

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

Appellate Case No. 2016-001264

The State,Respondent

v.

Larry Durant,Appellant.

PETITION FOR REHEARING

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I. INTRODUCTION.

In addition to asking this Court to consider the continued validity *State v. Wallace*, 384 S.C. 428, 683 S.E.2d 275 (2009), Pastor Larry Durant presented two federal questions. The first federal question appearing on the record involves a coercive *Allen*¹ charge. In a footnote, pursuant to Rule 220(b), SCACR, this Court misapprehended the right of the non-deliberating juror, singled out by the trial judge’s instruction requiring the juror to vote, to cease deliberations as a way to resist the pressure of the majority. By way of a supplemental citation, Pastor Durant asked this Court to consider *Brewster v. Hetzel*, 913 F.3d 1042 (11th Cir. 2019). Once the rights of the non-deliberating juror are considered in the context of *Brewster*, the need to rehear this matter is apparent. Additionally, the trial judge’s instruction in Pastor Durant’s case did not take into account the comfort of the jurors, including access to food and sleep, and is, therefore, distinguishable from *Johnson v. Sam English Grading, Inc.*, 412 S.C. 433, 772 S.E.2d 544 (Ct. App. 2015).

Next, although strongly articulating the prosecution’s *Brady*² obligation to provide an accurate criminal history for its witness and acknowledging the nondisclosed “evidence was clearly favorable to Durant, as defense counsel could have used it to impeach McRae,” *Durant*, at 4, this Court misapprehended the materiality of this evidence, overlooked the fact that this case turned on the credibility of the witnesses, and misapplied the appropriate standard for a *Brady* violation by failing to consider the entire record, solely relying on the prosecution’s evidence, excluding from consideration the evidence presented by the defense.

¹ *Allen v. United States*, 164 U.S. 492 (1896).

² *Brady v. Maryland*, 373 U.S. 83 (1963).

Turning the Pastor Durant’s request for this Court to consider the continued validity of *Wallace*, the concurring opinion in *State v. Perez* pointed out this Court’s holding in *Wallace* “so expanded the admissibility of prior bad acts in sexual offense cases that the exception has swallowed the rule.” 423 S.C. 491, 501, 816 S.E.2d 550, 556 (2018) (Hearn, J., concurring). In *State v. Perry*, No. 2017-001965, 2020 WL 2179238 (S.C. May 6, 2020), a divided Court purported to overrule *Wallace* and *State v. Hallman*, 298 S.C. 172, 379 S.E.2d 115 (1989). The majority in *Perry*, however, succumbed to the temptation of creating a “new framework,” *State v. Cotton*, No. 2017-002402, 2020 WL 2179256, at 1 (S.C. May 6, 2020), for the admissibility of propensity evidence in child sexual offense cases when the prosecution claims a “purpose beyond propensity.” *Perry*, at 8. This Court’s opinions in *Perry*, *Cotton*, and *State v. Durant*, No. 2016-001264, 2020 WL 2179248 (S.C. May 6, 2020) so expanded the admissibility of prior bad acts in child sexual offense cases that the exception to the rule is now the rule, thinly veiled as “new framework,” *Cotton*, at 1, for the admission of propensity evidence in child sexual abuse cases. *Perry* and *Durant* merely changed the vocabulary for admissibility of bad character evidence from “a close degree of similarity,” *Wallace*, 384 S.C. at 433, 683 S.E.2d at 278, to “a particularly unique method of committing” crimes, *Durant*, at 4, without articulating the distinction between those terms.

Our state’s appellate courts are inconsistent in the application of the exception Rule 404(b) and *State v. Lyle* for “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.” 25 S.C. 406, ___ 118 S.E. 803, 807 (1923). Perhaps, these inconsistencies result from the absence of cases, since *Lyle*, defining the meaning of this exception. Subsection II(C)(5)

of this petition will request this Court to provide guidance about the meaning of this exception to *Lyle* and Rule 404(b) and define and distinguish the terms “similar,” “quite similar,” “strikingly similar,” “close degree of similarity,” and “particularly unique method.”

Despite a passing reference to Rule 403, SCRE, in *Perry*, at 11, and *Cotton*, at 1, neither of those cases provided any guidance about the role of Rule 403 in “the new framework” for the admissibility of propensity evidence in child sexual abuse offenses, and *Durant* does not mention Rule 403 at all. This Court should provide guidance about the role of Rule 403 under its “new framework” for the admission of propensity evidence in child sex offense cases.

Additionally, this Court completely ignored the role of a limiting instruction in the “new framework” for admissibility of propensity evidence in child sexual offense cases. This Court should provide guidance about the role of a limiting instruction under its “new framework” for the admission of propensity evidence in child sex offense cases.

Finally, this Court summarily dismissed the applicability of the cumulative error doctrine to this case. In doing so, this Court, for the first time, created a new requirement that cumulative error be raised at trial in order to be raised on appeal. This Court should reconsider this new rule.

Pastor Larry Durant, accordingly, petitions this Court for rehearing.

II. GROUNDS FOR REHEARING.

This Court overlooked or misapprehended the following points and should rehear this case pursuant to Rule 221, SCACR. This petition will begin by discussing the two federal questions in the order they appear in the record.

A. *Allen* Charge (Issue V).

Regarding the *Allen* charge, this Court concluded:

It is apparent the trial court did not err in directing the juror to fulfill the oath he took at the outset of trial, as the court did not urge the jurors to vote in any specific way. Moreover, the court's suggestion that the jurors would have to deliberate for as long as they wanted to be there that evening does not render the charge coercive.

Durant, at 6, fn. 6. This conclusion is error for four reasons.

Frist, pursuant to Rule 208(b)(7), SCACR, Pastor Durant called this Court attention to *Brewster v. Hetzel*, 913 F.3d 1042 (11th Cir. 2019) through a supplemental citation letter dated January 24, 2019; *see also* supplemental citation letter dated June 6, 2012, citing *State v. Taylor*, 427 S.C. 208, 216, 829 S.E.2d 723, 728 (Ct. App. 2019) (citing *Brewster*). *Brewster* reviewed the historical significance of the *Allen* charge, including the importance of not coercing jurors to vote a certain way, and observed, "Pressure on jurors, especially on holdout jurors, is increased when the instructions to keep trying to reach unanimity come from a judge who knows how split the jury is and in which direction." 913 F.3d 1054-55 (jurors initially divided 9 to 3 for conviction). Here, the trial judge knew the split of the jurors were divided 8 to 3 for conviction, with one juror not deliberating. Court's Ex. No. 2, R. 776.

Second, the trial judge branded the non-deliberating juror "not helpful to the situation at all" because the juror might "ensure that we have a mistrial if you continue to refuse to even vote even if the 11 other folks do reach a unanimous decision." The juror singled out by this instruction is similarly situated to the non-deliberating juror in *Brewster*, 913 F.3d at 1047 ("when told that the one juror who wouldn't vote to convict was doing crossword puzzles, the judge ordered all the reading materials").

Third, thirty-four minutes after the *Allen* charge, the jurors returned a verdict finding Pastor Durant guilty of second-degree criminal sexual conduct with a minor. R. 711-12. *Cf. Brewster*, 913 F.3d at 056 (“The final circumstance contributing to our conclusion that the verdict was coerced is how quickly the jury unanimously agreed on a verdict after the court’s last instruction and action. A verdict of conviction ‘bounced out’ of the jury room only 34 minutes after the last instruction from the judge” and 18 minutes after removing reading materials.).

Fourth, the trial judge instructed, “So in light of that, let me send you back. However long it is you want to take *this evening*, we’ll be here as long as you want to be here. You know, I’ll leave it at that.” R. 711 (emphasis added). When the trial court gave this instruction, the judge knew the jurors has made four unsuccessful attempts to reach a verdict. R. 776. The trial judge did not offer the jurors dinner, an opportunity to resume deliberations on a later date, or anything else for the comfort of the jurors. Thus, Pastor Durant’s case is distinguishable from *Johnson v. Sam English Grading, Inc.*, where the trial judge made provisions for the jurors’ comfort. 412 S.C. 433, 457, 772 S.E.2d 544, 556 (Ct. App. 2015) (“The trial court’s statement about ordering dinner and about his wife being out of town were not coercive. Additionally, the trial court was not going to force the jury to come back on Saturday; he also offered the option of Tuesday.”).

This Court, accordingly, should rehear this matter, reverse the conviction and sentence, and order a new trial.

B. *Brady* Violation (Issue IV).

This Court strongly articulated, “[T]he failure [of the State] to provide information that could be obtained through a NCIC search is a *Brady* violation.” *Durant*, at 4.³ This Court “agree[d] with the trial court that McRae’s conviction for obtaining a signature under false pretenses likely would have been admissible.” *Id.*, at 6. Yet, this Court concluded Pastor Durant “cannot demonstrate the evidence was material because there was not a reasonable probability the result of the proceedings would have been different,” noting “the defense never suggested that McRae—as opposed to Johnson—forged the deed” and “the State presented cumulative evidence in the form of the girls’ testimony.” *Id.* These conclusions are error for three reasons.

First, this Court did not review the entire record and consider the fact that this case turned on the credibility of witnesses. *E.g. State v. Anderson*, 413 S.C. 212, 219, 776 S.E.2d 76, 79 (2015) (finding prejudice when the “case turned solely on the credibility” of witnesses). The record in Pastor Durant’s case contains a lot of evidence raising reasonable doubts. Dr. Leonard testified Pastor Durant has erectile dysfunction and a chronic sexually transmitted disease. R. 640-46. None of the complaining witnesses had a sexually transmitted disease. Pastor Durant presented the testimony of two “armor bearers,” who testified there would not have been an opportunity for Pastor Durant to commit the sexual assaults, at the church, in a manner described by the four women. R. 570-80, 594-602.

Second, this Court erred by dismissing the importance of McRae to the State’s case because “the defense never suggested that McRae—as opposed to Johnson—forged the

³ Pastor Durant’s *Brady* motion requesting, “All information relevant to the credibility of any State witness,” and “[t]he criminal records, both juvenile and adult, of such witnesses.” R. 778.

deed.” *Durant*, at 6. Pastor Durant’s defense included McRae participating in a conspiracy with Johnson and the four women, all of whom are connected by family and social relationships, to frame him for committing the sexual offenses. As trial counsel pointed out during the hearing on the motion for a new trial, during the State’s “very effective closing argument,” the prosecutor argued the jurors “must believe what the outcry witness [McRae] stated because she happened to overhear it which gives [the State’s] theory credibility, that no one could have made up this entire theory.” R. 739. Trial counsel continued:

The problem with that, of course, as Your Honor yourself mentioned during sentencing, this was a credibility case, and in light of the credibility case, the jury could make a decision of either listening to the defense witnesses or listening to State witnesses. With Yolanda [McRae] as the outcry witness, being able to testify un-cross-examined about her criminal record.

