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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No: 2019-001983

THE STATE,

RESPONDENT,

v.

JULIO ANDRES CASTILLO,

APPELLANT.

MOTION REGARDING
THE RECORD ON APPEAL

Pursuant to Rule 209, SCACR, Appellant filed a Designation of Matter to be Included in the Record on Appeal on October 29, 2020. The following items, which are the subject of this Motion, were included in the Designation:

1. Memorandum in Support of Joinder of All Listed Charges
2. Memorandum in Support of Rule 404(b) Evidence
3. Memorandum to Limit Rule 404(b) Evidence

By way of a footnote, counsel explained that she had only been able to locate unsigned copies of these items and that these unsigned copies were obtained from the Office of the Attorney General via the Sixteenth Circuit Solicitor's Office.

By way of this Motion, Appellant, through counsel, would move to include the unsigned and unfiled copies of the above listed items in the Record on Appeal. A redacted copy of the Memorandums is attached as Exhibit A. It is counsel's understanding that Respondent does not oppose this motion.

In support of this Motion, Appellant would submit the following:

1. The Memorandums were referenced and provided for the lower court's review during the motion regarding the admission of testimony pursuant to Rule 404(b), SCRE, which is the subject matter from which the issue is raised on appeal. Trial Transcript pp. 7, 11-14. Additionally, the Memorandums are cited to in the Brief of Appellant as the Memorandums were addressed by the parties and the lower court.
2. The Memorandums were provided to undersigned counsel by Jack Swerling, Esquire, and the Office of the Attorney General via the Sixteenth Circuit Solicitor's Office.
3. Erin Joyner, Esquire, and Jack Swerling, Esquire, have affirmed in writing the contents of the Memorandums and that the Memorandums were submitted to the lower court. Exhibit B.
4. The transcript reflects that the Memorandums were not marked as exhibits.
5. Undersigned counsel has contacted the York County Clerk of Court and the Memorandums are not located in the Clerk's file.

For these reasons, Appellant would respectfully request that this Court allow the inclusion of the unsigned and unfiled Memorandums in the Record on Appeal. Appellant would further request that the time for filing the Record on Appeal be held in abeyance while this Motion is pending and that counsel be given time to complete the Record on Appeal after issuance of a decision by this Court.

Respectfully submitted,



Tricia A. Blanchette
Bar No. 74904
PO Box 2147
Leesville, SC 29070
(803) 908-3266

March 8, 2021

EXHIBIT A

11/11

STATE OF SOUTH CAROLINA
COUNTY OF YORK

IN THE COURT OF GENERAL SESSIONS
SIXTEENTH JUDICIAL CIRCUIT

2016GS4602193
2016GS4602194
2016GS4602195
2016GS4602196
2016GS4602197
2016GS4602198
2016GS4602199
2016GS4602200

State of South Carolina,

Memorandum in Support of Joinder of All
Listed Charges

vs.

Julio Andres Castillo,

Defendant.

The State of South Carolina, through Assistant Solicitor Erin Joyner, offers this memorandum in support of the joinder of all charges regarding the Victim one with charges regarding victim two.

Procedural History

On January 8, 2016, Victim two filed a report with the Rock Hill Police Department reporting that he had been sexually assaulted by the Defendant as a child. The Defendant was a long-time family friend of the C family, Victim 2 and his brother Victim one's youth choir director for a number of years beginning in 2002, and next-door neighbor since 2004.

The case was assigned to Det. Ryan Thomas, who interviewed Victim two, his brother Victim one, who also disclosed sexual abuse, and their parents, Keith and Susan C. Police executed a search warrant at the Defendant's home and photographed the attic area, which was described as a location of sexual abuse.

The Defendant was arrested on February 29, 2016, on warrants 2016A4620300469, 2016A4620300506, 2016A4620300508, and 2016A4620300509, which alleged the sexual abuse Victim 1 and Victim two from 2005 through 2009. Ultimately, the following indictments were true-billed by York County Grand Jury:

Indictment Number	Charge	Date Range	Victim
2016-GS-46-2195	Criminal Sexual Conduct with a Minor, Second Degree	11/8/06 - 7/23/09	Victim <u>one</u>

2016-GS-46-2193	Criminal Sexual Conduct with a Minor, Second Degree	7/24/09	Victim one
2016-GS-46-2196	Lewd Act	6/20/05 - 7/1/07	Victim one
2016-GS-46-2197	Lewd Act	8/1/06 - 7/23/09	Victim one
2016-GS-46-2198	Lewd Act	7/1/07 - 7/23/09	Victim one
2016-GS-46-2199	Lewd Act	7/1/07 - 7/23/09	Victim one
2016-GS-46-2200	Lewd Act	6/20/05 - 7/11/08	Victim two
2016-GS-46-2194	Criminal Sexual Conduct with a Minor, First Degree	6/20/05 - 7/11/08	Victim two

Victim one

Victim one was eight years old when the Defendant became his next-door neighbor. Prior to that time, Victim 1 and his family met the Defendant at Church, where Victim one and his brother, Victim 2, participated in the youth choir. The Defendant assisted with youth choir. The Defendant became friends with Victim 1's parents and became like a part of the family.

When Victim 1 was eight years old, the Defendant invited the C family to stay on Daufuskie Island at his aunt's home. The trip took place between June 17 and June 19, 2005. On this trip, the Defendant exposed himself to

After returning home from Daufuskie Island, the Defendant began giving Victim 1 massages. Massages mostly involved Defendant sitting on Victim 1's leg as he massaged, with lying on his stomach. The massages consisted of back rubbing and the rubbing of feet and legs. Defendant would sit beside him to massage his legs. Victim 1 would be flipped over, at which point his penis would be touched. Initially, the touching of the penis seemed inadvertent. Victim 1 recalls massaging the Defendant one time. These massages occurred in the Defendant's home in his bedroom on his waterbed.

In the fifth grade, Victim 1 asked the Defendant about a joke that he did not understand. The joke was about masturbation. The Defendant explained the joke to Victim 1 and then masturbated Victim 1. This occurred in the Defendant's bedroom on his waterbed. After that, there were several other similar incidents that occurred in the Defendant's bedroom on the waterbed, to include one incident which occurred after the Defendant converted part of the attic into a living space. Victim 1 and his brother, Victim 2 were spending the night in the converted attic. Victim 1, by pre-arrangement, came downstairs to the Defendant's bedroom after Victim 2 fell asleep and was masturbated by the Defendant.

