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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
Appellate Case No. 2021-000622

The State, Petitioner,

v.

Guadalupe Guzman Morales, Respondent.

SUPPLEMENTAL APPENDIX

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ATTORNEY FOR RESPONDENT

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THE STATE,

RESPONDENT,

V.

GUADALUPE GUZMAN MORALES,

APPELLANT

ORIGINAL

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JAN 23 2019

SC Court of Appeals

APPELLATE CASE NO 2017-001796

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial judge err in admitting the testimony of Witness B as evidence of a common scheme or plan pursuant to Rule 404(b), SCRE, when the dissimilarities between Witness B's testimony and the testimony of Witness A, the prosecuting witness, outweighed the similarities and the prejudicial effect of the testimony substantially outweighed its probative value?

2. Did the trial judge err in admitting the testimony of Witness B., finding that the similarities to Witness A's testimony outweighed the dissimilarities, pursuant to State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009), when such a finding is contrary to Rule 404(b) and State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923), and the holding in Wallace should be overturned?

STATEMENT OF THE CASE

In October of 2002, Appellant, Guadalupe Guzman Morales, was arrested for two counts of criminal sexual conduct with a minor second degree and one count of attempted criminal sexual conduct with a minor second degree, arrest warrants #H-067093, 94, 95. In 2016, fourteen years later, the Lancaster County Grand Jury indicted Appellant for criminal sexual conduct with a minor first degree, criminal sexual conduct with a minor second degree and assault with intent to commit criminal sexual conduct with a minor, indictments #2016-GS-29-559, 564, 565. On May 26, 2017, Appellant appeared before the Honorable Brian Gibbons and moved to quash the indictment based on pre-indictment delay as a due process violation. (R. pp. 1- 74). Ned Gregory represented Appellant. Megan Burchstead with the South Carolina Attorney General Office represented the State. The State argued that Appellant had been indicted in 2003, but the indictments were not available because of a fire in the Lancaster Courthouse in 2008. (R. p. 6, line 6 – p. 7, lines 1-25). Judge Gibbons denied the motion to quash the indictment and instead treated the motion as a speedy trial motion.[1] Judge Gibbons did not dismiss the indictment for violation of Appellant's speedy trial rights but scheduled the trial for August 21, 2017. (R. pp. 68-74).

On August 21, 2017, Appellant proceeded to jury trial before the Honorable Roger E. Henderson. Ned Gregory again represented Appellant. Megan Burchstead and Joel Kazak represented the State. The jury returned verdicts of guilty as indicted. Judge Henderson sentenced Appellant to thirty (30) years for criminal sexual conduct first degree, ten (10) years consecutive for assault with intent to commit criminal sexual conduct with a minor and ten (10)

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[1] Counsel for Appellant stated that he did not want a speedy trial (R. p. 63, lines 7-16). This issue may need to be raised in post-conviction relief.

years concurrent for criminal sexual conduct with a minor second degree. A timely notice of intent to appeal was served on August 25, 2017. This appeal follows.

STANDARD OF REVIEW

In reviewing a trial court's ruling on the admissibility of evidence, appellate courts recognize that the trial judge has considerable latitude in this regard and will not disturb such rulings absent a prejudicial abuse of discretion. State v. Whitner, 399 S.C. 547, 557, 732 S.E.2d 861, 866 (2012); State v. Clasby, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." Whitner, 399 S.C. at 557, 732 S.E.2d at 866.

ARGUMENT

1. **The trial judge erred in admitting the testimony of Witness B as evidence of a common scheme or plan pursuant to Rule 404(b), SCRE, when the dissimilarities between Witness B's testimony and the testimony of Witness A, the prosecuting witness, outweighed the similarities and the prejudicial effect of the testimony substantially outweighed its probative value.**

Between December of 1999 to September of 2001, Witness A, her sister, Witness B, and another younger sister lived with their mother and Appellant. During this time Witness A believed that Appellant was her biological father but was later told he was not. (R. p. 139, lines 6-19). Witness B also believed that Appellant was her father but at the time of trial it was unclear if Appellant is Witness B's biological father. (R. p. 274, line 21 – p. 275, lines 1-25). At the time of trial in 2017, fifteen years after arrest warrants issued, Witness A was twenty-eight years of age. (R. p. 136, lines 10-11). At the time of trial Witness B was twenty- five years of age. (R. p. 267, lines 15-16).

