overlooked the fact that Appellant's only objection at trial to the sentences were that they were consecutive and that the consecutive nature of the sentences indicated the trial court was being vindictive and punishing Appellant for exercising his right to a jury trial. This Court may have overlooked precedent that limits appellate review to issues preserved for appeal. *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691 (2003). Therefore, assuming *arguendo*, this Court should remain steadfast in its conclusion that the trial court acted inappropriately in sentencing Appellant, the prison sentence on each conviction should not be disturbed. Rather, this Court should remand to the trial court for the limited purpose of reconsidering whether the sentences should run concurrently or consecutively and providing a basis for whichever decision is made.

WHEREFORE, for all of the foregoing reasons, the undersigned respectfully requests this Court to rehear and reverse its decision to set aside Appellant's sentence and remand this case for resentencing; affirm the sentences imposed by the trial court and/or, if it determines that remand is necessary, remand this case only for the purpose of having the trial court address and explain whether Appellant's sentences should run concurrently or consecutively; and for such other and further relief as this Court may deem just and proper.

Respectfully submitted,

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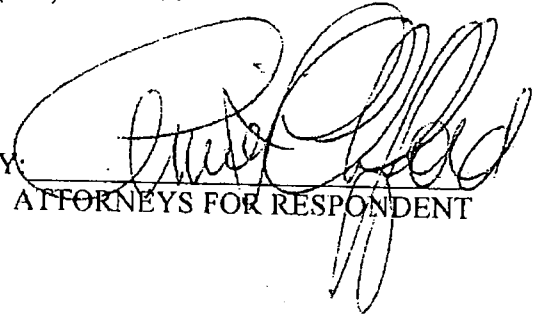
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May 13, 2015

Columbia, South Carolina

 COPY

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions

J. C. Nicholson, Circuit Court Judge

2010-GS-10-07730
2010-GS-10-07731
Appellate Case No. 2013-000179

RECEIVED
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SC Court of Appeals

State of South Carolina Respondent,

v.

Venancio Diaz Perez Appellant.

PETITION FOR REHEARING

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Appellant, pursuant to Rules 220(a), 219(b), & 240, SCACR, petitions this Court for rehearing of State v. Perez, Op. No. 2015-UP-217 (S.C.Ct.App. filed May 8, 2015) (the "Opinion").¹ Due to misapprehension of applicable law and overlooking relevant facts the Court should grant rehearing and issue a revised opinion reversing Appellant's conviction and sentence. The grounds for this petition, and its requested relief, are set forth in greater detail below.

Arguments

I. This Court has overlooked evidence that creates a reasonable possibility that the excluded testimony of Mother 2 affected the jury's verdict.

The state's case against the Appellant was based entirely on the testimony of Minor 1 and Minor 2; it did not introduce an iota of physical evidence linking the Appellant to any crime. In such a scenario, where a conviction balances on the knife-edge of witness credibility, a criminal defendant must be allowed to explore all sources of bias. Further, if the testimony of Minor 1 and Minor 2 is truly as "substantially similar" as the Court believes, then it is even more critical the Appellant present an explanation for that similarity. The exclusion of Mother 2's U visa testimony prevented the Appellant from advancing a meritorious defense theory to the jury and undercut the defense theory presented. While this Court was correct in recognizing that the exclusion of Mother 2's testimony was a violation of the Confrontation Clause, this Court overlooked the evidence of the great harm this exclusion caused and should thus amend its order.

¹ The Opinion was originally filed on April 29, 2015, but was re-filed on May 8, 2015, to remove references to the name of the mother of Minor 2. In order to harmonize this Petition with the re-filed Opinion, "Mother 1" will refer to the mother of Minor 1, while "Mother 2" will refer to the mother of Minor 2. This accommodation should in no way imply consent to Respondents' Petition to Seal or to the removal of this case file from the ACMS system.