R. 739-40. McRae’s criminal history, accordingly, undermined the credibility of the prosecution’s case.

Third, this Court did not correctly apply the standard for a *Brady* violation articulated in *United States v. Bagley*, 473 U.S. 667, 682 (1985) (“A ‘reasonable probability’ is a probability sufficient to undermine confidence in the outcome.”). *Bagley* modified the holding in *United States v. Agurs*, where the Supreme Court observed:

The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evince is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.

427 U.S. 97, 112-13 (1976). As discussed above, this Court did not evaluate McRae’s criminal history “in the context of the entire record,” as the opinion focused exclusively on the State’s case and excluded evidence presented by Pastor Durant. Consideration of Pastor Durant’s evidence is necessary to determine whether the ability to impeach McRae with her criminal record would “undermine confidence in the outcome,” *i.e.* would it “create[] a reasonable doubt that did not otherwise exist.” This case turned on the credibility of the witnesses, and, as seen above, the jurors were deadlocked after four votes. R. 776. Viewing the entire record, it is impossible for any court to say that impeaching the credibility of “outcry witness” with her criminal record would not have created a reasonable doubt.

This Court, accordingly, should rehear this matter, reverse the conviction and sentence, and order a new trial.

C. *Lyle* and Rule 404(b), SCRE (Issues I, II and III).

1. Traditional Application of Rule 404(b), SCRE.

The majority in *Perry* identified *Lyle*,⁴ which predated adoption of the South Carolina Rules of Evidence, as “the classic South Carolina case for understanding the

⁴ *Perry* cites four cases for our state’s continued reliance on *Lyle* for interpreting Rule 404(b), SCRE. The first is *State v. Anderson*, 318 S.C. 395, 403, 458 S.E.2d 56, 60 (Ct. App. 1995) (Howard, J., dissenting) (referring to *Lyle* as “the seminal case”). *Perry*, at 4. The majority in *Anderson* declined to sever the trial of a habitual traffic offense from the trial of driving under suspension (“DUS”) and driving under the influence (“DUI”) charges even though the habitual traffic offense charge required admission of prior convictions for DUS and DUI. The dissent in *Anderson*, citing *Lyle*, would have granted the severance because “the prejudicial effect of the admission of the prior DUI and DUS convictions in the trial on those offenses is obvious.” 318 S.C. at 403, 458 S.E.2d at 60 (Howard, J., dissenting). *Anderson*, accordingly, is more of a “severance case” than a “*Lyle* case.” If this Court decided *Anderson* in 2020, it very likely would require a bifurcated

admissibility of a defendant's other crimes.” *Perry*, at 4. “The substance of” our state’s “common law rules” regarding character evidence are codified in Rule 404, SCRE. *State v. Nelson*, 331 S.C. 1, 6, fn. 7, 501 S.E.2d 716, 719, fn. 7 (1998). Rule 404(b), “limits the use of evidence of other crimes, wrongs, or acts to those enumerated in” *Lyle*. Rule 404(b),

trial because of its holding in *State v. Cross*, 427 S.C. 465, 832 S.E.2d 281 (2019) (trial court committed error of law when it denied defendant’s motion to bifurcate trial).

The second case, *State v. Odom*, cited *Lyle* in a footnote to explain the State’s initial strategy was “to try [Odom] in Spartanburg County on other similar charges, and use the evidence gathered in the Oconee investigation as ‘prior bad acts’ evidence in the Spartanburg trial.” 412 S.C. 253, 260, fn. 5, 772 S.E.2d 149, 152, fn. 5 (2015). The State switched strategies and tried the Oconee County charges instead. *Odom* did not involve an Rule 404(b), SCRE issue on appeal; however, during a pretrial hearing regarding the State’s change in strategy, the prosecutor conceded, “There was gonna [sic] be potential *Lyle* evidence, and I don’t know that we would have ever gotten it in” if the case was tried in Spartanburg. *Id.*, 412 S.C. at 262, 772 S.E.2d at 153. Thus, other than reaffirming the validity of *Lyle* for interpreting Rule 404(b), *Odom* does not provide any guidance for interpreting that rule.

The third case is *State v. Cope*, 405 S.C. 317, 748 S.E.2d 194 (2013). Although citing *Lyle* as guidance for interpreting Rule 404(b), SCRE, *Cope* relied on *State v. Clasby*, which in turn relied on the *Wallace* test, *i.e.* whether the “similarities outweigh the dissimilarities” determines the admissibility under Rule 404(b). 385 S.C. 148, 155, 682 S.E.2d 892, 896 (2009). *Cope*, accordingly, is more of a “*Wallace* case” than a “*Lyle* case,” indicating *Cope* is no longer valid, despite the majority in *Perry* declining to “reconsider[] the results of prior cases.” *Perry*, at 6, fn. 5.

The fourth case, *State v. Nelson*, a leading case prohibiting propensity evidence in child sexual offense cases, rejected the prosecution’s contention the other bad act evidence was admissible “to show motive, intent, and a common scheme or plan.” 331 S.C. 1, 9, 501 S.E.2d 716, 720 (1998). Additionally, *Nelson* cited *State v. Alexander* as an example of when relevant evidence should be excluded when the danger of unfair prejudice substantially outweighs the probative value of the evidence and defining “[u]nfair prejudice” as “an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.” 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991) (internal quotations omitted) (citing Fed. R. Evid. 403 advisory committee's note). Although decided prior to our State adopting Rule 403, SCRE, *Alexander* is often cited when interpreting Rule 403. *E.g.* *State v. Langley*, 334 S.C. 643, 647, 515 S.E.2d 98, 100 (1999) (reversing murder conviction). As discussed in Section II(C)(3), *infra*, this Court should incorporate *Alexander*’s definition of “unfair prejudice” into the Rule 404(b), SCRE analysis.

SCRE, reporter's note. *Lyle* articulated the common scheme or plan exception as "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." 125 S.C. at ___, 118 S.E. at 807.

Lyle reasoned:

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

125 S.C. at ___ 118 S.E. at 811 (excluding the Georgia crimes as improper propensity evidence). By focusing on whether the other crimes established identity or criminal intent and focusing on whether the underlying facts of the other crimes offered proof of "an essential ingredient of the crime charged," *id.*, *Lyle* taught the bench and bar how to resist the temptation of using propensity evidence to secure a criminal conviction. In *Nelson*, this Court explained:

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

331 S.C. at 6, 501 S.E.2d at 718-19 (internal quotations and citations omitted) (emphasis added).

Traditionally, similarity is *not* a consideration for admissibility under *Lyle* and Rule 404(b), SCRE. Regarding the admissibility of prior crimes, this Court in *Lyle* warned about the dangerous temptation of focusing on similarity, *i.e.* propensity evidence, to secure a criminal conviction:

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

Lyle, 125 S.C. at 420, 118 S.E. at 808. In *Lyle*, this Court admitted the Aiken crimes, despite similarity, because of “the inference that the two extraneous crimes were committed within a few town blocks as to distance, and within a few minutes, as to time, of the crime charged, and that they were practically a part of the *res gestae*, each a part of one general scheme of a single expedition.” *Id.* Proof that *Lyle* committed the other crimes was logically connected to the charged crime “for the purpose of establishing the identity of the accused” and to refute an alibi defense. *Id.*

Under the traditional interpretation of *Lyle*, “[i]f the court does not clearly perceive the connection between the extraneous transactions and the crime charged, that is, its logical relevance, the accused should be given the benefit of the doubt, and the evidence rejected.” *State v. Brooks*, 341 S.C. 57, 61, 533 S.E.2d 325, 327-28 (2000). In *Brooks*, the State prosecuted Brooks from forging a check on November 11, 1996. The prosecution contended “evidence that Brooks had committed a prior forgery by writing a check on a closed account on September 25, 1995” was admissible under *Lyle* and as an exception to Rule 404(b), SCRE, to show absence of mistake or accident and intent in the current forgery.” *Id.*, 341 S.C. at 60-61, 533 S.E.2d at 327. Over Brooks’ objection, the trial court ruled “the evidence was proper because the two forgeries were ‘similar in that both

accounts were closed ... and either she knew, or should have known, that the account ... was closed.” *Id.* This Court held the 1995 forgery did not “disprove” Brooks’ defense to the 1996 charge or make it more probable “that Brooks forged *this check* or knew it was forged” and expressly found “the State introduced the prior act to demonstrate that Brooks acted in conformity with her propensity to commit crimes which is in direct contradiction of *Lyle*.” *Id.* 341 S.C. at 62, 533 S.E.2d at 328 (emphasis added) (citing *State v. Hough*, 325 S.C. 88, 480 S.E.2d 77 (1997) (by introducing prior bad act evidence, the State was attempting to demonstrate that because defendant had committed crimes in past, he was doing so on this occasion, precisely type of inference *Lyle* prohibits)).

In *Hough*, the State prosecuted Hough for the burglary of a warehouse and larceny of “two power saws and two flashlights.” 325 S.C. at 90, 480 S.E.2d at 78. This Court held testimony “concerning [Hough’s] prior instances of stealing to obtain crack money” was inadmissible as part of the *res gestae* and under *Lyle*. *Id.* 325 S.C. at 93, 480 S.E.2d at 80. This Court held “testimony concerning the subsequent sale of the saws and purchase of crack cocaine was properly admitted” because it “provides a motive for Hough to have committed the crime and would therefore be admissible under *Lyle*.” *Id.*, 325 S.C. at 95–96, 480 S.E.2d at 81.⁵

⁵ This Court also held the evidence “Hough bought one rock of crack cocaine with money used from the sale of the saws is simply insufficient to draw an inference that [he] ‘had a crack problem,’” as the Solicitor alleged during the State’s opening statement. *Hough*, 325 S.C. at 94, 480 S.E.2d at 80; *see also Robinson v. California*, 370 U.S. 660 (1962) (held state law which made ‘status’ of narcotic addiction a criminal offense for which offender might be prosecuted at any time before he reformed, and upon conviction required imprisonment of at least 90 days in a county jail, inflicted a ‘cruel and unusual punishment,’ in violation of the Fourteenth Amendment).