Victim 2

Following the attic conversion, the Defendant also massaged Victim 1 and masturbated Victim 1 in the attic and made Victim 1 touch his penis in the attic. Victim 1 only

recalls the latter occurring one time, with Victim 1 briefly masturbating the Defendant but not to ejaculation. This occurred during an instance where the Defendant had been masturbating Victim one.

The abuse progressed from massages to masturbation to fellatio. There were two instances of Defendant performing fellatio on Victim one. One occurred in the Defendant's home in his bedroom. The other incident occurred the night before the Defendant's wedding in the C's guest bedroom on July 24, 2009. The Defendant was an overnight guest of the C's at that time. That night, Victim 1 stopped the Defendant and told him that the abuse needed to end.

Victim one and Victim 2 were frequently at the Defendant's home together during the period of time when the abuse was occurring. There were also incidents where Victim 1 or Victim 2 would be alone at the house with the Defendant. With the exception of the July 24, 2009 incident, all incidents of sexual abuse occurred at the Defendant's home when Victim 1 was an invited guest in the home. Victim 1 and Victim 2 spent the night at the Defendant's house several times and incidents of abuse occurred then. Victim 1 recalls Victim 2 being present when some of the sexual abuse incidents occurred but does not remember witnessing Victim 2 being abused.

Victim two

Victim 2 was no younger than eight years old when he was sexually abused by the Defendant. Victim 2 like his brother Victim one knew the Defendant as a close family friend, youth choir director, and neighbor. Leading up to the beginning of the abuse, the Defendant had taken an active role in the C family

Victim 2 was massaged by the Defendant in the Defendant's home in the attic approximately four times, approximately two of which involved clearly-deliberate fondling of his penis. Victim 2 would be dressed, but Defendant would reach up or under his clothes. Victim 2 described these as strange massages all over, which would start like a regular massage around the shoulder and back, but would also involve arms and legs. Victim 2 would flip from his stomach to his back. The Defendant would move up the legs and act as though he had accidentally touched Victim 2's penis. The Defendant would be positioned next to

There were also two incidents involving fellatio, one giving and one receiving that occurred on the same night in the attic. This was during a sleep over in the attic and Victim one was there. Victim 2 recalls that this sleep-over occurred after three had spent a significant portion of the day together. Victim 2 recalls that Victim one was sexually abused that night as well.

All incidents of sexual abuse occurred at the Defendant's home in the attic when Victim 2 was an invited guest in the home. Victim 1 and Victim 2 were frequently at the Defendant's home together during the period of time when the abuse was occurring. There were also incidents where Victim 1 or Victim 2 would be alone at the house with the Defendant.

Following the abuse, the Defendant continued to have a friendly relationship with the C family. Victim 2 ultimately disclosed the sexual abuse in December 2015 and subsequently filed

a police report in January 2016. Victim 1 did not disclose the sexual abuse until Victim 2 came forward.

Indictments

The factual allegations underlying the indictments involving Victim 1 are as follows:

Indictment 2016-GS-46-02197 Lewd Act Upon a Child (August 1, 2006, through July 23, 2009): masturbation of Victim 1 in the Defendant's bedroom on more than one occasion, beginning in the Fifth Grade and including one incident in the Defendant's bedroom after the attic was converted

Indictment 2016-GS-46-02196 Lewd Act Upon a Child (June 20, 2005 through July 1, 2007): massaging Victim 1 in the Defendant's bedroom

Indictment 2016-GS-46-02198 Lewd Act Upon a Child (July 1, 2007 through July 23, 2009): massaging and touching Victim 1 and/or masturbating him in the converted attic, the beginning date meant to coincide with the conversion of the attic

Indictment 2016-GS-46-02199 Lewd Act Upon a Child (July 1, 2007 through July 23, 2009): Victim 1 touching Defendant's penis in the attic, the beginning date meant to coincide with the conversion of the attic

Indictment 2016-GS-46-02195 Criminal Sexual Conduct with a Minor in the Second Degree (November 8, 2006- July 23, 2009): performing fellatio on Victim 1 in Defendant's bedroom

Indictment 2016-GS-46-02193 Criminal Sexual Conduct with a Minor in the Second Degree (July 24, 2009): performing fellatio on Victim 1 in the Defendant's Home

The factual allegations underlying the indictments involving Victim 2 are as follows:

Indictment 2016-GS-46-0194 Criminal Sexual Conduct with a Minor, First Degree (June 20, 2005 through July 11, 2008): fellatio in the Defendant's home

Indictment 2016-GS-46-02200 Lewd Act Upon a Child (June 20, 2005 through July 11, 2008): massaging Victim 2 to include touching his penis in the Defendant's home

Law on Joinder

Charges may be tried together where they (1) arise out of a single chain of circumstances, (2) are proved by the same evidence, (3) are of the same general nature, and (4) no real right of the defendant has been prejudiced. State v. Beekman, 415 S.C. 632, 785 S.E.2d 202 (S.C. 2016). A motion for severance is addressed to the trial court and should not be disturbed unless an abuse of discretion is shown. Id.

In order to satisfy the first prong, the charges need not arise out of a single isolated incident. Id. Joinder is appropriate where the crimes involved connected transactions closely related in kind place and character. Id. Courts will consider the location of the abuse, the time frame of the abuse, and the relationship of the Defendant to the victims. See Beekman, supra (upholding the joinder of charges involving the sexual abuse of a brother and sister by their stepfather); State v. McGaha, 404 S.C. 289, 744 S.E.2d 602 (S.C. Ct. App. 2013).¹

In order to satisfy the second prong, the evidence need not be identical. Id.; State v. McGaha, 404 S.C. 289, 744 S.E.2d 602 (S.C. Ct. App. 2013).

As to the third prong, the appellate courts have held that Criminal Sexual Conduct with a Minor and Lewd Act upon a Child are of the same general nature. See State v. McGaha, 404 S.C. 289, 744 S.E.2d 602 (S.C. Ct. App. 2013); State v. Grace, 350 S.C. 19, 564 S.E.2d 331 (S.C. Ct. App. 2002).

