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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Lancaster County
Hon. Roger E. Henderson, Circuit Court Judge
Court of Appeals Appellate Case No. 2017-001796

The State, Petitioner,

v.

Guadalupe Guzman Morales, Respondent.

Opinion No. 5814 (S.C. Ct. App. filed April 7, 2021)

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Senior Assistant Deputy Attorney General

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3727

ATTORNEYS FOR PETITIONER

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CERTIFICATION OF COUNSEL

Counsel for Petitioner hereby certifies that a Petition for Rehearing was filed in the South Carolina Court of Appeals on April 22, 2021. The Petition for Rehearing was denied by Order filed May 13, 2021.

STATEMENT OF QUESTIONS PRESENTED

I. The issue addressed by the Court of Appeals was not preserved for review on appeal and was waived and conceded at trial by Respondent's counsel. As a result, the Court of Appeals erred by addressing it on the merits. After incorrectly finding the issue preserved and not waived, the Court of Appeals also erred in finding the evidence and testimony presented did not constitute a proper common scheme or plan under the standard articulated in State v. Perry, 430 S.C. 24, 824 S.E.2d 654 (2020) and State v. Cotton, 430 S.C. 112, 844 S.E.2d 56 (2020).

STATEMENT OF THE CASE

Procedural History

In October 2002, Respondent was arrested for two counts of criminal sexual conduct (CSC) with a minor second degree and one count of attempted CSC with a minor second degree. He was subsequently indicted in 2003 for the charges, but a fire in the Lancaster Courthouse in 2008 destroyed the indictments. (App. 10-11) Respondent was re-indicted in 2016 on charges of CSC with a minor first degree, CSC with a minor second degree, and assault with intent to commit CSC with a minor second degree. (True-billed Indictments; App. 406-411).

After two pretrial hearings, Respondent proceeded to trial before the Honorable Roger E. Henderson and a jury. The jury returned verdicts of guilty on all charges. (App.391). Judge Henderson sentenced Respondent to thirty years imprisonment for CSC with a minor first degree; ten years imprisonment, to be served consecutively, for CSC with a minor second degree; and ten years imprisonment, to be served concurrently, for assault with intent to commit CSC with a minor second degree—totaling forty years in prison. (Sentencing Sheets; App. 412-414).

The Court of Appeals, after briefing, affirmed the convictions and sentences. See State v. Morales, Op. No. 2020-UP-001 (S.C. Ct. App. filed Jan. 8, 2020). Respondent petitioned to the South Carolina Supreme Court arguing the trial court erred in its application of State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009). The Supreme Court granted certiorari, dispensed with further briefing, reversed the decision of the Court of Appeals, and remanded for "reconsideration of the substantive and procedural issues in light of [the Supreme Court's] decision in State v. Perry, 430 S.C. 24, 824 S.E.2d 654 (2020)."

On October 7, 2020, the Court of Appeals sent a letter in light of the remand requesting the parties provide a memorandum addressing the impact of Perry on this appeal. The parties both served and filed supplemental briefs. After oral argument, the Court of Appeals issued an opinion reversing and remanding for a new trial. State v. Morales, 433 S.C. 196, 857 S.E.2d 383 (Ct. App. 2021). The State served and filed a Petition for Rehearing on April 22, 2021, which was denied on May 13, 2021. This Petition for Writ of Certiorari follows.

Factual Background

When the victim was younger[1], she lived with her mother, Respondent, and two younger sisters. (App. 141-142). The victim's sisters were about two and five years younger than her. While she lived with Respondent, the victim believed he was her biological father, but found out later he was not. (App.144).

Respondent began sexually touching the victim when she was just four years old. She and her family lived in a different trailer. The victim and her middle sister were jumping on the bed. Respondent flipped her onto her back and pulled her to the edge of the bed. He spread her legs and rubbed his groin against hers on the outside of her clothing. (App. 147-148). When the victim turned around seven, Respondent began digitally penetrating her. Most of the time it occurred at home, but also in the car or at the river. The victim's mom was rarely home when it occurred or occasionally would be in the shower. (App. 148-150).

The abuse continued to escalate to Respondent raping the victim. When she was eleven years old the family planned to go to Carowinds for her birthday. The family was getting ready and her mom was in the shower when Respondent, who the victim believed was her dad, told her to get on the bed with him if she wanted to go to Carowinds. She tried to resist, but he insisted.

[1] At the time of trial, the victim was twenty-eight years old. (App. 140).