Because of cases like *Hough* and *Robinson*, this petition must address the shocking statement made by the dissent in *Perry*: “[C]hild molesters’ behavior is often repetitive and

Our Court of Appeals “has held that testimony of a prior drug sale [four days earlier] using a similar sales technique is not relevant to prove a single charge of distribution.” *State v. Carter*, 323 S.C. 465, 468, 476 S.E.2d 916, 918 (Ct. App. 1996) (citing *State v. Campbell*, 317 S.C. 449, 454 S.E.2d 899 (Ct.App.1994)). The Court of Appeals recognized, “[T]he State was not trying to prove a common scheme or plan, but was instead trying to convince the jury that because Carter sold crack cocaine [] on January 14th, he was selling crack cocaine on January 18th.” *Id.* “This is the precise type of inference prohibited by *Lyle*.” *Id.* *Campbell* applied an identical analysis.⁶

lends itself to establishing a pattern,” noting “certain sex crimes, such as criminal sexual conduct with a minor (via pedophilia), have made the short list of those crimes singled out for a specific diagnosis in the psychiatric community” in “the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-V).” *Perry*, at 26, fn. 37 (Kittredge, J., dissenting). This statement is shocking for at least three reasons. First, if the underlying concern is a medically diagnosable condition, then treatment should be favored over incarceration. Second, it applies a blanket diagnosis in child sex offense cases without requiring any proof that a particular person meets the diagnostic criteria of the diagnosis. Third, acceptance of this approach—labeling those accused of a child sex offense as mentally ill without a mental health evaluation—would completely abandon any limitation on the admissibility of propensity evidence in child sex offense cases. This statement also represents the first slide down a slippery slope embracing the temptation to use propensity evidence to solidify a criminal conviction. The DSM-V also contains diagnoses for alcohol and substance abuse disorders, kleptomania, and antisocial personality disorder. *But see. State v. Hamilton*, 344 S.C. 344, 543 S.E.2d 586 (Ct. App. 2001) (psychiatrist’s testimony regarding defendant’s antisocial personality disorder was not relevant, and, if relevant, should have been excluded as tending to confuse the jury), *overruled on other grounds by State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005).

⁶ The Court of Appeals’ opinion in *Wallace* called attention to our state’s sometimes inconsistent *Lyle* precedent and cited *Campbell* as “correctly reflect[ing] a more narrow interpretation of the common scheme or plan exception.” 364 S.C. at 139, 611 S.E.2d at 337. It is difficult to reconcile this Court denying *certiorari*, on July 26, 1995, in *Campbell*, 317 S.C. at 451, 454 S.E.2d at 901 (“Here, the testimony is of prior drug sales utilizing a *similar* sales technique. However, this is not enough to satisfy *Lyle*.” (emphasis added)), so soon after this Court, on March 27, 1995, decided *State v. Raffaldt*, 318 S.C. 110, 114, 456 S.E.2d 390, 392 (1995) (“Here, the record shows that the method of marijuana dealing between Raffaldt and Burchett was *quite similar* to the cocaine conspiracy. We find that the evidence of prior drug dealing between Raffaldt and Burchett, which gave rise to the

Returning to child sex offense cases, in *State v. Stokes*, Stokes “allegedly committed the lewd act when the child came to his home to purchase a frozen fruit-flavored treat sold to neighborhood children by appellant and his wife.” 279 S.C. 191, 192, 304 S.E.2d 814, 814 (1983). Over Stokes’ objection, “the trial judge allowed another child to testify [Stokes] had once offered her money to ‘meet him at the railroad tracks’” and speculate Stokes’ “purpose of the meeting, she was allowed to speculate that [he] intended to rape her.” *Id.* This Court reversed the conviction and held:

The “common scheme or plan” exception requires more than mere commission of two similar crimes by the same person. There must be some connection between the crimes. If there is any doubt as to the connection between the acts, the evidence should not be admitted. The record does not reveal any connection between the complained of evidence and the crime charged.

Id., 279 S.C. at 193, 304 S.E.2d at 815 (internal quotations omitted).

In fact, in other contexts, this Court recognized similarities inherently involved in child sex offense cases. In *Anderson, supra*, this Court approved of a procedure initially endorsed by the Court of Appeals in *State v. Brown*, of the prosecution “call[ing] and independent expert” who “did not examine” the child “to testify to the characteristics of victims” of child sex abuse. In *Brown*, the Court of Appeals approved of testimony by an independent expert explaining:

[C]hildren delay disclosing abuse for a number of reasons, including: (1) fear of consequences to themselves, the perpetrator, or someone the child loves; (2) the child’s age; (3) the child’s relationship to the perpetrator; (4)

cocaine transactions, was admissible as a common scheme or plan.” (emphasis added)). Likewise, it is difficult to reconcile *Raffaldt* with *State v. Gore*, 283 S.C. 118, 121, 322 S.E.2d 12, 13 (1984) (“When, as here, the previous alleged bad act is *strikingly similar* to the one for which the appellant is being tried, the danger of prejudice is enhanced.” (emphasis added)). For this reason, Section II(C)(5), *infra*, asks this court to define and distinguish the terms “similar,” “quite similar,” “strikingly similar,” “close degree of similarity,” and “particularly unique method.”

a lack of vocabulary or language to describe what has happened to them; (5) threats by the perpetrator; (6) grooming by the perpetrator; and (7) the perpetrator's normalization of the abusive conduct. [The expert] further explained that most disclosures happen accidentally, and children generally reveal more details over time throughout the disclosure process. When children suffer chronic abuse, [the expert] stated it is more difficult for them to sort out the timing of individual incidents and the order in which they occurred. [The Expert] also explained that having a close and trusting relationship with the perpetrator can have a very strong impact on whether a child feels like he or she can disclose the abuse. Finally, [the expert testified that child abuse victims will sometimes tolerate sexual abuse to maintain a relationship, particularly if the perpetrator is someone they love and trust.

411 S.C. 332, 337-38, 768 S.E.2d 246, 249 (Ct. App. 2015), *abrogated on other grounds* by *State v. Jones*, 423 S.C. 631, 817 S.E.2d 268 (2018). It is inconsistent for this Court, on one hand, to recognize child sex abuse cases contain dynamics so similar—including “grooming” and “close and trusting relationship with the perpetrator,” which often includes a perpetrator in a position of authority—that an expert who never examined the child is capable of providing testimony that can assist jurors and, then, on the other hand, say that a similarly situated accused “had a particularly unique method of committing his attacks.” *Durant*, at 4. As will be discussed in detail below, this Court’s opinions in *Perry*, *Durant*, and *Cotton* are not faithful to the *Lyle*, the Court of Appeals Opinion in *Wallace*, *People v. Romano* 84 A.D. 318, 319, 82 N.Y.S. 749, 749 (App. Div. 1903), or *People v. Molineux*, 168 N.Y. 264, 293, 61 N.E. 286, 294 (1901).

2. *State v. Wallace* and this Court’s Adoption of Special Rule in Child Sex Offense Cases.

The majority opinion in *Perry* cites with approval to the Court of Appeals’ opinion in *Wallace*. *State v. Wallace*, 364 S.C. 130, 139, 611 S.E.2d 332, 337 (Ct. App. 2005), *reversed by State v. Wallace*, 384 S.C. 428, 683 S.E.2d 275 (2009). Thus, it is important to understand the history of *Wallace*. As this petition will demonstrate, although the

majority opinion in *Perry* was generous in its praise of the Court of Appeals' opinion in *Wallace*, it was unfaithful to both the substance and spirit of that opinion. The Court of Appeals in *Wallace* reasoned:

In this case, the trial court did not address any connection between the two crimes to establish if the allegations by the victim's sister were admissible. The court instead ruled, "it goes to a common scheme or plan because of the close degree of similarity between the conduct, with regards to the two victims." When the State was asked to explain why the testimony was essential to its case, the solicitor responded:

This is technically a credibility case, that's what it is. It's one witness's word against potentially another witness's word. The evidence would be relevant and would be essential to the State's case because it is a piece of evidence, just like any other piece of evidence, that goes to prove or disprove the case. And this is strictly a credibility case: Therefore, this testimony is necessary to, again, prove the victim's allegations.

This argument could be used to admit testimony of any prior crime when a defendant is accused of a subsequent but similar crime. It falls far short of the threshold for the admission of a prior crime under the common scheme or plan exception to *Lyle*. Accordingly, the trial court erred in admitting the evidence on this basis.

364 S.C. at 141, 611 S.E.2d at 338. The Court of Appeals further reasoned, "It was also error for the trial judge to attempt to limit the testimony of the sister so that there *would* be a close similarity between the prior bad act and the crime charged" because "[t]he law should not permit a trial judge to make similar that which is different by redacting a part of the testimony." 364 S.C. at 141, 611 S.E.2d at 338 (emphasis original) (internal quotations omitted). The Court of Appeals concluded, "In addition to finding the admission of the sister's testimony error, we find the admission was not harmless" because "the outcome of this case rested on the credibility of the victim and Wallace." *Id.* 364 S.C. at 142, 611 S.E.2d at 338-39.

Regarding the requirement of a connection between the crime charged and the other bad act, the Court of Appeals opinion in *Wallace* documented the inconsistent interpretation of Rule 404(b), SCRE and *Lyle* by our state's appellate courts:

Wallace argues that numerous opinions from both this court and the South Carolina Supreme Court have focused exclusively on the close degree of similarity between the crime charged and the evidence of the other crime, without mentioning the "system" or relation between the two, which is the crux of the original exception. *See, e.g., State v. Hallman*, 298 S.C. 172, 175, 379 S.E.2d 115, 117 (1989) ("We find the evidence of prior bad acts bears such close similarity to the offense charged in this case that its probative value clearly outweighs its prejudicial effect."); *State v. McClellan*, 283 S.C. 389, 392, 323 S.E.2d 772, 774 (1984) ("Such evidence is inadmissible 'unless the close similarity of the charged offense and the previous act enhances the probative value of the evidence so as to overrule the prejudicial effect.' "); *State v. Patrick*, 318 S.C. 352, 356 457 S.E.2d 632, 635 (Ct.App.1995) ("There are sufficient similarities between the Georgia case and present case to apply the *Lyle* common scheme or plan exception."); *State v. Blanton*, 316 S.C. 31, 32, 446 S.E.2d 438, 439 (Ct.App.1994) ("The prior acts were sufficiently similar to the charged offense to be admissible."); *State v. Wingo*, 304 S.C. 173, 176, 403 S.E.2d 322, 324 (Ct.App.1991) (finding the evidence of prior bad acts tended to show common plan or scheme when the experiences of each victim paralleled that of the other victims).