In evaluating the fourth prong, courts have analyzed whether evidence of one or more charges would be admissible in a trial involving only the other charge. State v. McGaha, 404 S.C. 289, 744 S.E.2d 602 (S.C. Ct. App. 2013). Where evidence of crimes as to one victim would be admissible in the trial of the crimes as to the other victim, as is the case of Rule 404(b) common scheme or plan evidence, the Defendant is not prejudiced by the joinder of the cases. Id. The Rule 404(b), common scheme or plan, analysis in the joinder context, requires the State to establish a logical connection between the crimes by showing a close degree of similarity. Id. Factors the court should consider include: (1) the age of the victims when the abuse occurred; (2) the relationship between the victims and the perpetrator; (3) the location where the abuse occurred; (4) the use of coercion or threats; and (5) the manner of the occurrence, for example, the type of sexual battery. The court may also consider other factors. Id.; State v. Wallace, 384 S.C. 428 at 434-444, 683 S.E.2d 275 (S.C. 2009).

Argument in Support of Joinder

It is the State's position that the charges as to Victim one and Victim two are appropriately joined.

¹ Likewise, in State v. Jones, 325 S.C. 310, 315-316, 479 S.E.2d 517 (S.C. Ct. App. 1996), the South Carolina Court of Appeals, upheld the joinder of charges involving two different victims:

Appellants' argument that consolidation was improper in this case because the allegations concerned two different victims {"pagesel": "5b"} and required different proof is clearly without merit. Contrary to Appellants' assertions, the offenses charged were of the same general nature involving allegations of a pattern of sexual abuse involving the two minor victims. Evidence was presented at trial that both victims had been taken to the same location and were present in the same motel room on an occasion of abuse. Further, there has been no showing of prejudice resulting from the trial judge's decision. Accordingly, we hold there was no error in the judge's consolidation of the indictments.

(Internal Citation Omitted).

As to the first prong, the crimes involve connected transactions closely related in kind, place, and character. Like the Beekman and McGaha cases, the victims are siblings and the molestation occurred at the same place (with the exception of the conduct alleged in Indictment 2016-GS-46-02193), over the same period of time, the victims had the same relationship to the Defendant, and the Defendant gained access to the victims in the same way. Further, like State v. Jones, 325 S.C. 310, 315-316, 479 S.E.2d 517 (S.C. Ct. App. 1996), there will be testimony from Victim two that he and Victim 1 were together during some sexual abuse and from Victim One that he remembers Victim 2 being present when he was sexually abused.

As to the second prong, a substantial portion of the testimony the State would present at trial to prove the crimes against one victim would be presented to prove the crimes against the other to include the parents' lengthy testimony² and law enforcement testimony regarding the investigation and execution of a search warrant at the Defendant's home State v. McGaha, 404 S.C. 289, 297, 744 S.E.2d 602 (S.C. Ct. App. 2013), ("Thus, a substantial portion of the testimony the State presented at trial to prove the crimes against one child was the same evidence it would have used to prove the crimes against the other. Even though some of the evidence related to only one child, we find the evidence described above supports the trial court's determination that the separate charges would be proven by the same evidence.")

As to the third prong, the appellate courts have held that Criminal Sexual Conduct with a Minor and Lewd Act upon a Child, which are the pending charges, are of the same general nature. See State v. McGaha, 404 S.C. 289, 744 S.E.2d 602 (S.C. Ct. App. 2013); State v. Grace, 350 S.C. 19, 564 S.E.2d 331 (S.C. Ct. App. 2002).

As to the fourth prong, it is the State's position that the evidence of crimes as to Victim One would be admissible in the trial of the crimes as to Victim 2 and the evidence of the crimes as to Victim 2 would be admissible in the trial of the crimes as to Victim 1. It is the State's position that the admissibility is based upon Rule 404(b), common scheme or plan. As to the first Wallace factor, age at the time of abuse, Victim One is approximately one and a half years older than Victim 2 and they were one school grade apart. They were abused during the same time period, making them approximately the same age when the abuse occurred.³ As to the second Wallace factor, Victim 1's and Victim 2 had the same relationship to the Defendant. The Defendant was a family friend, neighbor, and their Youth Choir Director. The Defendant frequently attending their sporting events, their chess club events, and took them on special outings. As to the third Wallace factor, most of the abuse occurred in the Defendant's home. As to the fifth Wallace factor, both Victim 1 and Victim 2 experienced massages, which involved the touching of the penis, and oral sex.

² The parents' testimony is necessary to demonstrate the evolving relationship with the Defendant from church acquaintance to family friend to neighbor and to explain how the Defendant gained access to both Victim 1 and Victim 2. The parents' testimony would be necessary to help establish dates of events relied upon by the State in establishing the time line of abuse.

³ See State v. McGaha, 404 S.C. at 300 ("In addition, the children are approximately a year apart in age, and because they were abused in the same time frame, they were roughly the same age when the abuse occurred."). State v. Hallman, 298 S.C. 172, 379 S.E.2d 115 (S.C. 1989) (Victim testified that she was 7 to 9 years old at the time of the abuse; testimony by three former foster children about abuse admitted under common scheme or plan where those former foster children were ages six to twelve, seven to thirteen, and seven at the time of the abuse); State v. Adams, 332 S.C. 139, 504 S.E.2d 124 (S.C. Ct. App. 1998) (testimony of victim that abuse began when she was 10 years old; sister's testimony regarding her abuse, which began at nine years of age properly admitted)

Additionally, both Victim one and two recall the Defendant using ropes to demonstrate on each boy how to hog tie. Victim one recalls that some of his sexual abuse involved being tied up.

Additionally, as to the crimes involving Victim one the presentation of the case would involve reference to Victim 2' initial report to the law enforcement, which lead to Victim one coming forward and making his own disclosure.

Further, there will be testimony that Victim one recalls Victim 2 being present during some of his abuse, although he does not remember witnessing Defendant sexually abusing Victim 2 and testimony that Victim 2 recalls Victim one being present during sexual abuse and Victim one being sexual abused as well.

For the foregoing reasons, the State respectfully requests that all captioned cases be joined.

RESPECTFULLY SUBMITTED,

Erin Joyner, Assistant Solicitor

York, South Carolina
_____, 2019

STATE OF SOUTH CAROLINA
COUNTY OF YORK

IN THE COURT OF GENERAL SESSIONS
SIXTEENTH JUDICIAL CIRCUIT

State of South Carolina,

2016GS4602193
2016GS4602195
2016GS4602196
2016GS4602197
2016GS4602198
2016GS4602199
2016GS4602194
2016GS4602200
2018GS467693
2018GS461694
2018GS461695

Memorandum in Support of Rule 404(b)
Evidence

vs.