“A violation of the defendant’s Sixth Amendment right to confront the witness is not *per se* reversible error” only if the “error was harmless beyond a reasonable doubt.” State v. Graham, 314 S.C. 383, 385, 444 S.E.2d 525, 527 (1994). Proving harmless error is a “heavy burden.” See e.g. Anderson v. Warden, 696 F.2d 296, 300 (4th Cir. 1982) (en banc) (“Harm is presumed to have come from the constitutional error, and the state has the ‘heavy burden’ of proving harmlessness beyond a reasonable doubt.”).²

The phrase “harmless beyond a reasonable doubt” means there must be “no reasonable *possibility*” that the error contributed to the verdict. State v. Henderson, 286 S.C. 465, 334 S.E.2d 519, 522-23 (Ct. App. 1985) (emphasis added); U.S. v. Hasting, 461 U.S. 499, 506, 103 S.Ct. 1974, 1979 (1983). An error that impairs a defense theory creates this reasonable possibility. E.g. U.S. v. Brady, 561 F.2d 1319 (9th Cir. 1977) (Trial court’s refusal to allow cross-examination on a prior source of narcotics undercut the defense theory that the victim was lying of out fear when she named the defendant as her supplier.); Stack v. U.S., 519 A.2d 147 (D.C. 1986) (Trial court’s refusal to allow cross-examination on prior assault to decedent excluded evidence that “went to the heart of [the] defense theory” that someone else struck the fatal blow.); Baucham v. State, 881 So.2d 95 (Fla.Dist.Ct.App. 2004) (Trial court’s refusal to allow cross-examination on defendant’s prior complaints about police officers excluded evidence that was necessary to prove bias or motive for excessive force against defendant.); People v. Wilson, 965 N.E.2d 667 (Ill.Ct.App. 2012). Wilson is especially instructive, as the state had no

² The State’s harmless error argument in its brief consisted of the latter half of one sentence. (Resp. Brief p. 42). This is inadequate and constitutes abandonment of this argument. See State v. Colf, 332 S.C. 313, 322, 504 S.E.2d 360, 364 (Ct. App. 1998) (finding a conclusory, two-paragraph argument that cited no authority other than an evidentiary rule was abandoned).

physical evidence of the crime and the state's case hinged on credibility; the Illinois Court of Appeals found that it was improper to find harmless error ("it would be circular") where witness credibility was the most important issue. Wilson 965 N.E.2d at 667.

The Fourth Circuit also recently addressed harmless error in U.S. v. Watson, 703 F. 3d 684 (4th Cir. 2013), where the defendant (Watson) was found guilty of possession of a firearm by a felon. The Fourth Circuit found admission of a defendant's statement made in an unlawful custodial arrest was not harmless because:

(1) the absence of direct evidence showing that Watson possessed the revolver and the ammunition [that resulted in his conviction]; (2) the defense's theory, albeit speculative and circumstantial in its own right, that Jackson [another person in the building] planted the firearm in Watson's room; and (3) the jury's questions relating to Watson's statement [the jury wished to re-read Watson's statement regarding the revolver multiple times].

Id. at 699.

The Oregon Court of Appeals has specifically addressed exclusion of U visa³ testimony in a harmless error context. See State v. Del Real-Galvez, No. A153489, __ P.3d __, 2015 WL 1500246 (Or. Ct. App. filed April 1, 2015).⁴ In Real-Galvez, a minor accused the defendant of sexual assault, and based on accusation the minor's mother applied for a U visa. According to the Oregon Court of Appeals:

Because [minor's] mother had applied for an opportunity to stay in the United States on the ground that her daughter had been sexually abused

³ A U visa requires the certification of an agency in the investigation or prosecution in the qualifying criminal activity. 8 C.F.R. § 214.14(b)(3). (R. p. 301 ll. 18-23). The qualifying agency can, at any time, withdraw this certification and thus revoke a U visa holder's ability to remain in this country legally. 8 C.F.R. § 214.14(i)(A).

⁴ available at <http://www.publications.ojd.state.or.us/docs/A153489.pdf> (last visited May 11, 2015).

and coerced, a jury could reasonably infer that [minor], out of a desire to help her mother obtain a U visa, had a personal interest in testifying against defendant.