Respondent then raped the eleven year old victim. (App. 145-146). Later that summer, the victim's mom and sisters went to the store. The victim was in trouble and confined to her room. Respondent entered and again raped the eleven year old girl. She realized the window was open and tried to scream, but Respondent put his hand over her mouth. (App. 152-153). The victim never told anyone because she was scared, did not want to be called a liar, and did not want to be judged. (App.154).

After the victim was kicked out of the house with her mother and Respondent, she went to live with her Uncle Jimmy and his girlfriend Michelle. (App. 141; 155). Michelle walked the victim to the bus stop for school. One day the victim was being very quiet or distant. Michelle asked if the victim was doing okay. (App.155; 264-265). The victim disclosed the years of abuse by Respondent.

Respondent also sexually abused the middle sister, the second victim. She believed Respondent was her father at the time of the abuse, but was unsure of the truth as she got older. The abuse began when she was about three years old. Respondent would have her sit on his lap and would touch her under her underwear. The abuse occurred in the home. (App. 273-274). When the second victim was eight, Respondent saw that she could not sleep and had her get in the bed with him. Her mom was not home at the time. Respondent lay in the bed behind the second victim and pulled down her pants and underwear. She felt his penis touch her buttocks. (App. 276). The second victim did not tell anyone when the abuse was occurring, but later told her grandmother about the abuse after her older sister disclosed to Michelle and their grandmother. (App.276).

ARGUMENT

I. The issue addressed by the Court of Appeals was not preserved for review on appeal and was waived and conceded at trial by Respondent's counsel. As a result, the Court of Appeals erred by addressing it on the merits. After incorrectly finding the issue preserved and not waived, the Court of Appeals also erred in finding the evidence and testimony presented did not constitute a proper common scheme or plan under the standard articulated in State v. Perry, 430 S.C. 24, 824 S.E.2d 654 (2020) and State v. Cotton, 430 S.C. 112, 844 S.E.2d 56 (2020).

The Court of Appeals erred in addressing the Rule 404(b), SCRE, issue on its merits because Respondent failed to properly preserve the issue for review because he did not raise it when the actual testimony was being admitted after raising it during a pre-trial, in limine hearing. Additionally, he specifically waived and conceded the issue regarding whether the testimony by the second victim properly constituted a common scheme or plan, so the Court of Appeals erred in allowing it to be addressed on appeal. Finally, after incorrectly concluding the issue was properly preserved and not waived by Respondent, the Court of Appeals erred in its application of State v. Perry, 430 S.C. 24, 824 S.E.2d 654 (2020) and State v. Cotton, 430 S.C. 112, 844 S.E.2d 56 (2020) to the facts of this case. This Court should grant the Petition for Writ of Certiorari, find the issue not properly preserved for review on appeal, find the issue was waived and conceded by Respondent's counsel at trial, and find the testimony was properly admitted as demonstrative of a common scheme or plan under Rule 404(b) and Perry.

Preservation of Issues on Appeal

Initially, the pre-trial hearing regarding the testimony of the second victim—when Respondent did raise the issue of Rule 404(b)—did not result in a final ruling. Specifically, the trial court stated: "I'm prepared to issue a conditional ruling" and later reiterated: "Again it is a conditional ruling . . . .". (App. 117). He ended his ruling by stating: "So -- that's not a ruling

that's just, you know, and inclination . . . an inclination on my part at this point in time so - - but I am conditionally ruling with regards to the testimony of [the second victim], though." (App. 117-118). Because this was an *in limine* ruling, it was not a final ruling by the trial court. See State v. Forrester, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001) ("[M]aking a motion *in limine* to exclude evidence at the beginning of trial does not preserve an issue for review because a motion *in limine* is not a final determination. The moving party, therefore, must make a contemporaneous objection when the evidence is introduced."); State v. Wiles, 383 S.C. 151, 156, 679 S.E.2d 172, 175 (2009) ("Generally, a motion *in limine* is not a final determination; a contemporaneous objection must be made when the evidence is introduced."); State v. Atieh, 397 S.C. 641, 646, 725 S.E.2d 730, 733 (Ct. App. 2012) ("A ruling *in limine* is not final; unless an objection is made at the time the evidence is offered and a final ruling procured, the issue is not preserved for review."). Accordingly, it was incumbent on **Respondent** to make a further objection to the introduction of the second victim's testimony based on Rule 404(b) if he sought to preserve the issue.