According to Wallace, other decisions correctly reflect a more narrow interpretation of the common scheme or plan exception. *See, e.g., State v. Brooks*, 341 S.C. 57, 62, 533 S.E.2d 325, 328 (2000) ("When the prior bad acts are similar to the one for which the appellant is being tried, the danger of prejudice is enhanced."); *State v. Parker*, 315 S.C. 230, 233, 433 S.E.2d 831, 832 (1993) ("[T]he connection between the prior bad act and the crime must be more than just a general similarity."); *State v. Rogers*, 293 S.C. 505, 507, 362 S.E.2d 7, 8 (1987) (stating that where the acts are ten years apart and the only connection between the testimony of the two daughters was that the defendant touched them both, the prior bad act evidence should have been excluded), *overruled on other grounds by State v. Schumpert*, 312 S.C. 502, 506 n. 1, 435 S.E.2d 859, 862 n. 1 (1993); *State v. Nix*, 288 S.C. 492, 496, 343 S.E.2d 627, 629 (1986) (finding where the robbery could not have been committed without the get-away-car, the relevance of the car theft to the crimes charged was easily perceived); *State v. Stokes*, 279 S.C. 191, 192-93, 304 S.E.2d 814, 814-15 (1983) (concluding the trial judge erred in admitting testimony from a witness who speculated that the defendant intended to rape her because there was no connection made between that prior bad act and the act for which the defendant was

charged); *State v. Whitener*, 228 S.C. 244, 265, 89 S.E.2d 701, 711 (1955) (allowing testimony of another sexual act perpetrated against the same victim some hours after the original offense because the crimes were so related to each other that proof of one tended to establish the other); *State v. Hubner*, 362 S.C. 572, 608 S.E.2d 463 (Ct. App. 2005)⁷ (stating that the similarity between separate acts must not merely be a similarity in the results; “[r]ather, there must be such a concurrence of common features that the various acts are normally to be explained as caused by a general plan of which they are the individual manifestations”); *State v. Carter*, 323 S.C. 465, 468, 476 S.E.2d 916, 918 (Ct. App. 1996) (reversing defendant’s conviction where there was no legal connection between the prior bad act and the crime charged); *State v. Campbell*, 317 S.C. 449, 451, 454 S.E.2d 899, 901 (Ct. App. 1994) (finding absent a connection between the two acts, the testimony of prior drug sales utilizing a similar sales technique precisely the type of evidence *Lyle* prohibits).

Wallace is correct that some of the appellate decisions appear to focus exclusively on the alleged close similarity between the other crime and the crime charged, while others look beyond mere close similarity to consider the system or connection between the two. Nevertheless, sorting out any apparent inconsistencies in the appellate decisions of this state is not the province of this court. See *M & T Chems., Inc. v. Barker Industries, Inc.*, 296 S.C. 103, 109, 370 S.E.2d 886, 890 (Ct.App.1988) (stating that an intermediate appellate court has no authority to change existing law, but maintaining that the supreme court may want to grant certiorari and modify previous decisions).

364 S.C. at 139, fn. 2, 611 S.E.2d at 337, fn. 2 (internal footnote added). Thus, the Court of Appeals in *Wallace* invited this Court to overrule the cases listed in the opening paragraph of footnote 2, to wit: *Hallman, McClellan, Patrick, Blanton, and Wingo*.

Significantly, the Court of Appeals in *Wallace* further recognized, “[T]he appellate courts of this state have refused to recognize a specific exception to the inadmissibility of prior bad act evidence in criminal sexual conduct cases.” *Id.* 364 S.C. at 139, 611 S.E.2d at 337 (citing *Nelson*).

⁷ On the same day as its opinion in *Wallace*, this Court reversed the Court of Appeals in *Hubner* based on its holding in *Wallace*. *State v. Hubner*, 384 S.C. 436, 437, 683 S.E.2d 279, 280 (2009).

This Court reversed the Court of Appeals in *Wallace* and held (1) “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;” (2) “When the similarities outweigh the dissimilarities, the bad act evidence is admissible under Rule 404(b);” and (3) “A close degree of similarity establishes the required connection between the two acts and no further ‘connection’ must be shown for admissibility.” 384 S.C. 428, 433-34, 683 S.E.2d 275, 277-78. This Court’s opinion in *Wallace*, requiring trial courts to weigh similarities and differences of bad acts not only abandoned the requirement of logical relevancy of the other crime but also led to the practice of prosecutors and criminal defense lawyers quibbling over the number and types of similarities and differences—much like what occurred in Pastor Durant’s Rule 404(b), SCRE hearing (R. 83-95)—limited only by the attorneys’ creativity. This approach allows courts to engage in a result-oriented process of cherry-picking facts to support admissibility or inadmissibility.

The dissent in *Wallace* demonstrated this Court has “repeatedly held in non-sexual offense cases that, the mere presence of similarity only serves to enhance the potential for prejudice,” observed this Court’s “cases holding that evidence of other acts of sexual misconduct is admissible in a trial for criminal sexual conduct with a minor as a common scheme or plan under Rule 404(b), SCRE, have, in effect, created an exception to the rule’s exclusion of propensity evidence,” and recommended that, if this Court is “to permit the admission of propensity evidence in these types of cases, then [it] should propose a new

rule of evidence, and encourage public comment.” 384 S.C. at 435-36, 683 S.E.2d at 279 (Pleicones, J., dissenting).

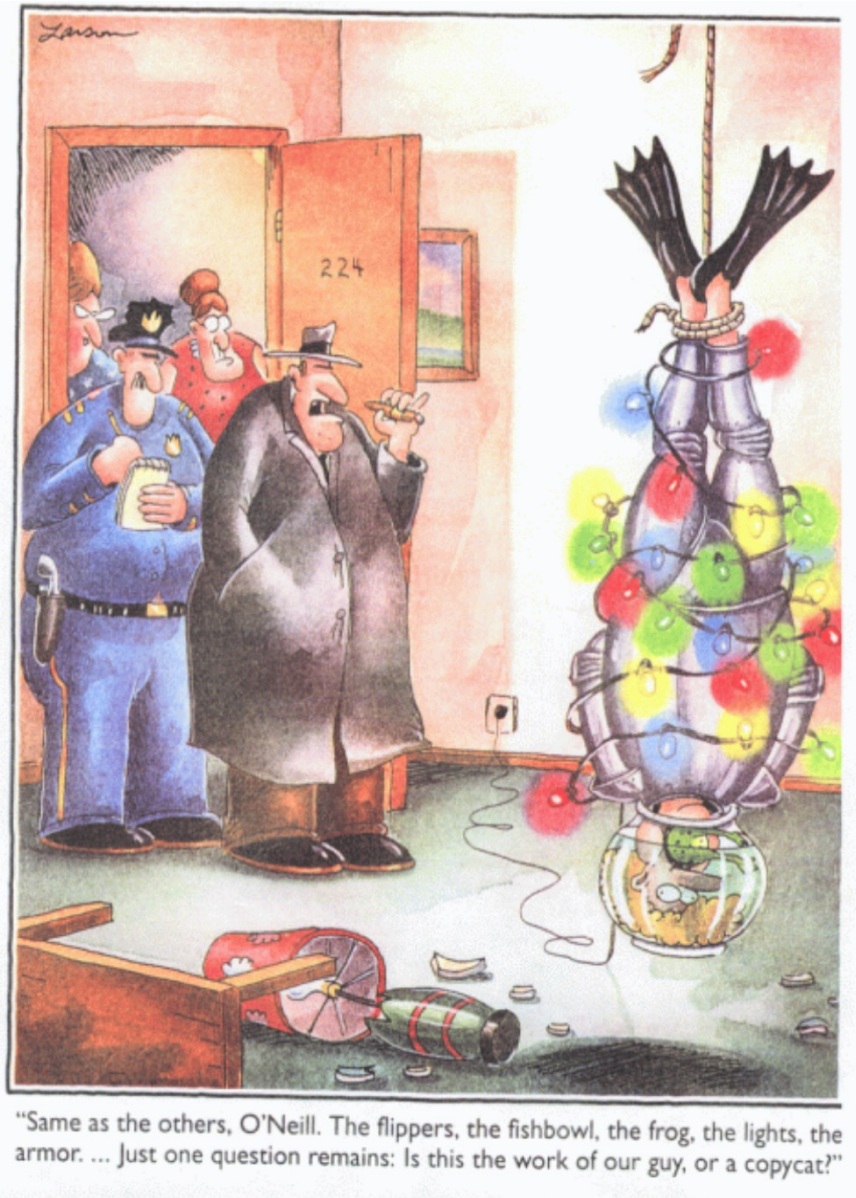
The concurring opinion in *Perez* echoed the dissent in *Wallace*, asserting, “*Wallace* broadened the common scheme or plan exception to such an extent that it no longer has a meaningful exclusionary effect in sexual offense cases.” 423 S.C. at 502, 816 S.E.2d at 556. And, “Without requiring a greater degree of connection beyond only a mere similarity, the exception has been enlarged such that it has become simply a means to prove a defendant’s criminal propensity.” *Id.* 423 S.C. at 502-03, 816 S.E.2d at 556-57. The concurring opinion in *Perez* opinion recognized “this Court has repeatedly warned of the prejudicial dangers stemming from the introduction of prior bad acts which are similar to the one for which the defendant is being tried” and recommended, “[a]bsent an amendment to our rules of evidence creating a different categorical rule for sexual offenses, [this Court should] apply the common scheme or plan exception equally to sexual and nonsexual offenses alike.” *Id.*

Against this backdrop, this Court agreed to consider *Perry*, *Durant*, and *Cotton* and granted motions to argue against the precedent, pursuant to Rule 217, SCACR.

3. *State v. Perry* and the Adoption of a “New Framework” for the Admissibility of Propensity Evidence in Child Sex Offense Cases.

The majority opinion in *Perry* purports to return to the reasoning of *Lyle*, stating its “focus is on restoring the integrity of the Rule 404(b) analysis.” *Perry*, at 6, fn. 5. In reality, *Perry* articulated a “new framework,” *Cotton*, at 1, for the admissibility of propensity evidence in child sex offense cases by endorsing the admissibility of propensity evidence when the prosecution claims a “purpose beyond propensity.” *Perry*, at 8. Although acknowledging “evidence the defendant committed similar criminal acts has the

inherent tendency to show [] propensity,” the majority opinion in *Perry* gratuitously declares, “The stepdaughter’s testimony was clearly relevant because if Perry committed similar acts of sexual abuse against a minor in the past, he was more likely to have done it this time too.” *Perry*, at 2-3. This *Far Side* Cartoon by Gary Larson exposes the fallacy this assertion and illustrates the inherent danger of unfair prejudice of propensity evidence:



Thus, the similarity of the crimes does not make it more probable that “our guy” committed this crime as opposed to “a copycat.” Proof of the identity of the person recently

stealing this particular set of armor, however, would establish “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*, 125 S.C. at ____, 118 S.E. at 807; *cf. Nix*, 288 S.C. at 496, 343 S.E.2d at 629 (“car theft occur[ing] within a short time, approximately two hours, before the robbery” was “so related to the charged crimes that they constitute evidence that there was a common scheme or plan between the crimes” as the stolen car was used to commit “the armed robbery, kidnapping and rape”).