At trial Witness A testified that in 2002, when she was thirteen years of age, she went to live with her uncle and his girlfriend and his two daughters because her mother "kicked her out of the house." (R. p. 137, lines 7-11; p. 159, lines 14-21). Witness A testified that after living with her uncle for about a month, upon questioning by the uncle's girlfriend Michelle, she told Michelle that Appellant had been touching her. (R. p. 151, line 4- p. 152, lines 1-2). As a result of the disclosure by Witness A, the maternal grandmother questioned Witness B and the younger sister. (R. p. 272, lines 15-18). Upon questioning by the maternal grandmother, Witness B told "what happened." (R. p. 272, lines 11-18). At trial Witness B admitted that she later recanted the accusation against Appellant. (R. p. 273, lines 17-19).

On July 26, 2017, prior to trial, the State moved before Judge Henderson for a conditional ruling on the admission of testimony from Witness B, during the trial for charges involving Witness A. (R. pp.76-114). The State argued that the testimony from Witness B should be admitted as the common scheme or plan exception contained in Rule 404(b). (R. p. 81, lines 8-19). Witness B testified that Appellant touched her sexually on three different occasions. (R. p. 91, line 20- p. 92, lines 1-12). Witness A did not testify at the hearing. After Witness B testified, the State argued that Witness B's testimony was admissible pursuant to State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009); State v. Hallman, 298 S.C. 172, 379 S.E.2d 115 (1989); State v. McClellan, 283 S.C. 389, 323 S.E.2d 772 (1984); State v. Blanton, 316 S.C. 31, 33, 446 S.E.2d 438, 439 (Ct. App. 1994); State v. Adams, 332 S.C. 139, 143, 504 S.E.2d 124, 126 (Ct. App. 1998) and State v. Henry, 313 S.C. 106, 108–09, 432 S.E.2d 489, 491 (Ct. App. 1993). (R. pp. 101 – 105). The State argued that there were strong similarities between Witness B's testimony and the testimony the State expected from Witness A at trial. (R. p. 105, lines 15-25). Counsel for Appellant argued that Rule 404(b) prohibited admission of the testimony from Witness B and cited State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). (R. p. 106, lines 5-15). The attorney for the State replied, "I don't believe I actually printed Lyle. We've all heard Lyle so much and to be candid I haven't read it in awhile." (R. p. 106, lines 16-18).

The judge ruled, "Again it is a conditional ruling but at this point in time I find that it would follow the guidelines set forth in Lyle's [sic] and the other cases that have come since then. So, therefore, at least at this point, I would find it to could be admissible as common scheme or plan." (R. p. 113, lines 15-21). It is unclear how the court concluded that the testimony from Witness B was admissible as common scheme or plan without hearing the testimony from Witness A.

After Witness A testified at trial, the State sought a **final** ruling on the admission of testimony from Witness B. (R. p. 211, line 21 – p. 212, 213, lines 1-2). The State argued that the similarities outweighed the dissimilarities. (R. p. 212, lines 17-21). Appellant objected to the testimony from Witness B. (R. p. 213, lines 4-21). The judge ruled, "Okay. Well, I heard the testimony. I heard the testimony from Witness B at the hearing in Chesterfield and now that I've heard Witness A's testimony, everything else aside their testimony does have a number of similarities and I do find that the similarities outweigh the dissimilarities and taking their testimony would tend to show a common scheme or plan by Mr. Morales." (R. p. 213, line 22 – p. 214, lines 1-5). The judge allowed Witness B's testimony. (R. p. 214, lines 9-12). The trial judge erred. The dissimilarities between Witness B's testimony and Witness A's testimony outweighed the similarities and the prejudicial effect of the testimony substantially outweighed its probative value.