In order to properly preserve an issue for review on appeal, the process has been succinctly stated with four basic requirements: "The issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity." Jean Hoefer Toal et al., Appellate Practice in South Carolina 57 (2d ed. 2002). "An appellate court may not, of course, *reverse* for any reason appearing in the record. The losing party must first try to convince the lower court it is has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 421–22, 526 S.E.2d 716, 724 (2000) (italics in original). This Court further announced: "imposing this preservation requirement on the

appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments." Id. at 422, 526 S.E.2d at 724; see also, State v. Torrence, 305 S.C. 45, 66, 406 S.E.2d 315, 327 (1991) (eliminating *in favorem vitae* review in death penalty cases and holding: "A contemporaneous objection requirement enables trial judges to make reasoned decisions by appropriately developing issues by way of argument, both for or against any particular legal proposition. This, in turn, allows potential errors to be prevented or cured."). The Court noted the purpose of an appeal is to determine whether the trial judge erroneously acted or failed to act and when appellant's contentions are not presented or passed on by the trial judge, such contentions will not be considered on appeal. Id. Previously, this Court has explained:

> The purpose of an appeal under our procedure is to determine if the lower court did something that it should not have done, or omitted doing something it should have done. A trial judge will not be reversed for failing to grant a motion on a ground that was not submitted to him.

Powers v. City of Aiken, 255 S.C. 115, 117, 177 S.E.2d 370, 371 (1970). The Court of Appeals overlooked this relevant case law and, instead, reversed the conviction merely because the issue appeared somewhere within the record—not where it was required to appear in order to properly preserve the issue for review on appeal.

The Court of Appeals, in making its ruling on preservation, completely overlooked the relevant sequence of events leading to the trial court's ruling on the issues presented. While the defendant did move pre-trial to exclude the testimony of the second victim based on Rule 404(b), it was **the State** and **not Respondent** who requested the final ruling from the trial court on whether the second victim's testimony would be admissible. Pre-trial, the court made it clear he was not making a final ruling on admissibility repeating multiple times that he was making a "conditional ruling." (App.117-118). At trial, before the second witness testified, **the State**

asked the judge: "before we get rolling tomorrow I wanted to get a final ruling from the Court on the bad act testimony we intend to elicit from [the second victim]." (App.215). The State then presented its argument on admissibility including recounting all the similarities involved—especially the "circumstances with that familial relationship." (App.216).

Respondent did **not** continue to raise an objection pursuant to Rule 404(b). Instead, after hearing the evidence presented by the victim and being able to compare it to the pre-trial testimony by the second victim, he shifted his objection to something he believed may be more advantageous. Respondent's trial counsel acknowledged the similarities of the testimony by agreeing the witnesses are saying the "same thing" and that the testimony established a "conspiracy" or a "pattern." Essentially, he admitted the second victim's testimony was sufficiently similar to the victim's testimony to establish a common scheme or plan.

> Your Honor, since the ruling that you made in Chesterfield on a temporary basis. We heard some testimony. We haven't heard Lisa's testimony but we did hear it there that day. It appears to me that it is becoming a little bit more clear as to where the conspiracy is, if that's what you want to call it; **the pattern. And I think that now I'm seeing a pattern** of – **I'm seeing a pattern of conspiracy**.
>
> . . . .
>
> But the consortium of witnesses **that are saying the same thing for the same reason**. . . . But now after hearing [Victim one]'s testimony it appears to be clear that's what it is. So we think that the testimony of [Victim two] is -- will be **improper bolstering** of [Victim one]'s testimony.

(App. 217) (emphasis added). As a result of his acknowledgement regarding the similarities in the testimony, he altered his objection from one based on Lyle and 404(b) to one based on improper bolstering.

The Record clearly demonstrates, the **only** request made to the circuit court to consider its ruling on Rule 404(b) came from the prosecutor and not the defendant. See Brock v. Bd. of Adjustment & Appeals of City of Rock Hill, 308 S.C. 539, 543, 419 S.E.2d 773, 776 (1992) (finding an issue is not preserved when it is not raised by the appellant and trial); Tupper v. Dorchester Cty., 326 S.C. 318, 324, 487 S.E.2d 187, 190 (1997) (finding appellant "cannot bootstrap an issue for appeal by way of a codefendant's objection"); State v. Carriker, 269 S.C. 553, 238 S.E.2d 678 (1977) (finding issue not preserved because "appellant may not utilize the objection of another defendant to gain review"). Respondent in this case is clearly relying upon the State's request for a final ruling in order to maintain the issue is preserved for review on appeal, and the Court of Appeals erred in ruling "the trial court understood [Respondent] was still arguing against admission of [the second victim's] testimony as prior bad act evidence" based solely on the fact his ultimate ruling addressed the issue.