Id. The court further held this was *not* harmless error because “[t]he jury was not fully informed about [minor’s] potential motive to fabricate allegations against defendant and [minor’s] potential interest in testifying in a certain manner.” Id. see also State v. Valle, 298 P.3d 1237, 1244 (Or. Ct. App. 2013) (finding exclusion of U visa testimony not reversible error).

Both Mother 1 and Mother 2 have legal residency in this country by virtue of the testimony of their children against the Appellant. Their legal residency is contingent on their children’s cooperation with law enforcement and can be revoked at any time. A jury may reasonably infer that one or both of the mothers have pressured their children to provide similar testimony in order to maintain legal status (and maintain their family unit). The exclusion of Mother 2’s testimony also prevented the Appellant from advancing a defense that the minors were fabricating or altering their testimony to protect their mothers’ legal status; any attempt by one of the minors to recant or revise her testimony would likely result in the deportation of their mother. This is a powerful argument that attacks the credibility, bias, and motivation of both the mothers and the children, and the trial court disallowed it. Such a defense was not a flight of fancy; even the state admitted that the story told by Minor 1 was different (*i.e.* less severe allegations) than the final product presented to the jury. (R. pp. 339 ll. 17-19, 390 ll. 4-7, 391 ll. 18-20). Trial counsel was allowed to present an argument that Minor 1 was “making it all up”, but trial counsel was not allowed to make the same argument for Minor 2. The fact that one witness was presented with motive to fabricate, and one was not, was extremely

prejudicial to the Appellant's case, as it undercut Appellant's motive argument as to Minor 1.⁵ Finally, even the trial jury recognized the significance of U visa testimony; the day after a U visa for Mother 1 was discussed, juror number 102 was excused from the jury panel for performing unauthorized research "on the visa kits or visa situation." (R. p. 368).

This Court is presented with a scenario similar to Watson: (1) no strong evidence of the crime committed (here, there is no physical evidence); (2) a defense theory (though not as "speculative and circumstantial" as that in Watson) that was undermined by a constitutional error; and (3) recognition by the jury of the importance of the evidence. Appellant's defense theory was compromised, and thus he is entitled to a new trial.

This Court supports its finding of harmless error by pointing out that Appellant "proffered no evidence" supporting its contentions, but this is incorrect. During Mother 2's proffered cross-examination, she provided testimony on when she learned of U visas ("recently") (R. p. 263 ll. 19-20), whether the Solicitor's office assisted her in obtaining a U visa ("no") (R. p. 263 ll. 21-24), whether a "victim advocate or helper" assisted her in obtaining a U visa ("no") (R. p. 264 ll. 3-5), where she obtained the information on U visas (see below) (R. p. 264 ll. 14-18), and whether she had applied for government benefits ("no") (R. p. 264 ll. 19-21).

It is completely irrelevant that the transcript of Mother 2's responses did not support the defense theory. However, Mother 2's demeanor, body language, and other similar non-verbal cues may have actually supported the defense theory by showing

⁵ If the minors' testimony is truly "substantially similar", as this Court contends, then the prejudice to the Appellant is compounded.

dishonesty.⁶ “The fact that testimony is not contradicted directly does not render it undisputed.” Black v. Hodge, 306 S.C. 196, 198, 410 S.E.2d 595, 596 (Ct. App. 1991). Further, it is naïve to believe that Mother 2 would fold on the witness stand and admit any misconduct; this is not a television courtroom drama. Witnesses sometimes lie – this is why juries must hear evidence of a witness’s possible motivation to lie. The existence of a U visa puts Mother 2’s credibility at issue, and therefore her responses must be evaluated by the jury for their veracity:

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The very existence of a U visa creates a question of credibility, as the Oregon Court of Appeals recognized:

[The defendant] presented information, in the form of [accuser’s] own testimony, that [accuser] had applied for a U visa on the ground that she was a victim of abuse. **From that testimony alone, a jury could infer that [accuser] had a personal interest in testifying that she had been abused.** Simply put, [accuser] had applied for an opportunity to stay in the country on the ground that she had been abused; based on that fact, a jury could reasonably infer that she had a personal interest in testifying in a manner consistent with her application for that opportunity.