The majority in *Perry* even addressed the concern raised by the Court of Appeals in *Wallace*, regarding trial courts “limit[ing] the testimony [] so that there *would* be a close similarity between the prior bad act and the crime charged,” *Wallace*, 364 S.C. at 141, 611 S.E.2d at 338 (emphasis original), by decreeing “[s]imilarity can be important to meeting that burden” of admissibility but is no longer required. *Perry*, at 11. Going forward, prosecutors will have three options: (1) the accused has “a particularly unique method of committing” crimes, *Durant*, at 4; (2) the similarities are “important to meeting that burden” of admissibility, *Perry*, at 11, but the trial court does not need to consider differences; or (3) the absence of similarity is irrelevant because the State claims a “purpose beyond propensity,” *Perry*, at 8, under the “new framework” for admissibility of propensity evidence in child sex offense cases. Prosecutors no longer will wonder, “There was gonna [sic] be potential *Lyle* evidence, and I don’t know that we would have ever gotten it in.” *Odom*, 412 S.C. at 262, 772 S.E.2d at 153 (quoting the prosecutor).

In its zeal to create a “new framework” for admission of propensity evidence in child sex abuse cases, the majority in *Perry*, at 8, accepted the government’s invitation to chase a red herring when it cited *State v. Benton*, 338 S.C. 151, 526 S.E.2d 228 (2000),

while ignoring the limitations this Court has placed on admissibility of evidence under *Benton* to avoid unfair prejudice caused by propensity evidence. As the majority in *Perry* pointed out, *Benton* affirmed the admission of prior burglary convictions to prove an the element of first-degree burglary under S.C. Code Ann. § 16-11-311(A)(2). *Benton*, however, imposed limitations on the use of the evidence:

To ensure a defendant is not convicted on an improper basis while allowing the State to prove the elements of first degree burglary, the trial court should limit evidence to the prior burglary and/or housebreaking convictions, as it did here. Particular information regarding the prior crimes should not be admitted. Additionally, the trial court, as it did here, should, on request, instruct the jury on the limited purpose for which the prior crime evidence can be considered.

338 S.C. at 156, 526 S.E.2d at 230-31 (citing Rule 105, SCRE). This Court subsequently limited the number of prior burglary convictions the prosecution could introduce to establish the elements of first-degree burglary. *State v. James*, 355 S.C. 25, 32, 583 S.E.2d 745, 748 (2003) (“trial court did not weigh the probative value of the seven prior convictions against their prejudicial impact”).

This Court recently distinguished *Benton* and *James* in *Cross* when it recognized “the inherently prejudicial stigma a prior sex-related offense undoubtedly carries.” 427 S.C. at 478, 832 S.E.2d at 288 (trial court committed error of law when it denied defendant’s motion to bifurcate trial). Notably, *Benton* and *James* do not allow the prosecution to introduce facts of the prior burglaries. By contrast, the very nature of the exceptions to Rule 404(b) allows the government to introduce the underlying facts of the other bad acts.⁸ *Benton*, accordingly, does not support the “new framework” for the

⁸ In fact, outside of the *Benton* context, when presented with *Lyle* evidence, jurors ordinarily are not told whether the other bad act resulted in a conviction or is subject of a pending criminal charge. This reality is precisely why this Court erred when it did not

admissibility of propensity evidence in child sex abuse cases. *Cross*, in fact, stated, “Our holding has no effect upon questions of admissibility of a prior conviction when introduction of such evidence is sought pursuant to Rule 404(b), SCRE.” 427 S.C. at 484, 832 S.E.2d at 291. The majority opinion in *Perry* does not explain why the *Benton-James-Cross* line of cases is now applicable to the “new framework,” *Cotton*, at 1, in child sex offense cases.⁹

Benton, *James*, and *Cross*, however, illustrate the significance of two glaring omissions in this Court’s “new framework” for admitting propensity evidence in child sex offense cases, to wit: (1) the absence of any meaningful guidance from this Court regarding the role of Rule 403, SCRE, and (2) the failure of this Court to discuss the role of a limiting instruction. Each of these omissions are discussed below.

First, *Benton* employed a Rule 403, SCRE analysis, and the holdings in *James* and *Cross* turned on Rule 403. By contrast, *Perry*, *Durant*, and *Cotton* omit the role of Rule 403 when determining the admissibility of other bad acts. The majority in *Perry*, in passing, stated, “The State must also convince the trial court that the probative force of the

reverse the trial court for mistakenly announcing the other charges to the jurors (Issue I). *Durant*, at 6, fn. 6. The curative instruction did not “unring the bell.” *State-Record Co. v. State*, 332 S.C. 346, 356, fn. 19, 504 S.E.2d 592, 597, fn. 19 (1998) (internal quotations omitted); cf. *Cross*, 427 S.C. at 832 S.E.2d at 290 (“limiting instructions are sometimes insufficient to cure the danger of unfair prejudice”). Additionally, that trial judge’s announcement is cumulative to the inherently prejudice propensity evidence admitted in the trial is grounds to reverse, not affirm. *See, e.g., State v. Barrett*, 299 S.C. 485, 487, 386 S.E.2d 242, 243 (1989) (“The State contends that any error here was harmless in that Thomas’ testimony was merely cumulative to Victim’s. To the contrary, it is precisely this cumulative effect which enhances the devastating impact of improper corroboration.”).

⁹ Based on *Cross*, it is foreseeable that an accused move—and a trial court will grant a motion—for a bifurcated trial of a first-degree burglary charge when the prosecution relies on prior burglary convictions as an element of the crime.

evidence when used for this legitimate purpose is not substantially outweighed by the danger of unfair prejudice from the inherent tendency of the evidence to show the defendant's propensity to commit similar crimes.” *Perry*, at 11, (citing Rule 403, SCRE). Perhaps because it reversed the convictions, *Perry* did not offer any meaningful explanation of Rule 403 under this Court’s “new framework” for the admissibility of propensity evidence in child sex abuse offenses. The telling sign that the trial courts are free to disregard (or gloss over) the Rule 403 in child sex offense cases is this Court mentioning Rule 403 in *Cotton*, without providing any Rule 403 analysis, despite acknowledging it was applying a “new framework” specific to child sex offense trials. This Court failed to cite Rule 403 at all in *Durant*, let alone provide any analysis under the “new framework.” This Court should incorporate definition of “unfair prejudice,” set forth in *Alexander* into Rule 404(b), SCRE analysis.

Second, *Benton*, *James*, and *Cross* all recognize the significance of a limiting instruction. Prior to *Perry*, *Durant*, and *Cotton*, this Court required an instruction limiting the use of Rule 404(b) evidence. *State v. Timmons*, 327 S.C. 48, 54-55, 488 S.E.2d 323, 326 (1997) (“general rule is that when evidence of other crimes is admitted for a specific purpose, the judge is required to instruct the jury to limit their consideration of this evidence for the particular purpose for which it is offered”). The exception to the requirement of a limiting instruction is when “evidence of another crime formed part of the *res gestae*.” *Id.*, 327 S.C. at 55, 488 S.E.2d at 327; *see, e.g., Nix*, 288 S.C. at 496, 343 S.E.2d at 629 (“car theft occur[ing] within a short time, approximately two hours, before the robbery” was “so related to the charged crimes that they constitute evidence that there was a common scheme or plan between the crimes” as the stolen car was used to commit “the armed robbery,

kidnapping and rape”).¹⁰ The other bad acts held admissible in *Durant* and *Cotton* were not a part of the *res gestae*. Thus, the bench and bar would benefit from this Court stating whether a limiting instruction is part of the “new framework” for the common scheme or plan exception to Rule 404(b) in child sex offense cases. If a limiting instruction is still required under new framework” specific to child sex offense trials, then this Court should articulate the language of such instruction that would eliminate the inherent danger of unfair prejudice resulting from propensity evidence. *But see, Cross*, 427 S.C. at 832 S.E.2d at 290 (“limiting instructions are sometimes insufficient to cure the danger of unfair prejudice”). It seems easy to craft an instruction limiting the use of another bad act to identity, motive, or absence of misstate. It seems much more difficult to craft a limiting instruction for limiting the use of evidence admitted precisely because it is similar without further exacerbating the danger of unfair prejudice from propensity evidence. Or, this Court could avoid the impossible challenge by recognizing similarity plays no role in determining whether the two crimes are 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. Such an approach is faithful to *Lyle, Molineux*,¹¹ *Romano*, and the Court of Appeals opinion in *Wallace*.

¹⁰ Pastor Durant consistently offered *Nix* as a classic example of the common scheme or plan exception to Rule 404(b), SCRE. R. 86; Final Brief of Appellant, at 10-11, fn. 8; Oral Argument, beginning at 5:20.

¹¹ The dissent in *Perry* attempts to distinguish *Molineux* because “the motive behind each murder was entirely distinct.” *Perry*, at 24, (Kittredge, J., dissenting). The dissent in *Perry*, however, does not attempt to distinguish *Romano* where robbery was the motive of both crimes.

Next, the majority's praise of the Court of Appeals' opinion in *Perry* suggests a majority of this Court believes it should have affirmed the Court of Appeals in *Wallace*. This Court's "new framework" specific to child sex offense trials, however, would not have excluded the bad character evidence in *Wallace*. Wallace's stepdaughter alleged the sexual abuse began when she was twelve years old and continued until she reported the abuse when she was in the ninth grade. *Wallace*, 364 S.C. at 133, 611 S.E.2d at 334. The Trial Court admitted testimony of the stepdaughter's older sister who alleged Wallace began sexually abusing her when she was in the "sixth or seventh grade" and "continued until she moved out of the family home during her second semester in college." *Id.*, 364 S.C. at 134-35, 611 S.E.2d at 334-35. Under *Perry* and *Durant*, a court could conclude Wallace had "a particularly unique method of committing" crimes and admit the evidence under this Court's "new framework" for the admissibility of propensity evidence in child sex offense cases.

Additionally, the "new framework" adopted in *Perry*, *Durant*, and *Cotton* would not have excluded the evidence in *Romano* and *Molineux*. In *Romano*:

The crime of which the defendant was convicted was committed by throwing snuff in the eyes of the complainant at the time of the robbery. The prosecution, for the purpose, as it now claims, of establishing the identity of the defendant, offered proof to show that about three weeks prior to the commission of the offense for which the defendant was on trial he committed another robbery at the same place, upon another person, by the use of the same means.

84 A.D. 318, 319, 82 N.Y.S. 749, 749 (App. Div. 1903). Under *Perry* and *Durant*, a trial court could conclude *Romano* had "a particularly unique method of committing" crimes and admit the evidence. Such a result would be unfaithful to *Romano*'s admonition:

There is always more or less of similarity between the commission of independent crimes of this class, and in many instances features that are

common to one are found in the other; and yet it has never been supposed that, where there was separation as to time and no connection established beyond that of place and similarity, the first crime was admissible to establish any of the elements which constituted the other.