Significantly, not only does Respondent attempt to rely on the State's request for a ruling in order to create a preserved issue, he is arguing a completely different issue on appeal from what **he** raised to the trial court prior to the admission of the second victim's testimony. The only way to read Respondent's actual objection made during trial on the admission of the second victim's testimony is as an objection based on improper bolstering—a different objection that what has been raised on appeal. As a result, the issue is not properly preserved for review on appeal. See State v. Stahlnecker, 386 S.C. 609, 617, 690 S.E.2d 565, 570 (2010) ("For an issue to be properly preserved it has to be raised to and ruled on by the trial court."); State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003) (holding a defendant may not argue one ground at trial and another on appeal); State v. Bailey, 298 S.C. 1, 377 S.E.2d 581 (1989) (stating the defendant may not argue one ground on appeal and an alternate ground on appeal).

The Court of Appeals erred in finding the issue preserved because the trial court addressed Rule 404(b). This ruling was for the benefit of the State and not based on any continuing objection from Respondent.[2] The trial court also directly addressed Respondent's new challenge in which he argued about the grandmother coaching and the testimony being so similar that it constituted impermissible bolstering as a conspiracy. The trial court specifically noted Respondent's new contention: "The fact that the grandmother and you contend that the grandmother may have something to do this. That is something you can certainly argue to the jury if you want to when the time comes." (App.218). It is improper for this Court to utilize the trial court's response to the State's request to find an issue preserved on behalf of Respondent, especially when the trial court specifically addressed Respondent's new argument in the same ruling.

In addition, Respondent never challenged application of State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009) to a determination of whether the testimony was admissible under Rule 404(b). Unlike the defendant in State v. Perry, 430 S.C. 24, 824 S.E.2d 654 (2020), who directly maintained Wallace was the inappropriate standard, Respondent never raised that as a consideration for the circuit court. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) (providing that in order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial court); see also, S.C. Dep't of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 301–02, 641 S.E.2d 903, 907 (2007) ("The issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely

[2] Respondent certainly could have continued his Rule 404(b) objection while raising a new objection if he had just let the court know that was his intention. Nowhere in the Record is there any indication given to the trial court that Respondent still believed Rule 404(b) to be an issue. In reality, the exact opposite is the case as Respondent not only declined to continue his objection, he agreed with the State that a common scheme or plan was established.

manner, and (4) raised to the trial court with sufficient specificity.") (quoting Jean Hoefer Toal et al., Appellate Practice in South Carolina 57 (2d ed. 2002)). The circuit court was never given the opportunity to consider or address the appropriate standard and all parties operated as if the Wallace standard was the standard for consideration under Rule 404(b).

Additionally, the decision in Perry should only apply in those cases in which the defendant specifically asked the circuit court to apply a standard other than that set forth at the time by the South Carolina Supreme Court in Wallace. Otherwise, this Court would be reversing a trial court and a jury's determination when, at the time, no error was committed and no one ever told the trial court that their determination should be based on a different standard than the one articulated and binding on the court at the time. This Court recently articulated this exact finding:

> Just as we do not require attorneys to be clairvoyant in anticipating changes to the law, we do not hold the PCR court erred in the face of what was—at the relevant time—clear and binding authority as expressed in *Lee-Grigg* and *Green*: a jury instruction on good character was warranted when a defendant introduced evidence thereof at trial. **We cannot expect our circuit courts to divine future refinements in appellate jurisdiction—only to apply the prevailing law to the facts of a case before them.**

Pantovich v. State, 427 S.C. 555, 563, 832 S.E.2d 596, 600 (2019) (emphasis added) (footnote omitted). To apply Perry in this case, is to require not only the trial court but all parties to be able to divine this Court's future refinements to Rule 404(b). It is also unfair to reverse a conviction when the trial judge ruled as he was bound to by this Court's precedent, and all parties proceeded as they were bound to by this Court's precedent. Everyone involved in this case believed Wallace to be the appropriate standard, and everyone argued their positions and ruled on admissibility according to the standard set forth by this Court in Wallace—the "clear and binding authority" that existed "at the relevant time."