Julio Andres Castillo,

Defendant.

The State of South Carolina, through Assistant Solicitor Erin Joyner, offers this memorandum in support of the introduction of evidence regarding *witness one*'s abuse under Rule 404(b), common scheme or plan, in the trial of criminal charges involving the sexual abuse of *victim one* and *victim two*, and the introduction of evidence regarding the sexual abuse of *victim one* and *victim two*'s testimony under Rule 404(b), common scheme or plan, in the trial of criminal charges involving the sexual abuse of *witness one*.

STATEMENT OF FACTS: *victim one*

victim one was eight years old when the Defendant became his next-door neighbor. Prior to that time, *victim 1* and his family met the Defendant at Church, where *victim one* and his brother, *victim 2*, participated in the youth choir. The Defendant assisted with youth choir. The Defendant became friends with *victim one's* parents and became like a part of the family.

When *victim one* was eight years old, the Defendant invited the C family to stay on Daufuskie Island at his aunt's home. The trip took place between June 17 and June 19, 2005. On this trip, the Defendant exposed himself to *victim one*.

After returning home from Daufuskie Island, the Defendant began giving *victim one* massages. Massages mostly involved Defendant sitting on *victim one's* leg as he massaged, with *victim one* lying on his stomach. The massages consisted of back rubbing and the rubbing of feet and legs. Defendant would sit beside him to massage his legs. *victim one* would be flipped over, at which point his penis would be touched. Initially, the touching of the penis seemed

inadvertent. Victim one recalls massaging the Defendant one time. These massages occurred in the Defendant's home in his bedroom on his waterbed.

In the fifth grade, Victim one asked the Defendant about a joke that he did not understand. The joke was about masturbation. The Defendant explained the joke to Victim one and then masturbated Victim one. This occurred in the Defendant's bedroom on his waterbed. After that, there were several other similar incidents that occurred in the Defendant's bedroom on his waterbed, to include one incident which occurred after the Defendant converted part of the attic into a living space. Victim one and Victim 2 were spending the night in the converted attic. Victim one, by pre-arrangement, came downstairs to the Defendant's bedroom after Victim 2 fell asleep and was masturbated by the Defendant.

Following the attic conversion, the Defendant also massaged Victim one and masturbated Victim one in the attic and made Victim one touch his penis in the attic. Victim one only recalls the latter occurring one time, with Victim one briefly masturbating the Defendant but not to ejaculation. This occurred during an instance where the Defendant had been masturbating Victim one.

The abuse progressed from massages to masturbation to fellatio. There were two instances of Defendant performing fellatio on Victim one. One occurred in the Defendant's home in his bedroom. The other incident occurred the night before the Defendant's wedding in the C's guest bedroom on July 24, 2009. The Defendant was an overnight guest of the C at that time. That night, Victim one stopped the Defendant and told him that the abuse needed to end.

Victim one and Victim 2 were frequently at the Defendant's home together during the period of time when the abuse was occurring. There were also incidents where Victim one or Victim 2 would be alone at the house with the Defendant. With the exception of the July 24, 2009 incident, all incidents of sexual abuse occurred at the Defendant's home when Victim one was an invited guest in the home. Victim one and Victim 2 spent the night at the Defendant's house several times and incidents of abuse occurred then. Victim one recalls Victim 2 being present when some of the sexual abuse incidents occurred but does not remember witnessing Victim 2 being abused.

Victim one recalls an incident in which he and Victim 2 were with the Defendant at the Defendant's mother's home. Victim one recalls being in the hot tub naked with the Defendant while Victim 2 was in the pool.

Following the abuse, the Defendant continued to have a friendly relationship with the C family. Victim one did not disclose the sexual abuse until after his younger brother Victim 2 came forward.

STATEMENT OF FACTS: Victim two

Victim two was no younger than eight years old when the Defendant began sexually abusing him. Victim 2 like his brother Victim one knew the Defendant as a close family

friend, youth choir director, and neighbor. Leading up to the beginning of the abuse, the Defendant had taken an active role in the C family.

Victim 2 was massaged by the Defendant in the Defendant's home in the attic approximately four times, approximately two of which involved fondling of his penis. Victim 2 would be dressed, but Defendant would reach up or under his clothes. Victim 2 described these as strange massages all over, which would start like a regular massage around the shoulder and back, but would also involve arms and legs. Victim 2 would flip from his stomach to his back. The Defendant would move up the legs and act as though he had accidentally touched Victim 2 penis. The Defendant would be positioned next to Victim two.

There were also two incidents involving fellatio, one giving and one receiving that occurred on the same night in the attic. This was during a sleep over in the attic and Victim one was there. Victim 2 recalls that this sleep-over occurred after the three had spent a significant portion of the day together. Victim 2 recalls that Victim one was sexually abused that night as well.

All incidents of sexual abuse occurred at the Defendant's home when Victim 2 was an invited guest in the home. Victim 1 and Victim 2 were frequently at the Defendant's home together during the period of time when the abuse was occurring. There were also incidents where Victim 1 or Victim 2 would be alone at the house with the Defendant.

Following the abuse, the Defendant continued to have a friendly relationship with the C family. Victim 2 first disclosed his sexual abuse to a mental health professional at the end of 2015. He filed a report with law enforcement in January 2016.

STATEMENT OF FACTS: witness one

Witness one first met the Defendant when the Defendant began dating witness 1's sister, Kat at the beginning of the 1997-1998 school year. Witness 1 was eight years old and in the third grade. The Defendant came frequently to the V home, forming a close relationship with witness one's parents, which continued after the Defendant and Kat ended their romance. Even while the Defendant and Kat were dating, it was not uncommon for the Defendant to come to the V home when Kat was not present.

Between the ages of eight to eleven years of age, witness 1 was sexually abused by the Defendant. This abuse occurred at the Defendant's home. The sexual abuse occurred when witness 1 slept over at the Defendant's home.

The abuse began as massaging and progressed to masturbation. Initially, the massages involved touching of the crotch area that seemed inadvertent. As the massages progressed, the Defendant would kneel beside witness 1 and have witness 1 hold his erect penis while he massaged him. The Defendant would then have them switch positions.