In State v. Lyle, 125 S.C. 406, 118 S.E. 803, 811 (1923), the South Carolina Supreme Court wrote:

> 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. If, as we have seen, no such connection was shown to exist between the separate Georgia offenses and the Aiken crime as would constitute them practically "a continuous transaction" (State v. Weldon, 39 S. C. 321, 17 S. E. 688, 24 L. R. A. 126), or as would otherwise render this evidence relevant to prove identity, and if, as we have held, the evidence was not competent on the question of intent, it follows that it was not admissible merely to show plan or system. See Shaffner v. Com., 72 Pa. 63, 13 Am. Rep. 651, State v. Kenny, supra, and full discussion by Justice Werner in People v. Molineux, supra.

Rule 404(b) provides that, "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." Over time two different approaches emerged in terms of analyzing the admissibility of prior bad acts as a common scheme or plan. See State v. Wallace, 364 S.C. 130, 139, 611 S.E.2d 332, 337, n. #2 (Ct. App. 2005), rev'd, 384 S.C. 428, 683 S.E.2d 275 (2009). The first approach adhered to the traditional requirement of a connection between the charged crime and the prior bad act, as discussed in Lyle. The second approach focused on the close degree of similarity between the charged crime and the prior bad act. In Wallace, the South Carolina Supreme Court wrote, "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. State v. Parker, 315 S.C. 230, 433 S.E.2d 831 (1993). When the similarities outweigh the dissimilarities, the bad act evidence is admissible under Rule 404(b)." 384 S.C. at 433, 683 S.E.2d at 277–78. The Court then went on to write:

> Although not a complete list, in this type of case, the trial court should consider the following factors when determining whether there is a close degree of similarity between the bad act and the crime charged: (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. See State v. Hallman, 298 S.C. 172, 379 S.E.2d 115 (1989) (evidence admissible as common scheme or plan where all victims were foster children of similar age and the types of sexual batteries were similar); State v. McClellan, 283 S.C. 389, 323 S.E.2d 772 (1984) (evidence admissible as common scheme or plan where both victims were defendant's daughters, were the same age at time of the initial attack, and defendant gave same explanation for his actions). We emphasize that these factors are set out merely for guidance and that other factors may be relevant in weighing the similarities and the dissimilarities between the crime charged and the bad act evidence.

Wallace, 384 S.C. at 433–34, 683 S.E.2d at 278. The Wallace decision appears to have veered away from the traditional connection analysis in Lyle and carved out an exception for sexual abuse cases, as will be discussed further in issue two. Pursuant to a Wallace analysis, the trial judge abused his discretion in allowing the testimony of Witness B because the similarities did not outweigh the dissimilarities.

Testimony of Witness B.

During the pre-trial hearing on July 26, 2017, Witness B testified that beginning when she was three years old until the third grade Appellant touched her in a sexual way three times. (R. p. 88, lines 1-10). She testified that the incidents took place inside the home. (R. p. 92, lines 13-25). Witness B testified that the touching stopped when she was in the third grade. (R. p. 89, lines 19-23). According to Witness B, the last time it happened she was unable to sleep and Appellant told her to come in the room with him and watch television. (R. p. 86, lines 11-18). Witness B testified that while they were laying down on the bed he pulled her pants and underwear down and she felt his penis touch her butt. (R. p. 86, line 23 – p. 87, lines 1-14). Witness B testified that her sisters were asleep in another room. (R. p. 88, lines 21-24). According to Witness B, her mother was working when the incident took place. (R. p. 89, lines 3-10).

Witness B testified that the other two times she was sitting on Appellant's lap and he would put his hands down her pants but there was no digital penetration. (R. p. 87, lines 15-25). She testified that when these other two incidents occurred her sisters were home but in a different room. She testified that her mother was not home. (R. p. 88, line 25 -p. 89, lines 1-18). Later, when Witness B was in the fifth grade, her grandmother questioned her, after Witness A alleged abuse, and Witness B disclosed the incidents to her grandmother. (R. p. 91, lines 1-15).

Testimony of Witness A.