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- Q. ...Do you remember how you came across the name of the attorney that is helping you apply for this visa?
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The "questioning and exam" referenced by Mother 2 was Minor 2's intake interview at the police station and her examination at the Dee Norton Lowcountry Children's Center ("DNLCC"). (R. pp. 64-69, 71-72). "They" from line 18 who recommended Mother 2 pursue a U visa is ambiguous, and either refers to the North Charleston Police Department or the DNLCC. Regardless of whom "they" was referring to, the transcript indicates that Mother 2 was provided information on her U visa in conjunction with her police report.

While the excluded testimony of Mother 2 only occupies roughly two pages, its exclusion undercut the Appellant's theory of defense; regardless of whether this Court believes Appellant would prevail at trial, it creates a reasonable *possibility* that the outcome of the trial would be different. Appellant would ask this Court to amend its original opinion and reverse the trial court's conviction.

II. The doctrine of cumulative error now demands full reversal of the trial court.

According to this Court's opinion, the trial court violated two of Appellant's fundamental rights under the sixth (the Confrontation Clause) and fourteenth (Due Process) amendments to the United States Constitution. This Court has already held that the latter violation warrants a partial reversal; taken together, these two violations demand a full reversal.

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IV. The Court's decision to reverse the sentence and remand requires clarification.

The Opinion (Part III) is silent as to whether Appellant's resentencing will occur before the original trial judge or before a new judge. Appellate courts in other jurisdictions have remanded similarly-situated cases for resentencing before a different judge. See e.g. Lindsay v. U.S., 84 A.3d 50 (D.C. 2014). Appellant would request any resentencing be before a new judge.

For the purposes of preservation, Appellant also requests the Court's clarification on the role of ABA Standard 14-3.3(f) in its decision to reverse the trial court's sentence. See Harden v. State, 276 S.C. 249, 255, 277 S.E.2d 692, 694-95 (1981).

V. This Court should re-hear this appeal.

As argued in a separate petition, pursuant to Rule 219(b), Appellant suggests that rehearing should also take place before this Court *en banc*. The Wallace line of cases are fatally at odds with the requirements of Rule 404(b) and Lyle. If this Court believes there is an interpretation of the law in which these authorities exist in harmony with one another, an *en banc* opinion would provide substantial guidance for future criminal practitioners.

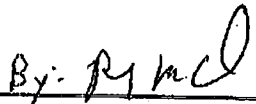
Further, the admissibility of U Visas is an issue of first impression in South Carolina. A definitive opinion from this full Court would provide helpful guidance and certainty to future criminal law practitioners as South Carolina's immigrant population grows.

Finally, there is a dearth of case law in South Carolina discussing judicial participation in plea negotiations and vindictiveness in sentencing. A definitive opinion from this full Court would provide helpful guidance to the bench and bar.

Conclusion

For the above argument, the Appellant requests that this Court rehear this appeal, and, as requested in a separate petition rehear it *en banc* and issue a revised opinion reversing the trial court *in toto*. In the alternative, the Appellant requests that this Court clarify its Opinion as set forth above.

Dated: 13th day of May, 2015

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Attorneys for Appellant

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM CHARLESTON COUNTY
Court of General Sessions

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MAY 13 2015

J. C. Nicholson, Circuit Court Judge

SC Court of Appeals

2010-GS-10-07730

2010-GS-10-07731

Appellate Case No. 2013-000179

State of South Carolina Respondent,

v.

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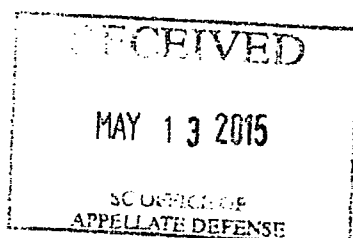
PETITION FOR REHEARING *EN BANC*

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Appellant, pursuant to Rules 220(a), 219(b), & 240, SCACR, petitions this Court for rehearing (*en banc*) of State v. Perez, Op. No. 2015-UP-217 (S.C.Ct.App. filed May 8, 2015) (the "Opinion").¹ Due to misapprehension of applicable law and overlooking relevant facts the Court should grant rehearing and issue a revised opinion reversing Appellant's conviction and sentence. The grounds for this petition, and its requested relief, are set forth in greater detail below.