Accordingly, this Court should grant the Petition for Writ of Certiorari, finding the Court of Appeals erred in addressing an issue which was clearly not properly preserved for review on appeal. See Repko v. Cty. of Georgetown, 424 S.C. 494, 503, 818 S.E.2d 743, 748 (2018) (concluding "the court of appeals erred in sua sponte raising and ruling upon an issue that Repko never advanced to the trial court); State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) ("An issue that was not preserved for review should not be addressed by the Court of Appeals, and the court's opinion should be vacated to the extent it addressed an issue that was not preserved."); Hendrix v. E. Distribution, Inc., 320 S.C. 218, 219, 464 S.E.2d 112, 113 (1995) (finding "[s]ince the issue concerning Eastern's motion for a directed verdict was not preserved for review, it should not have been addressed" and vacating "the Court of Appeals' opinion to the extent it addressed an issue which was not preserved.").

Waiver/Concession of Issue on Appeal

Respondent also conceded the existence of a common scheme or plan in his remarks to the trial court regarding the admissibility of the second victim's testimony. He heard the State's arguments on why the second victim's testimony was admissible under Rule 404(b) as common scheme or plan right after hearing the testimony of the victim and with knowledge of the testimony to be admitted by the second victim based on the pre-trial hearing. Instead of arguing the State's theory was incorrect, Respondent's acknowledgement of "a pattern" and that the victims were "saying the same thing" was a clear concession of the admissibility of the second victim's testimony as a common scheme or plan, and his failure to contradict the trial court's ruling that the testimony met the requirements under Rule 404(b) for admission was an acquiescence and acceptance in the ruling. Respondent never challenged the State's argument that admission was proper and his conceding a "pattern" establishes the logical connection as

well as the necessary similarities to constitute a common scheme or plan. As a result, he cannot challenge on appeal an issue he explicitly conceded at trial. See State v. Benton, 338 S.C. 151, 156–57, 526 S.E.2d 228, 231 (2000) ("Respondent's present issue is not preserved for appellate consideration as he previously conceded the palm print was direct evidence."); TNS Mills, Inc. v. South Carolina Dep't of Revenue, 331 S.C. 611, 503 S.E.2d 471 (1998) (an issue conceded in the trial court cannot be argued on appeal); State v. Mitchell, 330 S.C. 189, 195, 498 S.E.2d 642, 645 (1998) (where counsel acquiesces in the judge's ruling and makes no other objections regarding the issue, the issue is not preserve for appeal); Ex parte McMillan, 319 S.C. 331, 335, 461 S.E.2d 43, 45 (1995) (an issue conceded at trial cannot be argued on appeal); Southern Ry. Co. v. Routh, 161 S.C. 328, 159 S.E. 640 (1930) (issue conceded in trial court cannot be argued on appeal); Richland Cty. v. Carolina Chloride, Inc., 382 S.C. 634, 656, 677 S.E.2d 892, 903 (Ct. App. 2009) (an issue expressly waived during trial is not preserved for appellate review), *aff'd in part, rev'd in part on other grounds*, 394 S.C. 154, 714 S.E.2d 869 (2011).

Accordingly, this Court should grant the Petition for Writ of Certiorari, finding Respondent conceded the testimony of the second victim was properly admitted and waived any issue related to Rule 404(b) at trial.

Merits

Even if this Court overlooks all the blatant procedural bars to consideration of the issue as raised on appeal, the Court of Appeals erred in its analysis and finding that the testimony by the second victim was not admissible as a common scheme or plan. Also, assuming Perry is the correct standard to apply[3], the testimony was admissible because a logical connection existed and

[3] The State maintains the Wallace standard is the standard to be applied because Respondent never requested or even articulated any other standard for the trial court to apply. Under the

the admission was similar to the admission of testimony in State v. Cotton, 430 S.C. 112, 844 S.E.2d 56 (2020) decided at the same time as Perry.

In Perry this Court required more than just similarities. The Court stated: "There must be something in the defendant's criminal process that logically connects the 'other crimes' to the crime charged." State v. Perry, 430 S.C. 24, 41, 842 S.E.2d 654, 663 (2020). In the instant case, there is something more; there is a logical connection that makes the victim in this case and the testimony of victim two unique and more than just propensity evidence.