84 A.D. at 320, 82 N.Y.S. at 750.

The Court of Appeals opinion in *Wallace* summarized the facts in *Molineux*,

The defendant was accused of murder by sending poison contained in a bottle of Bromo Seltzer through the mail to the director of the Knickerbocker Athletic Club. The director, Harry Cornish, believing the silver “Tiffany’s” bottle holder containing the bottle of Bromo Seltzer to be a Christmas gift, took it to his home. Thereafter, a member of his household, Katharine Adams, took some of the bottle's contents to relieve a headache and died. At trial, the State sought to introduce into evidence that the defendant was responsible for the previous death of Henry Barnet, who died at the Knickerbocker Athletic Club after taking a dose of a powder he had received in the mail the month before Cornish received his bottle. Both powders were in fact cyanide of mercury, a rare and deadly poison. The evidence of the prior crime was admitted in the trial court.

364 S.C. at 137-38, 611 S.E.2d at 336 (internal citations omitted). By applying “a particularly unique method” test, the “new framework” created by *Perry*, *Durant*, and *Cotton* would hold this evidence admissible. The New York Court of Appeal, of course, held the other crime inadmissible and reversed the conviction, warning:

Logically, the commission of an independent offense is not proof in itself of the commission of another crime. Yet it cannot be said to be without influence on the mind, for certainly if one be shown to be guilty of another crime equally heinous, it will prompt a more ready belief that he might have committed the one with which, he is charged. It therefor predisposes the mind of the juror to believe the prisoner guilty.

Molineux, 168 N.Y. 264, 293, 61 N.E. 286, 294 (1901). Regarding the common scheme or plan, *Molineux* observed:

It sometimes happens that two or more crimes are committed by the same person in pursuance of a single design, or under circumstances which render it impossible to prove one without proving all. To bring a case within this exception to the general rule which excludes proof of extraneous crimes, there must be evidence of system between the offense on trial and the one

sought to be introduced. They must be connected as parts of a general and composite plan or scheme, or they must be so related to each other as to show a common motive or intent running through both. Underhill, in his work on Criminal Evidence (section 88), thus states this exception to the general rule: ‘No separate and isolated crime can be given in evidence. In order that one crime may be relevant as evidence of another, the two must be connected as parts of a general and composite scheme or plan. Thus the movements of the accused prior to the instant of the crime are always relevant to show that he was making preparations to commit it. Hence on a trial for homicide it is permissible to prove that the accused killed another person during the time he was preparing for or was in the act of committing the homicide for which he is on trial. And, generally, when several similar crimes occur near each other, either in time or locality,—as, for example, several burglaries or incendiary fires upon the same night,—it is relevant to show that the accused, being present at one of them, was present at the other, if the crimes seem to be connected. Some connection between the crimes must be shown to have existed in fact and in the mind of the actor, uniting them for the accomplishment of a common purpose, before such evidence can be received. This connection must clearly appear from the evidence. Whether any connection exists is a judicial question. If the court does not clearly perceive it, the accused should be given the benefit of the doubt, and the evidence rejected. The minds of the jurors must not be poisoned and prejudiced by receiving evidence of this irrelevant and dangerous description.’

168 N.Y. at 305-06, 61 N.E. 286 at 299. Thus, *Perry*, *Durant*, and *Cotton* are unfaithful to *Romano* and *Molineux*.

Finally, the dissent in *Perry* observed, “[I]n affirming the admission of Rule 404(b) common scheme or plan evidence in *Durant* and *Cotton*, [*Perry*’s] decision overruling *Wallace* may not foreshadow a significant change in the admission of Rule 404(b) evidence in our trial courts.” *Perry*, at 12 (Kittredge, J., dissenting). In reality, the decisions in *Perry*, *Durant*, and *Cotton*, foreshadow the expanded admission of propensity evidence under this Court’s “new framework” specific to child sex offense trials.

4. *State v. Durant*.

During the Rule 404(b), SCRE hearing, the State represented, “The specific exception in this case that we’re contending this evidence is admissible under is the

common scheme or plan exception.” R. 79. The other Rule 404(b) exceptions—motive, identity, the absence of mistake or accident, and intent—were not an issue in the case.¹² Thus, the only issue should be whether the testimony of the other three girls 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*, 125 S.C. at ____, 118 S.E. at 807. Instead of analyzing this issue under *Lyle*, this Court purportedly considered “whether the admission of the other three girls’ testimony can nonetheless be upheld under” its “new framework” for admissibility of propensity evidence in child sex offense cases. *Durant*, at 3. Although this Court purported to abandon the “mathematical exercise [endorsed by *Wallace*] where the number of similarities and dissimilarities are counted,” *Durant*, at 3, the opinion in *Durant* merely changed the vocabulary for admissibility of bad character evidence from “a close degree of similarity,” *Wallace*, 384 S.C. at 433, 683 S.E.2d at 278, to “a particularly unique method of committing” crimes, *Durant*, at 4, without articulating the distinction between those terms.

As this Court noted, Pastor Larry Durant’s trial was “conducted under *Wallace*.” *Durant*, at 3.¹³ He, accordingly, argued against the continued validity of *Wallace* and engaged in a “mathematical exercise” approved by *Wallace*, illustrating the dissimilarities outweighed the similarities, even providing the trial judge with five charts illustrating how the dissimilarities outweighed the similarities. R. 83-95. After declaring Pastor Durant

¹² None of the other exceptions to Rule 404(b), SCRE are even arguably implicated by the evidence in the case. As the dissent in *Perry* acknowledged, “Where, as here, the question is whether the sexual abuse occurred at all, and not who the perpetrator was, the identity exception does not apply.” *Perry*, at 23 (Kittredge, J., dissenting).

¹³ At trial, pastor Durant argued the other allegations were not admissible even under *Wallace*, which is Question III in this appeal.

“had a particularly unique method of committing his attacks common to all the girls,” this Court conceded “there were differences in their ages and the type of sex act,” *Durant*, at 4, and ignored five charts comparing dissimilarities and similarities. In doing so, this Court most certainly did not employ the same analysis regarding age as the majority did in *Perry* that allowed the majority and dissent to quibble over whether there was a meaningful difference in the ages of the girls at the time of the assaults. Compare *Perry*, at 8 (“This is a clever attempt to make dissimilarities sound similar, but assaulting one child beginning at age five to seven and another at age ten or eleven is not a similarity. Perry began assaulting the stepdaughter at age nine, which is not similar to age five. Age nine may be similar to ten, but in terms of the age at which a sexual predator begins sexually assaulting a daughter, ages nine and seven hardly seem to show ‘a close degree of similarity.’”) with *Perry*, at 18 (Kittredge, J., dissenting) (“In its pursuit to show dissimilarities, the majority implies there was a large gap in the age of onset of abuse among the children.”). Candidly, this Court should explain, under its “new framework” for admissibility of propensity evidence in child sex offense cases, how its quibbling over similarities and dissimilarities in age is any different from the “mathematical exercise [endorsed by *Wallace*] where the number of similarities and dissimilarities are counted.” *Durant*, at 3. This approach has the ultimate effect of allowing courts to engage in a result-oriented process of cherry-picking facts supporting admissibility, while ignoring factors militating against admissibility.

Additionally, this Court did not provide Pastor Durant with any notice or an opportunity to respond to the allegation that he “had a particularly unique method of committing his attacks,” *Durant*, at 4, as this Court had not previously articulated this test.

At a hearing to determine whether he has “a particularly unique method of committing his attacks,” presumably, the prosecution would be required to present evidence that no other pastor or church leader has ever committed a child sex offense in a manner similar enough to undermine the “uniqueness” of Pastor Durant’s alleged assaults. Now that undersigned counsel understands this Court’s focus on *McClellan*, see Subsection II(C)(6), *infra*, at a hearing, Pastor Durant would point out this Court’s comparison of the allegations against him with *McClellan* undermines any argument that either he or McClellan had “a particularly unique method of committing [their] attacks.”

Consider also the Court of Appeals’ opinion in *Hubner*, cited with approval in footnote 2 of the Court of Appeals opinion in *Wallace*, which this Court reversed the same day it overruled the Court of Appeals in *Wallace* because of this Court’s holding in *Wallace*. *Hubner*, a child sex offense case, involved the admissibility of a prior sexual assault. How would this Court resolve *Hubner* today? Presumably, this Court would not employ a “mathematical calculation” to determine whether the similarities outweigh the dissimilarities. Would it quibble over the similarities or dissimilarities as the majority and dissent did in *Perry*? Would it ignore the dissimilarities identified by the Court of Appeals but ignored by this Court in *Wallace* and, instead, declare *Hubner* “had a particularly unique method of committing his attacks,” as it did in *Durant*, at 4. We may never know the answer to these questions because the majority opinion in *Perry* declined to “reconsider[] the results of prior cases,” other than *Hallman*. *Perry*, at 6, fn. 5. This inquiry not only questions the accuracy of labeling any crime “particularly unique,” but also illustrates why similarity has never been the test for “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*, 125 S.C. at ___, 118 S.E. at 807; *see also* Larson, *Far Side Cartoon*, *supra*, at p. 21.

This Court’s holding in *Durant* is unfaithful to the Court of Appeals opinion in *Wallace* for four significant reasons. First, as noted above, the Court of Appeals in *Wallace* rejected the State’s contention that, in a credibility case, *Lyle* “testimony is necessary to [] prove the victim’s allegations,” noting, “This argument could be used to admit testimony of any prior crime when a defendant is accused of a subsequent but similar crime.” And, “It falls far short of the threshold for the admission of a prior crime under the common scheme or plan exception to *Lyle*.” 364 S.C. at 141, 611 S.E.2d at 338. Pastor *Durant*’s trial turned on the credibility of the witnesses, a fact our appellate courts ordinarily consider when discussing harmless error, a the Court of Appeals did in *Wallace*, 364 S.C. at 142, 611 S.E.2d at 338-39 (“In addition to finding the admission of the sister’s testimony error, we find the admission was not harmless” because “the outcome of this case rested on the credibility of the victim and *Wallace*.”); *see also* *Anderson*, 413 S.C. at 219, 776 S.E.2d at 79 (finding prejudice when the “case turned solely on the credibility” of witnesses). Second, the Court of Appeals in *Wallace* recognized, “The law should not permit a trial judge to make similar that which is different” 364 S.C. at 141, 611 S.E.2d at 338. *Durant* committed this error when it declared Pastor “*Durant* had a particularly unique method of committing his attacks common to all the girls” and then proceeded to ignore the “differences in their ages and the type of sex act.” *Durant*, at 4. Third, *Durant* relied on *McClellan*, despite the Court of Appeals opinion in *Wallace* inviting this Court to overrule *McClellan*. 364 S.C. at 139, fn. 2, 611 S.E.2d at 337, fn. 2; *see also* Subsection II(C)(6), *infra* (discussing *McClellan*). *Fourth*, and perhaps most significant, the Court of Appeals

in *Wallace* recognized, “[T]he appellate courts of this state have refused to recognize a specific exception to the inadmissibility of prior bad act evidence in criminal sexual conduct cases.” *Id.* 364 S.C. at 139, 611 S.E.2d at 337 (citing *Nelson*). *Perry*, *Durant*, and *Cotton*, however, expressly created a “new framework” for the admissibility of propensity evidence in child sex offense cases.