Arguments

I. This Court has overlooked evidence that creates a reasonable possibility that the excluded testimony of Mother 2 affected the jury's verdict.

The state's case against the Appellant was based entirely on the testimony of Minor 1 and Minor 2; it did not introduce an iota of physical evidence linking the Appellant to any crime. In such a scenario, where a conviction balances on the knife-edge of witness credibility, a criminal defendant must be allowed to explore all sources of bias. Further, if the testimony of Minor 1 and Minor 2 is truly as "substantially similar" as the Court believes, then it is even more critical the Appellant present an explanation for that similarity. The exclusion of Mother 2's U visa testimony prevented the Appellant from advancing a meritorious defense theory to the jury and undercut the defense theory presented. While this Court was correct in recognizing that the exclusion of Mother 2's testimony was a violation of the Confrontation Clause, this Court overlooked the evidence of the great harm this exclusion caused and should thus amend its order.

¹ The Opinion was originally filed on April 29, 2015, but was re-filed on May 8, 2015, to remove references to the name of the mother of Minor 2. In order to harmonize this Petition with the re-filed Opinion, "Mother 1" will refer to the mother of Minor 1, while "Mother 2" will refer to the mother of Minor 2. This accommodation should in no way imply consent to Respondents' Petition to Seal or to the removal of this case file from the ACMS system.

“A violation of the defendant’s Sixth Amendment right to confront the witness is not *per se* reversible error” only if the “error was harmless beyond a reasonable doubt.” State v. Graham, 314 S.C. 383, 385, 444 S.E.2d 525, 527 (1994). Proving harmless error is a “heavy burden.” See e.g. Anderson v. Warden, 696 F.2d 296, 300 (4th Cir. 1982) (en banc) (“Harm is presumed to have come from the constitutional error, and the state has the ‘heavy burden’ of proving harmlessness beyond a reasonable doubt.”).²

The phrase “harmless beyond a reasonable doubt” means there must be “no reasonable *possibility*” that the error contributed to the verdict. State v. Henderson, 286 S.C. 465, 334 S.E.2d 519, 522-23 (Ct. App. 1985) (emphasis added); U.S. v. Hasting, 461 U.S. 499, 506, 103 S.Ct. 1974, 1979 (1983). An error that impairs a defense theory creates this reasonable possibility. E.g. U.S. v. Brady, 561 F.2d 1319 (9th Cir. 1977) (Trial court’s refusal to allow cross-examination on a prior source of narcotics undercut the defense theory that the victim was lying of out fear when she named the defendant as her supplier.); Stack v. U.S., 519 A.2d 147 (D.C. 1986) (Trial court’s refusal to allow cross-examination on prior assault to decedent excluded evidence that “went to the heart of [the] defense theory” that someone else struck the fatal blow.); Baucham v. State, 881 So.2d 95 (Fla.Dist.Ct.App. 2004) (Trial court’s refusal to allow cross-examination on defendant’s prior complaints about police officers excluded evidence that was necessary to prove bias or motive for excessive force against defendant.); People v. Wilson, 965 N.E.2d 667 (Ill.Ct.App. 2012). Wilson is especially instructive, as the state had no

² The State’s harmless error argument in its brief consisted of the latter half of one sentence. (Resp. Brief p. 42). This is inadequate and constitutes abandonment of this argument. See State v. Colf, 332 S.C. 313, 322, 504 S.E.2d 360, 364 (Ct. App. 1998) (finding a conclusory, two-paragraph argument that cited no authority other than an evidentiary rule was abandoned).

physical evidence of the crime and the state's case hinged on credibility; the Illinois Court of Appeals found that it was improper to find harmless error ("it would be circular") where witness credibility was the most important issue. Wilson 965 N.E.2d at 667.