In Perry, this Court explained:

> The question for a trial court, and for this Court on appeal from Perry's conviction, is whether the evidence also serves some legitimate purpose that is not prohibited by Rule 404(b). The rule provides examples of legitimate purposes, stating evidence of other crimes "may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." Rule 404(b), SCRE.

Perry, 430 S.C. at 30–31, 842 S.E.2d at 657. The Court continued:

> Historically, to justify a finding that evidence of other crimes, wrongs, or acts is offered for a legitimate purpose, and thus should not be excluded pursuant to Rule 404(b), South Carolina courts have required a logical relevancy or connection between the other crime and some disputed fact or element of the crime charged.

Id. at 31, 842 S.E.2d at 658.

The primary question to be resolved in this case is whether a logical connection or logical relevancy exists between the testimony of the two victims to establish the common scheme or plan. The Perry Court provided some guidance by indicating: "There must be something in the defendant's criminal process that logically connects the 'other crimes' to the crime charged." Perry, 430 S.C. at 41, 842 S.E.2d at 663. The Court then discussed several cases in which the

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Wallace standard, as with the Perry standard, the testimony of the second victim is clearly admissible as a common scheme or plan.

logical connection was developed including: State v. McClellan, 283 S.C. 389, 392, 323 S.E.2d 772, 774 (1984), State v. Durant, 430 S.C. 98, 844 S.E.2d 49 (2020), and State v. Cotton, 430 S.C. 112, 844 S.E.2d 56 (2020).

In both McClellan and Durant, the logical connection was established through a "particularly unique method of committing his attacks" which involved using the Bible or spiritual healing as a means of being able to abuse the girls. The Court explained: "The fact he carried out his plan in its unique detail when assaulting all three children warranted the admission of the uncharged crimes into evidence. The evidence had a logical connection to whether a crime was committed and to who committed it." Perry, 430 S.C. 24, 42, 842 S.E.2d 654, 663 (2020) (discussing McClellan).

The more apropos comparison in the instant case is with the Supreme Court's holding and analysis in Cotton. In Cotton, the Court explained: "the trial court admitted testimony from a second victim (another young woman) who had suffered an **essentially identical assault** at Petitioner's hands." Cotton, 430 S.C. at 114, 844 S.E.2d at 57 (emphasis added). The Court then explained many of these similarities and noted a somewhat unique circumstance in that both victims tried to persuade the defendant not to rape her, but he did anyway. In Cotton, it was not the "unique method" like what occurred in both McClellan and Durant, but instead very similar facts and a circumstance that occurred in both which created a stronger indication of who attacked the women.

In the instant case, the testimonies of the two victims were very similar. As a matter of fact, Respondent's own counsel conceded: "the . . . witnesses [] are saying the same thing for the same reason." (App.217). If they are saying the same thing for the same reason, it is hard to imagine of many scenarios which do not meet the "essentially identical assault" as discussed in

Cotton. They both indicated the abuse began when they were very young, three and four years old. They both testified Respondent began by touching them under their clothes. Both victims indicated the abuse generally happened at home when the mom was either not home or occupied and their sisters were not in the same room. The extent of the abuse against the victim—which included intercourse—was worse than the abuse against the second victim—which only included Respondent placing his penis against her buttocks. However, this is likely only because of the disclosure by the victim which ended the opportunity of Respondent to do more to the second victim.

Most significantly, and similar to Cotton's circumstance where the case involved something beyond mere common occurrence, both victims in this case believed Respondent was their biological father at the time of the abuse, but later learned he was not their father. Both girls testified that they always believed Respondent to be their dad, but only after the abuse did they learn that he was not actually their biological father. Respondent took advantage of this false relationship for his sexual gratification, and this false "relationship" also is a prime factor in the failure to disclose and the failure to resist the abuse that was occurring. The fact he allowed both girls to believe he was their biological father, when he was not, and relied on that false "relationship" to be able to abuse the girls is the logical connection required, coupled with the "essentially identical assault," to allow admission of the testimony under Cotton and Perry.

Accordingly, this Court should grant the Petition for Writ of Certiorari, finding the Court of Appeals erred in its application of Perry and Cotton, and find the trial court properly admitted the second victim's testimony as evidence of a common scheme or plan.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should grant the Petition for Writ of Certiorari to the Court of Appeals.

Respectfully submitted,

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Senior Assistant Deputy Attorney General
S.C. Bar No. 15608

BY: _____
William M. Blitch, Jr.

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3727

ATTORNEYS FOR PETITIONER

June 14, 2021