Approximately one year into the abuse, it progressed to masturbation. The first incident of masturbation occurred in the Jacuzzi tub in the Defendant's parents' bathroom. It began with the Defendant explaining to witness 1 what masturbation was by attempting to masturbate witness one

Masturbation of the Defendant by witness 1 occurred on more than one occasion in the Jacuzzi tub and also occurred in the Defendant's bed during massages. Masturbation to Defendant ejaculating occurred only in the Jacuzzi. Incidents in the Jacuzzi only occurred if the Defendant's parents were not home.

Defendant and witness 1 would also shower together at the Defendant's home when his parents were home. This would occur in the guest bathroom. There was no touching during showering.

The abuse ceased around the beginning of the sixth grade when witness 1 refused to participate in the abuse. After that the Defendant continued to have a friendly relationship with the V. family and with witness one.

In 2008, witness 1 disclosed to his now-wife that he had been sexually abused by an unspecified family friend as a child. In 2016, when the Defendant was arrested for charges involving victim one and victim two, he admitted to his wife that the Defendant was his abuser. In 2017, he admitted to other family members that he had been sexually abused by the Defendant. In the fall of 2018, he spoke with law enforcement regarding his abuse.

STATEMENT OF LAW

In determining the admissibility of bad act evidence, the trial judge must first determine whether the proffered evidence is relevant under Rule 401, SCRE. If the trial judge finds that the evidence is relevant, the judge must then determine whether the bad act evidence falls within an exception of Rule 404(b). If the Defendant has not been convicted of the other crime, evidence of the other bad act must be clear and convincing. Even if the prior bad act evidence is proven by clear and convincing evidence, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. State v. Clasby, 385 S.C. 148, 154-156, 682 S.E.2d 892 (S.C. 2009).

In determining the admissibility of other bad acts as evidence of common scheme or plan under Rule 404(b), the Court should analyze the similarities and dissimilarities between the charged crime and other bad act to determine whether there is a close degree of similarity. When the similarities outweigh the dissimilarities, the bad act evidence is admissible. Factors the court should consider include: (1) the age of the victims when the abuse occurred; (2) the relationship between the victims and the perpetrator; (3) the location where the abuse occurred; (4) the use of coercion or threats; and (5) the manner of the occurrence, for example, the type of sexual battery. The court should also consider other relevant factors. State v. Wallace, 384 S.C. 428, 434-444, 683 S.E.2d 275 (S.C. 2009).

A close degree of similarity establishes the required connection between the two acts and no further connection must be shown. Id.

In making the similarity determination, focus should be upon whether each particular proffer of bad act evidence is sufficiently similar to the crimes charged, not whether multiple proffers are sufficiently similar to each other. State v. Scott, 405 S.C. 489, 505-506, 748 S.E.2d 236 (S.C. 2013).

The question whether the probative value of this evidence outweighs its prejudicial effect hinges on the degree of similarity between the prior acts and the offense charged. State v. Hallman, 293 S.C. 172, 379 S.E.2d 115 (S.C. 1989). The Court should also consider temporal remoteness and other factors. See State v. Scott, 405 S.C. 489, 505-506, 748 S.E.2d 236 (S.C. 2013) (upholding the admission of two 404(b) witnesses who testified about bad acts occurring twenty years before the charged crimes).

STATE'S POSITION AS TO VICTIM ONE AND WITNESS ONE

It is the State's position that evidence of witness one's sexual abuse is admissible under Rule 404(b), common scheme or plan, in the trial of criminal charges involving the sexual abuse of Victim one, and that evidence of Victim one's sexual abuse is admissible under Rule 404(b) common scheme or plan, in the trial of criminal charges involving the sexual abuse of witness one.

It is the State's position that the similarities in the acts committed against Victim one and witness one outweigh the dissimilarities and, as such, the bad act evidence offered by one witness would be admissible in the criminal trial concerning the other.

As to the first Wallace factor, age at the time of abuse, Victim one and witness one were approximately the same age at the time the abuse began. Victim one was nine years old when the Defendant exposed himself at Daufuskie Island. After Daufuskie Island, the Defendant began giving Victim one massages. Witness 1 was eight years old when his sexual abuse began.

As to the second Wallace factor, the relationship between the victims and the perpetrator, Victim one and witness one had a similar relationship with the Defendant. In both instances, the Defendant met each boy through an older family member and cultivated a relationship with the parents and sibling. He ingratiated himself into each boy's family and invited the boy to his home, where he then sexually abused each boy. See State v. Scott, 405 S.C. 489, 501-502, 748 S.E.2d 236 (S.C. 2013) (noting that although April, the 404(b) witness was not blood-related to the Defendant as the four victims were, this was not dispositive as her relationship to the Defendant's live-in girl-friend afforded the Defendant an opportunity to abuse her under nearly identical circumstances as the victims).

As to the third Wallace factor, the location of abuse, the location in both cases is the Defendant's home, except for the July 24, 2009, incident involving Victim one. In witness 1's case, the abuse occurred in the Defendant's parent's home, where the Defendant was residing. In Victim 1's case, the abuse occurred in the Defendant's home, located at Egret Court.

It is important to note that with both Victim one and witness one, the Defendant frequently interacted with each boy in the boy's home and drove each boy to different activities and events, which provided access and opportunity to abuse the boys in other locations. Yet, the abuse, except as noted above, was confined to the Defendant's residence.

As to the fourth Wallace factor, the presence of coercion or threats, neither Victim one nor Witness one was threatened to engage in activity or to not tell. In both cases, the Defendant used his friendship with each to coerce and manipulate them into sexual activity.

As to the fifth Wallace factor, the manner of occurrence, the evidence shows the same progression from full body massaging to masturbation, with the progression occurring in a similar time frame. Witness 1's sexual abuse progressed to masturbation after approximately one year. Victim 1's sexual abuse progressed to masturbation sometime in the fifth grade, which began one year and two months after the Daufuskie trip.

In both cases, the initial massages involved the grazing or seemingly inadvertent touching of each boys' penis.

Although Witness 1 was massaged wearing underwear or naked while Victim one was clothed, the massages in both cases involved skin to skin contact, as Victim 1 was massaged underneath his clothing. Additionally, the massages in both cases involved Defendant positioned beside the boy for part of the massage.