At trial Witness A testified that when she was four Appellant rubbed his groin area against her groin area on the outside of her clothing. (R. p. 143, line 23 – p. 144, lines 1-14). Witness A testified that when she was in first grade digital penetration took place on a daily basis. (R. p. 145, lines 12-19). She said the digital penetration took place mainly at home but also in the car and at the river. (R. p. 145, lines 20-23). Witness A testified that her mom was usually not home when the touching took place and if she was home she was in the shower. (R. p. 146, lines 2-5). Sometimes her sisters would be at home and other times they would not be at home. (R. p. 146, lines 6-9).

Witness A testified that Appellant had intercourse with her on her eleventh birthday in the bedroom Appellant shared with Witness A's mother. (R. p. 140, line 17 – p. 141, 142, lines 1-18). According to Witness A, the whole family was going to Carowinds for her birthday and Appellant threatened not to take them to Carowinds unless she got in bed with him. (R. p. 141, line 2 – p. 142, lines 1-2). Witness A testified that at the time her sisters were getting ready in the room they shared and her mother was in the shower. (R. p. 142, lines 11-14). According to witness A, Appellant continued to have sex with her after her eleventh birthday. (R. p. 142, lines 17-19).

Witness A testified that Appellant had sex with her in her room in the summer after she turned eleven. (R. p. 148, line 15 – p. 149, lines 1-3). Witness A testified that, at the time, she was in trouble, confined to her room and her mom had taken her sisters to Walmart. (R. p. 148, lines 15-21). Witness A also testified that one time when she was at home from school because she was sick Appellant asked her to lie on the couch with him and he put his hands down her

pants. (R. p. 149, lines 9-25). According to Witness A, Appellant told her that if she told her mother, her mother would kill her. (R. p. 150, lines 16-19).

Dissimilarities outweigh similarities.

The allegations made by Witness B were substantially different from the allegations made by Witness A. The three instances of sexual touching alleged by Witness B never progressed to digital penetration and always took place in the home. Witness A alleged digital penetration on an almost daily basis that progressed to instances of sexual intercourse. The incidents took place mainly in the home but also in the car and at the river. Viewing the factors listed in Wallace, while both witnesses allege the abuse began when they were young, three or four years old, Witness B testified that the abuse ended when she was in the third grade. Witness A testified that the abuse continued after her eleventh birthday. Appellant was a father figure to both, but the type of alleged abuse was different. The locations were different. While the State argued that Appellant used coercion in the form of his role as a father figure, (R. p. 103, lines 8-15), only witness A testified about a threat. Witness B testified that her mother was not home during the three alleged instances but Witness A testified that her mother was in the shower during at least one of the alleged incidents.

The present case is distinguished from Wallace. In Wallace both the prosecuting witness and the Lyle witness were stepdaughters of Wallace, the abuse began around the same time with the fondling of breasts, the abuse of both occurred in the family home when the mother was not home and Wallace admonished both not to tell as nobody would believe them. The degree of similarity present in Wallace is not present in this case.

The present case is also distinguished from State v. Hallman, 298 S.C. 172, 379 S.E.2d 115 (1989). In Hallman the extent of the abuse of the prosecuting witness was greater than that

of the Lyle witnesses, as in the present case, but the type of abuse in Hallman was similar for all, starting with rubbing outside of the clothes, digital penetration and forcing the witnesses to rub his penis. In the present case the type of abuse alleged by Witness B was limited to sexual touching with no digital penetration and no intercourse as alleged by Witness A.

The present case is also distinguished from State v. McClellan, 283 S.C. 389, 323 S.E.2d 772 (1984). In McClellan three daughters testified that beginning on their twelfth birthday their father would come into their bedroom at night, wake one of them and take her to his bedroom where he would explain the Biblical verse that children are to "Honor thy Father" and he would explain that he was teaching them how to be with their husbands. No such similarity exists in the present case.

The case is also distinguished from State v. Blanton, 316 S.C. 31, 33, 446 S.E.2d 438, 439 (Ct. App. 1994), where the South Carolina Court of Appeals wrote, "All three of the female victims were approximately the same age. Each was subjected to requests both for the performance of cunnilingus and fellatio. All of the alleged activities took place in Blanton's house or his vehicle. In each instance, Blanton took advantage of his relationship with the victim for his sexual gratification. The prior acts were sufficiently similar to the charged offense to be admissible." Unlike in Blanton, the type of and location of the abuse alleged in the present case is different.