The majority in *Perry* stated, “The State must also convince the trial court that the probative force of the evidence when used for this legitimate purpose is not substantially outweighed by the danger of unfair prejudice from the inherent tendency of the evidence to show the defendant’s propensity to commit similar crimes.” *Perry*, at 11 (citing Rule 403, SCRE). Perhaps because it reversed the convictions, *Perry* did not offer any meaningful explanation of Rule 403 under this Court’s “new framework” for the admissibility of propensity evidence in child sex offense offenses. If, as the majority in *Perry* suggests, Rule 403 remains an important part of the Rule 404(b) analysis, then *Durant* did not fully “determine whether the evidence would have been admissible under the framework in *Perry*,” *Durant*, at 3, because its opinion in *Durant* does not even cite Rule 403, let alone provide any analysis applying Rule 403 under this Court’s “new framework” for the admissibility of propensity evidence in child sex offense cases.

As discussed above, *Parry*, *Durant*, and *Cotton* did not discuss the role of a limiting instruction under this Court’s “new framework” for the admissibility of propensity evidence in child sex offense cases. Prior to the “new framework,” this Court required a limiting instruction, except when the other bad act is part of the *res gestae*, which is not the situation here. *Timmons*, *supra*. Pastor Durant’s trial judge did not provide a limiting instruction. Nor did the trial court limit the prosecution’s use of the evidence. From the

very beginning of the trial, the State made it clear that they planned to prove its case through the allegations of all four women. During opening statements, the prosecutor told the jurors would “hear from victims,” stating:

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

R. 179-81. During its closing argument, the State argued, “[Y]es, a lot of this case rest[s] on the testimony of” the four women. And, Pastor Durant “was supposed to be their shepherd, but he was nothing but a wolf in sheep’s clothing.” He “went from praying for them to preying on them.” R. 674-75. By sentencing, it was clear that even the trial court had come to believe that the trial was about the allegations involving all four women, when the trial judge stated:

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

R. 731 (emphasis added). Because of these statements by the prosecutor and the trial judge, this Court should address the role of a limiting instruction under its “new framework” for the admissibility of propensity evidence in child sex offense cases. As discussed in Subsection II(C)(3), *supra*, this Court should craft a limiting instruction that will eliminate the danger of unfair prejudice resulting from admitting propensity evidence.

- 5. This Court should provide definitions 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” and the terms “similar,” “quite similar,” “strikingly similar,” “close degree of similarity,” and “particularly unique method.”**

As the Court of Appeals pointed out in footnote 2 of its opinion in *Wallace*, our state’s appellate courts have been inconsistent in the application of the exception in *Lyle*

and Rule 404(b), SCRE for “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.” Perhaps, these inconsistencies result from the absence of cases, since *Lyle*, actually defining the meaning of this exception, rather than reciting it in shorthand. Cases recognizing an exception to the requirement of a limiting instruction when the other bad act is part of the *res gestae* provide guidance. *E.g. State v. Johnson*, 306 S.C. 119, 126–27, 410 S.E.2d 547, 552 (1991) (evidence of the other crime “had a direct bearing on and related to the commission of the murder of the trooper such that it formed part of the *res gestae*”); *Timmons*, 327 S.C. at 55, 488 S.E.2d 323, 327 (1997) (exception to the requirement of a limiting instruction is when “evidence of another crime formed part of the *res gestae*.”); *Nix*, 288 S.C. at 496, 343 S.E.2d at 629 (“car theft occur[ing] within a short time, approximately two hours, before the robbery” was “so related to the charged crimes that they constitute evidence that there was a common scheme or plan between the crimes” as the stolen car was used to commit “the armed robbery, kidnapping and rape”). Although this *Lyle* exception is likely broader than *res gestae*, *res gestae* is useful for establishing when a common scheme or plan embracing the commission of two or more crimes is truly so related to each other that proof of one tends to establish the others.

The majority in *Perry*, at 11, stated “[s]imilarity can be important” when determining admissibility. *Durant*, at 4, for the first time, articulated “a particularly unique method” test. *But see Wallace*, 384 S.C. at 435-36, 683 S.E.2d at 279 (Pleicones, J., dissenting) (this Court has “repeatedly held in non-sexual offense cases that, the mere

presence of similarity only serves to enhance the potential for prejudice”).¹⁴ The bench and bar would benefit from this Court clarifying the terminology courts use for admissibility of *Lyle* evidence. The lack of “a close degree of similarity” militated against admissibility in *Perry*, at 8. Yet, crimes involving “similar” techniques are inadmissible, *Campbell*, 317 S.C. at 451, 454 S.E.2d at 901, while crimes that are “quite similar” are admissible, *Raffaldt*, 318 S.C. at 114, 456 S.E.2d at 392, but a prior bad act that is “strikingly similar” to the charged crime is inadmissible because it enhances the danger of unfair prejudice, *Gore*, 283 S.C. at 121, 322 S.E.2d at 13. In addition to distinguishing these terms, the Court should define a “particularly unique method,” which presumably does not involve “similar” or “strikingly similar” techniques.

¹⁴ The dissent in *Perry*, at 23, considered “modus operandi” as a category of common scheme or plan. Most courts consider modus operandi as an identity exception and require a clear connection between the crimes. *E.g. Woodlee v. Commonwealth*, 306 S.W.3d 461, 465 (Ky. 2010) (“The modus operandi exception requires acts that mark the crime as that of a specific person who may be unknown until caught, but who is identified by the distinctive nature of his or her acts. Examples include well-known criminals such as Jack the Ripper; the BTK (bind, torture, kill) strangler; and the Unabomber. By their distinct criminal methods, each of them signed off on their crimes. While modus operandi may not require commonalities as blatant as those listed above, there must be some peculiar or distinct commonalities that show that the crimes were committed by the same person.”); *People v. Kimbrough*, 138 Ill. App. 3d 481, 486–87, 485 N.E.2d 1292, 1297 (1985)(internal citations omitted) (“If evidence of other crimes is offered to prove modus operandi, there must be some clear connection between the other crime and the crime charged which creates a logical inference that if defendant committed one of the acts, he may have committed the other act. This inference of identity does not arise from the mere fact that the crime charged and the other crime share certain common features or marks of similarity, for it may be that these similarities are shared not only by the crime charged and defendant’s other crime, but also by numerous distinct crimes committed by persons other than the defendant. Rather, the inference is created when both crimes share peculiar and distinctive common features so as to earmark both crimes as the handiwork of the defendant. There must be some distinctive features that are not common to most offenses of that type.”). *See also Larson Far Side Cartoon, supra*, at p. 21.

This Court should avoid the ridiculous exercise of distinguishing these terms by recognizing similarity plays no role in determining whether the two crimes are 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. Such an approach is not only faithful to *Lyle*, *Molineux*, *Romano*, and the Court of Appeals opinion in *Wallace*, but also required to guard against courts engaging in a result-oriented process of cherry-picking facts to support its decision and then seeking refuge under one of these inconsistent holdings to defend its decision.

6. *State v. McClellan*.

This Court's opinions in *Perry*, *Durant*, and *Cotton* depend on "*McClellan* remain[ing] good law." *Durant*, at 4. Although generously praising the Court of Appeals' opinion in *Wallace*, *Perry* overlooks footnote 2 in that Court of Appeals' opinion in *Wallace* that included *McClellan* on the list of cases it invited this Court overrule. Under these circumstances, this Court's reliance on *McClellan* in *Perry*, *Durant*, and *Cotton* requires a closer look at *McClellan*.

McClellan actually involved the admission of two categories of other bad acts. The first category involved "testimony [by *McClellan*'s daughter (the victim)] regarding prior attacks" by *McClellan* "to show the continued illicit intercourse forced upon her by" *McClellan*. 283 S.C. at 392, 323 S.E.2d at 774. In affirming the admission of this testimony, this Court relied on *Whitner*'s holding "the common scheme exception to the *Lyle* rule 'is generally applied in cases involving sexual crimes, where evidence of acts prior and subsequent to the act charged in the indictment is held admissible as tending to show continued illicit intercourse between the same parties.'" *Id.* (citing *Whitner*, 228 S.C.

at 265, 89 S.E.2d at 711). Footnote 2 of the Court of Appeals’ opinion in *Wallace* cited *Whitner* as an example of a case “reflect[ing] a more narrow interpretation of the common scheme or plan exception.” 364 S.C. at 39, fn.2, 611 S.E.2d at 337, fn.2. *McClellan* also cited *State v. Richey* for the same proposition as *Whitner*. 88 S.C. 239, ___, 70 S.E. 729, 730 (1911) (affirming admission of evidence of “continued illicit intercourse between the same parties”); *see also State v. Brooks*, 235 S.C. 344, 111 S.E.2d 686 (1959) (vidence that defendant had had intercourse with companion at same time and place as with prosecutrix was relevant to issue of consent of prosecutrix and competent evidence of defendant’s guilt) *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991). Pastor Durant has never contended that this category of evidence—continued illicit conduct between the same parties, including evidence of grooming—should be prohibited by Rule 404(b)’s common scheme or plan exception. *See, e.g., Oral Argument*, beginning at 32:30. This Court, accordingly, should not overrule this *Whitner*, *Richey*, *Brooks*, and this portion of *McClellan*.

The second category of bad character evidence admitted in *McClellan* is problematic, which is affirming the admission of testimony by *McClellan*’s other two “daughters [] concerning the pattern of this and prior attacks” involving them. 283 S.C. at 391, 323 S.E.2d at 773. In *McClellan*, this Court did not cite any authority linking the admissibility of this category of evidence to *Lyle* or Rule 404(b), SCRE. The only case arguably cited by *McClellan* for the admissibility of evidence of another accuser is *State v. Rivers*,¹⁵ which actually held inadmissible the testimony of the other witness because this

¹⁵ *Rivers*, despite excluding the propensity evidence, is still problematic for its role in recognizing a special rule in child sex offense cases, which will be discussed below.

Court was “[u]nable to clearly perceive the connection between the acts as required by *Lyle*,” 273 S.C. 75, 79, 254 S.E.2d 299, 301 (1979). That this section of *McClellan* “focused exclusively on the close degree of similarity between the crime charged and the evidence of the other crime” is the very reason the Court of Appeals opinion in *Wallace* included *McClellan* on the list of cases it recommended this Court overrule. 364 S.C. at 139, Fn. 2, 611 S.E.2d at 337, fn. 2.