In each case, the Defendant masturbated the boy for the first time as part of explaining masturbation to him. In Witness 1's case, masturbation occurred in the Jacuzzi tub at the Defendant's parents' home and began with the Defendant explaining to Witness 1 what masturbation was. In Victim 1's case, Victim 1 asked the Defendant about the meaning of a joke he heard at school about masturbation, which progressed to the Defendant masturbating him as explanation.

The State submits that an additional relevant factor for the court's consideration is the apparent reason that the abuse ended and the continuation of the relationship after the abuse. In Witness one's case, the sexual abuse ceased around the beginning of the Sixth Grade when he refused to participate. In Victim 1's case, the abuse ended the night before the Defendant's wedding when Victim 1 told the Defendant that it needed to end. This occurred the summer before Victim 1 began the eighth grade. In both cases, the Defendant remained on friendly terms with each boy after the abuse, still taking him on outings and spending time with each at his home. The Defendant also remained friendly with the families, maintaining his position of being part of the family.

It is the State's position that, to the extent that Victim one abuse progressed further than Witness one's the case law allows for redaction of dissimilar particulars to avoid unfair prejudice to the Defendant. See State v. Wallace, 384 S.C. at 435 ("We note that the trial court redacted only the last step in a progressive course of abuse. Sister's abuse began with touching of the breasts, digital penetration and oral sex, and then progressed to the point of intercourse. The fact that Victim's abuse was interrupted before it could culminate in intercourse does not diminish the similarity between the progression the abuse took in each case. Moreover, the trial court may properly redact dissimilar particulars of sexual conduct to avoid unfair prejudice to the defendant".)

STATE'S POSITION AS TO VICTIM TWO AND WITNESS ONE

It is the State's position that witness one's sexual abuse is admissible under Rule 404(b), common scheme or plan, in the trial of criminal charges involving the sexual abuse of Victim two, and that the sexual abuse of Victim two is admissible under Rule 404(b) common scheme or plan, in the trial of criminal charges involving the sexual abuse of witness one.

It is the State's position that the similarities in the acts committed against Victim two and witness one outweigh the dissimilarities and as such the bad act evidence offered by one witness would be admissible in the criminal trial concerning the other.

As to the first Wallace factor, age at the time of abuse, Victim two and witness one were approximately the same age at the time the abuse began. Victim two's sexual abuse began when he was approximately eight years old. Witness one was also eight years old when his sexual abuse began.

As to the second Wallace factor, the relationship between the victims and the perpetrator, Victim two and witness one had a similar relationship with the Defendant. In both instances, the Defendant met the boy through an older family member and cultivated a relationship with the parents and the boy's sibling. He ingratiated himself into the boy's family and invited the boy to his home. See State v. Scott, 405 S.C. 489, 501-502, 748 S.E.2d 236 (S.C. 2013)

As to the third Wallace factor, the location of the abuse in each case was the Defendant's home. This is true despite the fact that the Defendant spent time with each boy in the boy's home and despite the fact that the Defendant would take the boys to different events, providing ample opportunity for abuse to occur in other locations.

In witness one's case, the abuse occurred in the Defendant's parent's home, where the Defendant was residing. In Victim two's case, the abuse occurred in the Defendant's home, located at Egret Court.

As to the fifth Wallace factor, the sexual abuse involved full body massages, which included the touching of the penis.

It is the State's position that, to the extent that witness one and Victim two abuse was dissimilar, the case law allows for redaction of dissimilar particulars to avoid unfair prejudice to the Defendant. See State v. Wallace, 384 S.C. 428 at 434-444, 683 S.E.2d 275 (S.C. 2009).

For the foregoing reasons, the State respectfully submits that evidence regarding witness one's abuse should be admissible under Rule 404(b), common scheme or plan, in the trial of criminal charges involving the sexual abuse of Victim one, and Victim two, and the introduction of evidence regarding the sexual abuse of Victim one and Victim two should be admissible under Rule 404(b), common scheme or plan, in the trial of criminal charges involving the sexual abuse of Victim two.

RESPECTFULLY SUBMITTED,

Erin Joyner, Assistant Solicitor

York, South Carolina
_____, 2019

STATE OF SOUTH CAROLINA)
COUNTY OF YORK)

IN THE COURT OF GENERAL SESSIONS
SIXTEENTH JUDICIAL CIRCUIT

State of South Carolina,)

Memorandum to Limit
Rule 404(b) Evidence

vs.)

Julio Andres Castillo,)

Warrant Nos. 2016G4602193 thru
2016G4602200

Defendant.)
_____)

The State has offered a memorandum in support of the introductions of evidence regarding witness one's alleged abuse under Rule 404(b), common scheme or plan, in the trial of the criminal charges involving the alleged sexual abuse of Victim one and Victim two, and the introduction of evidence regarding the alleged sexual abuse of Victim one and Victim two's testimony under Rule 404(b), common scheme or plan, in the trial of criminal charges involving the alleged sexual abuse of witness one.

As far as the State seeks to include bad act evidence regarding Victim 2 and Victim one at the trial for the criminal charges involving witness one, the Defense objects to this motion as premature.

In regards to the inclusion of prior bad act evidence regarding witness 1 at the trial for the criminal charges regarding Victim 1 and/or Victim two, the evidence should be inadmissible as it is not relevant, not part of a common scheme or plan, more prejudicial than probative, and confusing to the jury.

Witness one's Allegations

Witness one's allegations consist of their own unique facts, making them completely

separate and not relevant. There is no legitimate argument that demonstrates that the witness 1 allegations are necessary to make any of the victims allegations more or less probable. The State's desire to admit testimony regarding the allegations of sexual assault of a different victim is an attempt by the State to admit the prior bad act evidence in a way that is forbidden by SCRE 403, SCRE 404(b) and *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923). Simply based on the definition of "relevant evidence", the prior allegations should be excluded by this Court. Admitting testimony related to the witness 1 allegations would not only be more prejudicial than probative, but would likely lead to confusing the jury. If this Court does determine that the evidence is relevant, then the Court should rule that it is inadmissible based on *Lyle* and fails the balancing test set forth under SCRE 403.

a. The Rule from *Lyle* and 404(b)

In 1923, the South Carolina Supreme Court stated "the familiar and salutary general rule, universally recognized and firmly established in all English-speaking countries, that evidence of other distinct crimes committed by the accused may not be adduced merely to raise an inference or to corroborate the prosecution's theory of the defendant's guilt of the particular crime charged." *State v. Lyle*, 125 S.C. 406, 118 S.E. 803, 807. "Under our system of justice, a conviction must be based upon evidence of the offense for which the accused is on trial rather than prior criminal or immoral acts." *State v. Gore*, 283 S.C. 118, 322 S.E.2d 12, 13 (1984). Evidence of other crimes is not admissible to prove the character of a person to show that he acted in conformity therewith. *State v. Bailey*, 275 S.C. 444, 272 S.E.2d 439, 440 (1980)(citing *State v. Lyle*).