The present case is distinguished from State v. Adams, 332 S.C. 139, 143, 504 S.E.2d 124, 126 (Ct. App. 1998), where the Court of Appeals wrote:

> Here, Adams used his relationship as stepfather to control the girls; the girls were approximately the same age; the attacks began in the back-yard hammock; both girls were molested in Adams's truck; both girls were forced to place their hands on Adams's genitals while in his truck; Adams picked locks to both girls' bedrooms to watch them change clothes; Adams entered the bathroom while both girls were showering and pulled the shower curtain aside while they were bathing;

> Adams offered to show both girls a pornographic videotape; Adams repeatedly asked both girls when they could have sex; and, to control both girls from disclosing his abuse, Adams threatened both girls with the same line: "If you tell, you'll go down with me."

Again, the similarities present in Adams are not present in this case.

In State v. Henry, 313 S.C. 106, 108–09, 432 S.E.2d 489, 491 (Ct. App. 1993), the South Carolina Court of Appeals wrote:

> We hold that the testimony of the oldest step-daughter, Nayenda, is clearly admissible under Lyle. Both Jenne and Nayenda experienced similar acts of abuse from the defendant which occurred in the same places and during the same time frame. We hold that the probative value of Nayenda's testimony substantially outweighs any danger of unfair prejudice. Thus, her testimony falls within the Lyle common scheme exception.
>
> The testimony of the youngest step-daughter, Tenita, is a much closer question. Tenita was not subjected to the alleged abusive conduct to the extent of her sisters. The crimes committed on Jenne and Tenita are not "so related to each other that proof of one tends to establish the other." State v. Wilson, 274 S.C. 635, 637, 266 S.E.2d 426, 427 (1980), citing State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). There must be a connection between the crime charged and the prior bad act or the accused should be given the benefit of the doubt. State v. Rivers, 273 S.C. 75, 254 S.E.2d 299 (1979). Accordingly, we hold that Tenita's testimony should be excluded to prevent undue prejudice.

The testimony of Witness B in the present case is analogous to the testimony of the youngest step-daughter in Henry and should have been excluded. Witness B was not subjected to the alleged abusive conduct to the extent of her sister, just as the younger sister in Henry, and the alleged crimes committed on both witnesses are not so related to each other that proof of one tends to establish the other. While Henry was decided prior to Wallace, and used a connection analysis rather than a similarities analysis, under either analysis the testimony should be excluded as the similarities do not outweigh the dissimilarities and there was no connection between the alleged incidents. Witness B's testimony was inadmissible propensity evidence and the admission of the testimony was not harmless.

Even if the prior bad act evidence is clear and convincing[2] and falls within a Lyle exception, the trial judge must exclude it if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. State v. Tutton, 354 S.C. 319, 325, 580 S.E.2d 186, 189 (Ct. App. 2003). Rule 403, SCRE provides that, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." In Old Chief v. United States, 519 U.S. 172, 180, 117 S. Ct. 644, 650, 136 L. Ed. 2d 574 (1997) the Court defined unfair prejudice writing:

> The term "unfair prejudice," as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged. See generally 1 J. Weinstein, M. Berger, & J. McLaughlin, Weinstein's Evidence ¶ 403[03] (1996) (discussing the meaning of "unfair prejudice" under Rule 403). So, the Committee Notes to Rule 403 explain, " 'Unfair prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." Advisory Committee's Notes on Fed. Rule Evid. 403, 28 U.S.C.App., p. 860.

In the present case, the testimony from Witness B did not meet the similarities test of Wallace and should have been excluded. Alternatively, the testimony should have been excluded because the probative value is substantially outweighed by the danger of unfair prejudice.

2. **The trial judge erred in admitting the testimony of Witness B., finding that the similarities to Witness A's testimony outweighed the dissimilarities, pursuant to State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009), when such a finding is contrary to Rule 404(b) and State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923), and the holding in Wallace should be overturned.**

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[2] An argument was not made at trial that Witness B's testimony did not meet the clear and convincing standard for required for uncharged conduct although Witness B at one point recanted the allegations.