Pastor Durant included this Court’s opinions in *Hubner*, *Hallman*, *McClellan*, and *Rivers* as examples of cases similar to this Court’s opinion in *Wallace* “creat[ing] a rule allowing admission of prior bad acts against individuals other than the alleged victim in the case to demonstrate general propensity in direct contravention of Rule 404(b), SCRE.” Final Brief of Appellant, at 28, fn. 15. Undersigned counsel, therefore, must address his confusion during the oral argument, beginning at 6:14, regarding the continued validity of *McClellan*. Regrettably, counsel was thinking of the portion of *McClellan* holding admissible evidence of continued illicit conduct between the parties. Counsel, perhaps unsuccessfully, attempted to correct this confusing later on in the oral argument, beginning at 34:41.

Actually overruling *Wallace*, in addition to overruling *Hallman*, requires overruling the cases following *Wallace* (such as this Court’s opinion in *Hubner*), *McClellan*, and the other cases cited in the opening paragraph of footnote 2 of the Court of Appeals opinion in *Wallace*. When it declined to “reconsider[] the results of prior cases,” other than *Hallman*, the majority opinion in *Perry*, at 6, fn. 5, was unfaithful to both the substance and spirit of the Court of Appeals’ opinion in *Wallace*.

7. Lack of Consent from the General Assembly.

Article V, § 4A of our state's constitution provides:

All rules and amendments to rules governing practice and procedure in all courts of this State promulgated by the Supreme Court must be submitted by the Supreme Court to the Judiciary Committee of each House of the General Assembly during a regular session, but not later than the first day of February during each session. Such rules or amendments shall become effective ninety calendar days after submission unless disapproved by concurrent resolution of the General Assembly, with the concurrence of three-fifths of the members of each House present and voting.

This Court thus recently recognized, “[T]he South Carolina Constitution limits this Court’s power to promulgate rules governing practice and procedure in the courts of this State.” *State v. Beaty*, 423 S.C. 26, 41, 813 S.E.2d 502, 510 (2018). As seen, the concurring opinion in *Perez* cautioned, “Absent an amendment to our rules of evidence creating a different categorical rule for sexual offenses, [this Court should] apply the common scheme or plan exception equally to sexual and nonsexual offenses alike.” 423 S.C. at 503, 816 S.E.2d at 55 (Hearn, J., concurring); *see also Wallace*, 384 S.C. at 436, 683 S.E.2d at 279 (Pleicones, J., dissenting) (“if this Court is] to permit the admission of propensity evidence in these types of cases, then [it] should propose a new rule of evidence, and encourage public comment).

Comparing the Federal Rules of Evidence and the South Carolina Rules of Evidence reveals the legislative intent underlying the respective rules. When our state adopted Rule 404(b), SCRE, “the purposes for which evidence of other crimes may be admitted” was more limited than Fed. R. Evid. Rule 404(b), as our rule “limits the use of evidence of other crimes, wrongs, or acts to those enumerated in” *Lyle*. Rule 404(b), SCRE, reporter’s note. Even under the more inclusive federal rule, Congress had to amend the Federal Rules of Evidence to add Rules 413 and 414 to allow admission of propensity

evidence in sex offense cases. That Congress amended the federal rules is evidence that Fed. R. Evid. 404(b) did not allow the admission of propensity evidence in sex offense cases. *Cf. Bailey v. S.C. State Election Comm’n*, No. 2020-000642, 2020 WL 2745565, at 2 (S.C. May 27, 2020) (“if existing law already permitted all voters to vote by absentee [ballot in the June 9, 2020 primary] in the face of [the COVID-19] pandemic, it would have been unnecessary for the Legislature to change the law”).

Finally, the majority opinion in *Perry* does not reconcile how adopting the “new framework” for admissibility of propensity evidence in child sex offense cases can be reconciled with *Beaty* and the dissent in *Cross*, 427 S.C. at 489, 832 S.E.2d 294 (Few, J., dissenting) (“It is regrettable, however, this Court is creating this rule without following the procedure to which we are constitutionally bound.”).

8. Future Implications if this Court Does Not Grant Rehearing.

This Court’s “the new framework” for the admissibility of propensity evidence in child sexual abuse offenses will spark future litigation. As evidenced by the disagreement between the majority and dissent in *Perry*, the “new framework” has not eliminated quibbling over similarities and dissimilarities. *Compare Perry*, at 8 (stating the age of the children is not substantially similar) *with Perry*, at 18 (Kittredge, J., dissenting) (“In its pursuit to show dissimilarities, the majority implies there was a large gap in the age of onset of abuse among the children.”). The criminal defense bar will request hearings regarding the application of the newly announced “particularly unique method,” demanding the prosecution call witnesses and present evidence to establish the “particular uniqueness.” As discussed above, the defense bar will ask trial courts to distinguish the terms “similar,” “quite similar,” “substantially similar,” “strikingly similar,” “close degree

of similarity,” and “particularly unique method.” The resulting confusion will generate calls for this Court to revisit the continued validity of *Perry, Durant, Cotton, McClellan*, and the “results” in other cases this Court declined to reconsider in *Perry*, at 6, fn. 5; and see 364 S.C. at 139, fn. 2, 611 S.E.2d at 337, fn. 2.

Unless this Court grants rehearing and addresses the roles of Rule 403, SCRE and a limiting instruction under its “new framework,” then prosecutors will argue Rule 403 and limiting instructions are no longer applicable, while the criminal defense bar will argue Rule 403 should exclude the evidence, even if admissible under the “new framework,” and no limiting instruction can cure the danger of unfair prejudice of propensity evidence. *But see Cross*, 427 S.C. at 832 S.E.2d at 290 (“limiting instructions are sometimes insufficient to cure the danger of unfair prejudice”).

The defense bar will attack this Court’s “the new framework” for the admissibility of propensity evidence in child sexual abuse offenses as a violation of due process under the Fourteenth Amendment to the United States Constitution and Article I, Section 3 of the South Carolina Constitution. Although the Supreme Court of the United States has not addressed “whether a state law would violate the Due Process Clause if it permitted the use of ‘prior crimes’ evidence to show propensity to commit a charged crime,” *Estelle v. McGuire*, 502 U.S. 62, 75, fn. 5 (1991), the High Court has recognized the unfair danger of admitting such evidence by explaining:

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

record and deny him a fair opportunity to defend against a particular charge.

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

Additionally, other state courts that have addressed the admissibility of propensity evidence in child sexual abuse cases have held that introducing this type of propensity evidence violates the due process clauses of state constitutions. For example, “[b]ased on Iowa's history and the legal reasoning for prohibiting admission of propensity evidence out of fundamental conceptions of fairness, . . . the Iowa Constitution prohibits admission of prior bad acts evidence based solely on general propensity.” *State v. Cox*, 781 N.W.2d 757, 768 (Iowa 2010). In reaching this conclusion, the Iowa Supreme Court reviewed its state’s “policy against admissibility of general propensity evidence stems from a fundamental sense that no one should be convicted of a crime based on his or her previous misdeeds.” *Id.* at 767 (internal quotations omitted). The Iowa Supreme Court further noted, “The general rule prohibiting propensity evidence was firmly established in Iowa courts at common law.” *Id.* at 764 (citing *State v. Vance*, 119 Iowa 685, 686, 94 N.W. 204, 204 (1903)). Likewise, the Missouri Supreme Court “act[ed] consistently with a long line of cases holding that the Missouri constitution prohibits the admission of previous criminal acts as evidence of a defendant's propensity” and invalidated a state statute admitting this type of evidence in child sexual abuse cases. *State v. Ellison*, 239 S.W.3d 603, 607-08 (Mo. 2007). These same considerations are just as firmly rooted in South Carolina’s common law. *Lyle*; *see also State v. Kenny*, 57 S.E. 859, 861-62 (S.C. 1907) (“Logically, the

commission of an independent offense is not proof, in itself, of the commission of another crime.... Without [an] obvious connection it is not only unjust to the prisoner to compel him to acquit himself of two offenses instead of one, but it is detrimental to justice to burden a trial with multiplied issues that tend to confuse and mislead the jury.”).

9. Summary.

For the forgoing reasons, this Court should rehear this case and reconsider its “new framework” for the admissibility of propensity evidence in child sex offense cases when the prosecution claims a “purpose beyond propensity,” *Perry*, at 8.¹⁶ When doing so, this Court should keep in mind that its “new framework” for the admissibility of propensity evidence in child sex offense cases “would make it easier to convict the guilty. Unfortunately, it would also make it easier to convict the innocent.” *Commonwealth v. Bujanowski*, 418 Pa. Super. 163, 172, 613 A.2d 1227, 1232 (1992). Once the Court considers the matters raised in this petition, the need to reverse Pastor Larry Durant’s conviction and sentence will be apparent. This Court should also address the roles of limiting instructions and Rule 403, SCRE in the admissibility of other bad act evidence under Lyle and Rule 404(b).

¹⁶ Pastor Durant notes the State petitioned for rehearing in *Perry*. Although Pastor Durant does not want to interfere with Mr. Perry’s new trial, he cannot ignore the role of the *Perry* opinion in this Court’s “new framework” for the admissibility of propensity evidence in child sex offense cases. Pastor Durant is informed and believes Mr. Cotton will petition for rehearing. This Court, accordingly, has discretion to rehear all three cases. In *Perry*, this Court need not look past the remoteness of the prior offense to realize there is not a common or logical connection.

D. Cumulative Error (Issue VI).

This Court declined to apply the cumulative error doctrine to because it concluded “the trial court did not commit any reversible errors.” *Durant*, at 6, fn. 6. Once this Court reconsiders its holdings on the *Lyle*, *Brady*, and *Allen* charge issues, this conclusion no longer will be valid.

The cumulative error doctrine “provides relief to a party when a combination of errors that are insignificant by themselves have the effect of preventing a party from receiving a fair trial.” *State v. Johnson*, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999); *and see State v. Blurton*, 342 S.C. 500, 512, 537 S.E.2d 291, 297 (Ct. App. 2000) (cumulative error of solicitor’s improper argument and improperly excluded evidence warranted reversal), *reversed on other grounds by State v. Blurton*, 352 S.C. 203, 573 S.E.2d 802 (2002). In *Durant*, this Court, for the first time,¹⁷ required that the cumulative error doctrine be raised to the trial court, in addition to the objections to the other error. This this Court is going to impose such a requirement, then it should provide guidance about how such an objection should be raised. Would raising it in a post-trial motion be sufficient? Or would it be necessary to litigate cumulative error outside the presence of the jurors each time counsel objects?

(conclusion on next page)

¹⁷ Undersigned counsel was trial counsel in *Blurton* and has no recollection of raising cumulative error in the trial court in addition to the other objections.

III. CONCLUSION.

For the reasons set forth in Pastor Larry Durant's Final Brief of Appellant, the Final Reply Brief of Appellant, and this Petition for Rehearing, this Court should rehear this case, enter an order reversing his convictions and sentences, and remand for a new trial.

Respectfully Submitted,

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