The Fourth Circuit also recently addressed harmless error in U.S. v. Watson, 703 F. 3d 684 (4th Cir. 2013), where the defendant (Watson) was found guilty of possession of a firearm by a felon. The Fourth Circuit found admission of a defendant's statement made in an unlawful custodial arrest was not harmless because:

(1) the absence of direct evidence showing that Watson possessed the revolver and the ammunition [that resulted in his conviction]; (2) the defense's theory, albeit speculative and circumstantial in its own right, that Jackson [another person in the building] planted the firearm in Watson's room; and (3) the jury's questions relating to Watson's statement [the jury wished to re-read Watson's statement regarding the revolver multiple times].

Id. at 699.

The Oregon Court of Appeals has specifically addressed exclusion of U visa³ testimony in a harmless error context. See State v. Del Real-Galvez, No. A153489, __ P.3d __, 2015 WL 1500246 (Or. Ct. App. filed April 1, 2015).⁴ In Real-Galvez, a minor accused the defendant of sexual assault, and based on accusation the minor's mother applied for a U visa. According to the Oregon Court of Appeals:

Because [minor's] mother had applied for an opportunity to stay in the United States on the ground that her daughter had been sexually abused

³ A U visa requires the certification of an agency in the investigation or prosecution in the qualifying criminal activity. 8 C.F.R. § 214.14(b)(3). (R. p. 301 ll. 18-23). The qualifying agency can, at any time, withdraw this certification and thus revoke a U visa holder's ability to remain in this country legally. 8 C.F.R. § 214.14(i)(A).

⁴ available at <http://www.publications.ojd.state.or.us/docs/A153489.pdf> (last visited May 11, 2015).

and coerced, a jury could reasonably infer that [minor], out of a desire to help her mother obtain a U visa, had a personal interest in testifying against defendant.

Id. The court further held this was *not* harmless error because “[t]he jury was not fully informed about [minor’s] potential motive to fabricate allegations against defendant and [minor’s] potential interest in testifying in a certain manner.” Id. see also State v. Valle, 298 P.3d 1237, 1244 (Or. Ct. App. 2013) (en banc) (finding exclusion of U visa testimony not reversible error).

Both Mother 1 and Mother 2 have legal residency in this country by virtue of the testimony of their children against the Appellant. Their legal residency is contingent on their children’s cooperation with law enforcement and can be revoked at any time. A jury may reasonably infer that one or both of the mothers have pressured their children to provide similar testimony in order to maintain legal status (and maintain their family unit). The exclusion of Mother 2’s testimony also prevented the Appellant from advancing a defense that the minors were fabricating or altering their testimony to protect their mothers’ legal status; any attempt by one of the minors to recant or revise her testimony would likely result in the deportation of their mother. This is a powerful argument that attacks the credibility, bias, and motivation of both the mothers and the children, and the trial court disallowed it. Such a defense was not a flight of fancy; even the state admitted that the story told by Minor 1 was different (*i.e.* less severe allegations) than the final product presented to the jury. (R. pp. 339 ll. 17-19, 390 ll. 4-7, 391 ll. 18-20). Trial counsel was allowed to present an argument that Minor 1 was “making it all up”, but trial counsel was not allowed to make the same argument for Minor 2. The fact that one witness was presented with motive to fabricate, and one was not, was extremely

prejudicial to the Appellant's case, as it undercut Appellant's motive argument as to Minor 1.⁵ Finally, even the trial jury recognized the significance of U visa testimony; the day after a U visa for Mother 1 was discussed, juror number 102 was excused from the jury panel for performing unauthorized research "on the visa kits or visa situation." (R. p. 368).

This Court is presented with a scenario similar to Watson: (1) no strong evidence of the crime committed (here, there is no physical evidence); (2) a defense theory (though not as "speculative and circumstantial" as that in Watson) that was undermined by a constitutional error; and (3) recognition by the jury of the importance of the evidence. Appellant's defense theory was compromised, and thus he is entitled to a new trial.