The judge allowed the testimony from Witness B stating, "Okay. Well, I heard the testimony. I heard the testimony from Witness B at the hearing in Chesterfield and now that I've heard Witness A's testimony, everything else aside their testimony does have a number of similarities and I do find that the similarities outweigh the dissimilarities and taking their testimony would tend to show a common scheme or plan by Mr. Morales." (R. p. 213, line 22 – p. 214, lines 1-5). The similarities analysis used by the trial judge in the present case derives from the Wallace case. The Wallace similarities analysis for sexual abuse cases, however, is contrary to Lyle and Rule 404, SCRE, a rule of exclusion that only provides for limited exceptions as provided in Rule 404(b). The testimony of Witness B should have been excluded pursuant to Lyle and Rule 404(b), SCRE.

The dissent in Wallace wrote:

> I respectfully dissent. In my opinion, our 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. *Compare, e.g.,* Vogel v. State, 315 Md. 458, 554 A.2d 1231 (Ct.App.1989). We have repeatedly held in non-sexual offense cases that, "the mere presence of similarity only serves to enhance the potential for prejudice," State v. Tuffour, 364 S.C. 497, 613 S.E.2d 814 (Ct.App.2005) *vacated on other grounds* 371 S.C. 511, 641 S.E.2d 24 (2007) *internal citations omitted,* yet under the majority's view, similarity is the touchstone of admissibility in child sexual offense cases. In my view, if we are to permit the admission of propensity evidence in these types of cases, then we should propose a new rule of evidence, and encourage public comment. *See e.g.* Rules 413 and 414, Fed.R.Evid.; Rule 404(c), Az. R. Evid. In light of the controversy engendered by these rules in other jurisdictions, I believe that thorough scrutiny is warranted.

Wallace, 384 S.C. at 435–36, 683 S.E.2d at 279.

Recently, in a concurring opinion in State v. Perez, 423 S.C. 491, 816 S.E.2d 550, 556–57 (2018), the Court wrote:

> Accordingly, I would overrule Wallace and restore the common scheme or plan exception in sexual misconduct cases to its original purpose as articulated in Lyle whereby proof of a common plan or system requires "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." Just as mere similarities between the prior bad act and the crime charged would be insufficient in the case of all other crimes, it should likewise be insufficient when sexual misconduct is involved.

As noted by the Wallace dissent, the similarities analysis for the admission of prior bad act evidence in sexual abuse cases is impossible to reconcile with the traditional Lyle connection analysis used in non-sexual abuse cases. For example, in State v. Timmons, 327 S.C. 48, 52, 488 S.E.2d 323, 325 (1997), a murder, armed robbery case, the South Carolina Supreme Court found that prior robberies were inadmissible and wrote:

> In the case of the common scheme or plan exception under Lyle, a close degree of similarity or connection between the prior bad act and the crime is necessary. State v. Parker, 315 S.C. 230, 433 S.E.2d 831 (1993). *See also* State v. Douglas, 302 S.C. 508, 397 S.E.2d 98 (1990). The connection between the prior bad act and the crime must be more than just a general similarity. State v. Stokes, 279 S.C. 191, 304 S.E.2d 814 (1983). A common scheme or plan concerns more than the commission of two similar crimes; some connection between the crimes is necessary. Id.

While the Court in Timmons discussed similarities, the Court relied on the traditional connection analysis of Lyle as noted above. See also State v. Fletcher, 379 S.C. 17, 23, 664 S.E.2d 480, 483 (2008) (Homicide by child abuse case - "Under Rule 404(b), SCRE, evidence of other crimes, wrongs, or acts is generally not admissible to prove the defendant's guilt for the crime charged. Such evidence is, however, admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent. State v. Pagan, 369 S.C. 201, 631 S.E.2d 262 (2006); State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). To be admissible, the bad act must logically relate to the crime with which the defendant has been charged.). Additionally, the Wallace similarities analysis for the admission of prior bad act evidence in

sexual abuse cases is impossible to reconcile with sexual abuse cases decided prior to Wallace that used the traditional Lyle connection analysis. See State v. Henry, 313 S.C. 106, 108–09, 432 S.E.2d 489, 491 (Ct. App. 1993).