Its effect is to predispose the mind of the juror to believe the prisoner is guilty, and thus effectively to strip him of the presumption of innocence." *State v. Lyle*, 118 S.E. at 807. "It

compels the defendant to meet charges of which the indictment gives him no information, confuses him in his defense, raises a variety of issues, and thus diverts the attention of the jury from the one immediately before it." *Id.* "[T]he general rule should be strictly enforced in all cases where applicable because of the prejudicial effect and injustice of such evidence, and should not be departed from except under conditions which clearly justify departure." *State v. Sharpe*, 239 S.C. 258, 122 S.E.2d 622, 630 (1961).

Exceptions to the rule were recognized in *Lyle*, and later included into SCRE 4B4(b). Evidence of other crimes or bad acts is competent to prove the specific crime charged in five situations, one of which is to show 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. *Id.*, at 806.

Evidence which falls into an exception is not automatically admissible. The following inquiries must first be made:

1. Can the government establish the prior by act by clear and convincing evidence?
2. If yes, what is the connection between the crime charged and the prior bad act sought to be introduced?
 - a. In essence, how is the prior bad act relevant to prove a material fact or element of the crime charged?
 - b. The connection between the prior bad act and the present crime must also be close, not just a general similarity.
3. If yes, is the probative values of the evidence substantially outweighed by the danger of unfair prejudice?
4. If yes, does the evidence sought to be introduced fit as an exception?

I. There is no connection between the crime charged and the prior bad act

The prior bad acts are alleged sexual abuse to include touching and masturbation with a different child, witness one who is unrelated to either of the victims. The prior bad acts

are not relevant to prove any material fact or elements of the crimes charged. The prosecution is seeking to introduce the evidence solely to show criminal propensity.

Additionally, other than the Defendant being accused in both cases, there is no connection between the bad acts and the charged crimes. Even if the Court were to find that there was a connection between the bad acts and the charged crimes, the prior allegations are still inadmissible as they do not satisfy any exception to SCRE 404(b) and *Lyle*.

To qualify for admissibility under SCRE 404(b), the State must prove the bad act falls into one of five categories; Absence of Mistake or Accident, Motive, Intent, Common Scheme or Plan, or Identity. In the case at bar, the State is claiming that the prior bad acts fall into the category of Common Scheme or Plan.

This exception require more than mere commission of two similar crimes by the same individual. *State v. Stokes*, 279 S.C. 191 (1983). There must be some **connection** between the crimes. It requires a **close** relationship between the crimes. *State v. Moultrie*, 316 S.C. 547, 544 (Ct. App. 1994)(emphasis added).

Under this exception, in cases involving sexual abuse of children, the Court has determined that the standard for child sex cases is different than any other criminal cases. In *State v. Wallace*, the Court held that "...a trial court must analyze the similarities and dissimilarities between the crime charged and the bad act evidence to determine whether there is a close degree of similarity; when the similarities outweigh the dissimilarities, the bad act evidence is admissible..." Factors the court should consider include the age of the victims when the abuse occurred, the relationship between the victims and the perpetrator, the location where the abuse occurred, the use of coercion or threats, the manner of the occurrence - the type of sexual battery, and any other relevant factors. 384 S.C. 428 at 434-444 (2009).

The bar for admissibility under *Lyle* is not lowered solely because a sex crime is involved. *State v. Tutton*, 354 S.C. 319, 328 (2003). "The suggestion that common scheme or plan evidence will generally be admitted in cases involving continuous misconduct is misleading. The evidence must also be logically relevant to the crime being tried." *Id.* at 329.

Applying the *Wallace* factors to the case at bar, the defendant submits that the dissimilarities outweigh the similarities, and the evidence should not be admitted.

As to the age, the victims were relatively the same age.

As to the relationship with the defendant, *witness one* was more like a brother to the defendant. There is evidence that the two became "blood brothers" and *witness 1* called defendant "Bro". The age difference between *witness 1* and the defendant was approximately 8 years. The relationship with the *victim* boys was drastically different. Defendant was fourteen and sixteen years older than *victim 1* and *victim 2*, respectively. Defendant was out of college, owned his own house, and supported himself. Although Defendant considered the *victim* boys family, it was not the same brotherly relationship he had with *victims*.

Additionally, Defendant's relationship with the families of the alleged victims was different. Defendant was like a son to the V . . . They threw him birthday parties and included them in their family celebrations. The C looked at Defendant as more of an equal in that they trusted their children in his care and let their sons spend copious amounts of time with the Defendant alone.

As to the third factor, the State claims that the alleged abuse happened in the same place - Defendant's home. There were actually two different residences in which Defendant resided, one of which was Defendant's parents home. *victim 1* also claims some of the abuse happened in the C household and in Dafuskie Island.

As to the presence of coercion or threats, ^{victim 2} claims that he was threatened and felt unsafe. Neither ^{victim 1} nor ^{witness 1} have any claims of threats. Additionally, ^{witness 1} claims that he continued his relationship with Defendant in order to get gifts from him such as a rebuilt computer and a sound system for his car.

As to the fifth factor, the manner or type of abuse, there are also dissimilarities. ^{witness} ^{one} does not allege any fellatio occurred. ^{victim 1} alleges Defendant performed fellatio on him, and ^{victim 2} alleges he was forced to give and receive fellatio. Additionally, the ^{victim} boys allegations include the use of ropes and being hog tied during the alleged abuse. ^{witness one} makes no claims of this type.