This Court supports its finding of harmless error by pointing out that Appellant "proffered no evidence" supporting its contentions, but this is incorrect. During Mother 2's proffered cross-examination, she provided testimony on when she learned of U visas ("recently") (R. p. 263 ll. 19-20), whether the Solicitor's office assisted her in obtaining a U visa ("no") (R. p. 263 ll. 21-24), whether a "victim advocate or helper" assisted her in obtaining a U visa ("no") (R. p. 264 ll. 3-5), where she obtained the information on U visas (see below) (R. p. 264 ll. 14-18), and whether she had applied for government benefits ("no") (R. p. 264 ll. 19-21).

It is completely irrelevant that the transcript of Mother 2's responses did not support the defense theory. However, Mother 2's demeanor, body language, and other similar non-verbal cues may have actually supported the defense theory by showing

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Molineux and his Illegitimate Offspring: The History and Mystery of 404(b), 38 Champion 28 (July/August 2014).

IV. The Court's decision to reverse the sentence and remand requires clarification.

The Opinion (Part III) is silent as to whether Appellant's resentencing will occur before the original trial judge or before a new judge. Appellate courts in other jurisdictions have remanded similarly-situated cases for resentencing before a different judge. See e.g. Lindsay v. U.S., 84 A.3d 50 (D.C. 2014). Appellant would request any resentencing be before a new judge.

For the purposes of preservation, Appellant also requests the Court's clarification on the role of ABA Standard 14-3.3(f) in its decision to reverse the trial court's sentence. See Harden v. State, 276 S.C. 249, 255, 277 S.E.2d 692, 694-95 (1981).

V. This Court should re-hear this appeal *en banc*.

Pursuant to Rule 219(b), Appellant suggests that any rehearing that takes place before this Court be conducted *en banc*. The Wallace line of cases are fatally at odds with the requirements of Rule 404(b) and Lyle. If this Court believes there is an interpretation of the law in which these authorities exist in harmony with one another, an *en banc* opinion would provide substantial guidance for future criminal practitioners.

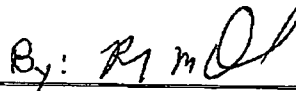
Further, the admissibility of U Visas is an issue of first impression in South Carolina. A definitive opinion from this full Court would provide helpful guidance and certainty to future criminal law practitioners as South Carolina's immigrant population grows.

Finally, there is a dearth of case law in South Carolina discussing judicial participation in plea negotiations and vindictiveness in sentencing. A definitive opinion from this full Court would provide helpful guidance to the bench and bar.

Conclusion

For the above argument, the Appellant requests that this Court rehear this appeal, *en banc*, and issue a revised opinion reversing the trial court *in toto*. In the alternative, the Appellant requests that this Court clarify its Opinion as set forth above.

Dated: 13th day of May, 2015

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The State, Respondent,

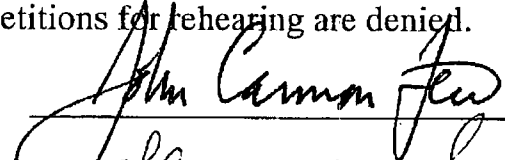
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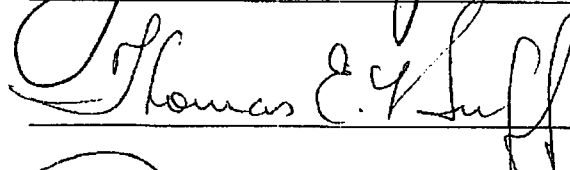
Venancio Diaz Perez, Appellant.

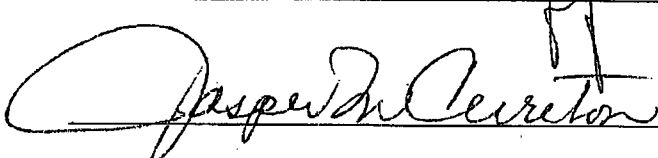
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ORDER

After careful consideration of both Appellant's and Respondent's petitions for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petitions for rehearing are denied.


C.J.


J.


A.J.

Columbia, South Carolina

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The Honorable J. C. Nicholson, Jr.

FILED

June 23, 2015