The Defendant would object to any "redaction" of dissimilar particulars in the allegations in order to avoid unfair prejudice. It is the Defendant's position that redacting testimony to be more similar to the charged crimes would in fact cause greater prejudice to the Defendant in that the alleged prior bad acts would be seem more consistent and therefore more likely to have occurred.

II. SCRE 403 Analysis

If the Court finds that the evidence the State seeks to present satisfies SCRE 404(b), it should still be excluded pursuant to SCRE 403 because the prejudice of the admission is outweighed by any probative value it may have.

Although relevant, SCRE 403 prohibits admission of evidence if its probative value is substantially outweighed by the danger of unfair prejudice or confusion of the issues.

The prejudicial effect of admitting evidence of the prior bad acts alleged by ^{witness one} is disproportionate to its probative value. Admitting evidence of the prior acts would only inflame the emotions of the jury and prejudice the Defendant in the eyes of the jury. Further,

evidence of an additional victim and his allegations would only confuse the issues. Defendant is not on trial for the acts alleged by witness 1, but by allowing him to testify under SCRE 404(b) as to the prior bad acts of the Defendant, the Court is theoretically putting Defendant on trial for those allegations. The jury will not be able to separate in their minds the difference between the alleged crimes committed upon ^{victim2} ^{victim1} and witness 1 and may convict Defendant on the charged crimes based upon the testimony of witness 1 even though Defendant is not on trial for the crimes alleged by witness one

CONCLUSION

In conclusion, the evidence sought to be introduced by the State regarding prior bad acts alleged by witness one is not relevant to prove a material fact or element of the crimes charged. Further, under *Lyle*, the State seeks to introduce the evidence as part of a common scheme or plan. To introduce evidence under the common scheme or plan exception in child sex abuse cases, the Court held that a five factor analysis be used to determine the similarity between the prior bad act and the charged crimes. The Defendant submits that the prior bad acts and the charged crimes are too dissimilar and that the evidence should not be admitted. Further, even if the Court finds that similarities do exist, the evidence should be excluded based on SCRE 403 as the prejudice to the Defendant outweighs and probative value and the testimony of an alleged third victim would be very confusing to the jury.

Therefore, Defendant requests that all testimony of prior bad acts be inadmissible under *Lyle*, SCRE 404(b), and SCRE 403.

Respectfully Submitted,

Jack B. Swerling
Attorney for Defendant
1720 Main Street, Suite 301
Columbia, South Carolina 29201
(803) 765-2626

Columbia, South Carolina

Date: _____

EXHIBIT B



Tricia Blanchette <blanchettelaw@gmail.com>

State v. Julio Castillo

JACK SWERLING <jacklaw@aol.com>

Thu, Feb 25, 2021 at 4:09 PM

To: Tricia Blanchette <blanchettelaw@gmail.com>, "Joyner, Erin" <erin.joyner@yorkcountygov.com>
Cc: Josh Edwards <JEdwards@scag.gov>, Kellie Switzer <KSwitzer@jbswerling.com>, Alissa Wilson <awilson@jbswerling.com>

I can verify that the documents furnished were the documents submitted to the Court on the opening day of trial.
If you need anything further please advise.

Jack Swerling

1720 Main Street, Columbia, SC 29201

Office: (803) 765-2626

Cell: (803) 237-6300

Fax: (803) 799-4059

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On Feb 17, 2021, at 11:25 AM, Jack Swerling <jacklaw@aol.com> wrote:

Received, thank you.

[Quoted text hidden]



Tricia Blanchette <blanchettelaw@gmail.com>

State v. Julio Castillo

Joyner, Erin <erin.joyner@yorkcountygov.com>

Tue, Mar 2, 2021 at 11:05 AM

To: JACK SWERLING <jacklaw@aol.com>, Tricia Blanchette <blanchettelaw@gmail.com>

Cc: Josh Edwards <JEdwards@scag.gov>, Kellie Switzer <KSwitzer@jbswerling.com>, Alissa Wilson <awilson@jbswerling.com>

I agree that the contents of the documents furnished in your email were presented to the court on the opening day of trial.

Erin Joyner

[Quoted text hidden]

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

Mar 08 2021

SC Court of Appeals

APPEAL FROM YORK COUNTY
G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No: 2019-001983

THE STATE,

RESPONDENT,

v.

JULIO ANDRES CASTILLO,

APPELLANT.

CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Motion Regarding the Record on Appeal has been served on opposing counsel by sending to opposing counsel's primary e-mail address as listed in the Attorney Information System (AIS):

Josh Edwards, Esquire
JEdwards@scag.gov

This 8th day of March 2021.



Tricia A. Blanchette
S.C. Bar No. 74904
PO Box 2147
Leesville, SC 29070
(803) 908-3266
Attorney for Appellant

March 8, 2021



Tricia Blanchette <blanchettelaw@gmail.com>

Julio Andres Castillo v. State

1 message

Tricia Blanchette <blanchettelaw@gmail.com>
To: Josh Edwards <JEdwards@scag.gov>

Mon, Mar 8, 2021 at 12:24 PM

Josh,

I have attached the Motion that I will be e-filing with the Court of Appeals today. I will print this email to provide to the Court, along with the Certificate of Service. Please don't hesitate to contact me with any questions.



Thanks,

Tricia

--

Tricia Blanchette
Attorney at LawLaw Office of Tricia A. Blanchette
PO Box 2147
Leesville, SC 29070
803-908-3266

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32K

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TRICIA A. BLANCHETTE

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Mar 08 2021

SC Court of Appeals

March 8, 2021
VIA E-FILING

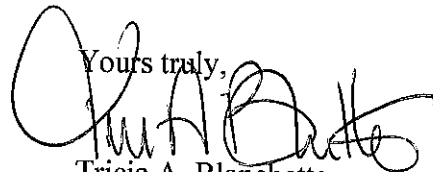
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

RE: State v. Julio Andres Castillo; Appellate Case No.: 2019-001983

Dear Madam Clerk:

For filing and consideration of the Court, I have attached a Motion Regarding the Record on Appeal, with exhibits. Please note this appeal involves charges of criminal sexual conduct with a minor; therefore, I have redacted the exhibits and ask that the documents be handled with this in mind. I have also attached a Certificate of Service.

Please let me know if any additional information is needed. I appreciate your assistance with this matter.

Yours truly,

Tricia A. Blanchette
Attorney at Law

cc: Josh Edwards, Esquire
Julio Andres Castillo