In State v. Nelson, 331 S.C. 1, 6, 501 S.E.2d 716, 718–19 (1998), the South Carolina Supreme Court wrote:

> In a criminal case, the State cannot attack the character of the defendant unless the defendant first places his character in issue. Mitchell v. State, 298 S.C. 186, 379 S.E.2d 123 (1989) (per curiam). 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. State v. Stokes, 279 S.C. 191, 304 S.E.2d 814 (1983); State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923).[7] 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." State v. Peake, 302 S.C. 378, 380, 396 S.E.2d 362, 363 (1990).

The admission of prior bad act evidence based on similarities alone allows the admission of inadmissible propensity evidence. The Wallace opinion should be overruled and the traditional connection test of Lyle and Rule 404(b) applied in all cases, including cases involving sexual abuse allegations. In State v. Brooks, 341 S.C. 57, 61, 533 S.E.2d 325, 327–28 (2000), the South Carolina Supreme Court wrote, "The record must support a logical relevance between the prior bad act and the crime for which the defendant is accused. State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996). '[I]f the court does not clearly perceive the connection between the extraneous criminal transaction and the crime charged, that is, its logical relevancy, the accused should be given the benefit of the doubt, and the evidence should be rejected.' Lyle, 125 S.C. at 417, 118 S.E. at 807."

Applying the traditional connection test of Lyle and Rule 404(b) to the testimony of Witness B in the present case, the record fails to establish a logical relevance between the

allegations made by Witness B and the crimes for which Appellant stood trial. As discussed in issue one, the alleged crimes committed on both witnesses are not so related to each other that proof of one tends to establish the other. State v. Wilson, 274 S.C. 635, 637, 266 S.E.2d 426, 427 (1980) citing State v. Lyle, 125 S.C. 406, 118 S.E.803 (1923). The testimony of Witness B constituted inadmissible propensity evidence. The testimony of Witness B should have been excluded. The error in admitting the propensity evidence was not harmless. As the South Carolina Supreme Court noted in State v. Wilson, 274 S.C. 635, 637–38, 266 S.E.2d 426, 427 (1980), "The Lyle court emphasized that evidence of other crimes must be strictly scrutinized before its admission, since 'the inevitable tendency of such evidence is to raise a legally spurious presumption of guilt in the minds of the jurors.' Lyle at 125 S.C. 412, 118 S.E. at 807. If there is any doubt as to the connection between the acts, the accused is to be given the benefit of the doubt and the evidence should not be admitted." The trial judge abused his discretion in admitting Witness B's testimony as evidence of a common scheme or plan.

CONCLUSION

Based on the above arguments, this Court should reverse the convictions and remand for a new trial.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 23rd day of January, 2019.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

January 23, 2019

Kathrine H. Hudgins
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ATTORNEY FOR APPELLANT

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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lancaster County

Honorable Roger E. Henderson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

GUADALUPE GUZMAN MORALES,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon William M. Blitch, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 23rd day of January, 2019.

Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 23rd day of January, 2018.

(L.S)
Notary Public for South Carolina
My Commission Expires: July 5, 2027.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lancaster County
Honorable Roger E. Henderson, Circuit Court Judge
Appellate Case Tracking No. 2017-001796

The State, Respondent,

vs.

Guadalupe Guzman Morales, Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. The trial court did not err in admitting the testimony of the second victim pursuant to Rule 404(b), SCRE. Further, Appellant's trial counsel acknowledged the similarities and waived any issue regarding Rule 404(b). Finally, neither issue raised by Appellant in his brief is preserved for review on appeal. (Appellant's Issues I and II).

STATEMENT OF THE CASE

In October 2002, Appellant 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. (5/26T.6-7; R. 6-7) Appellant 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; R. 402-407).

After two pretrial hearings, Appellant proceeded to trial before the Honorable Roger E. Henderson and a jury. The jury returned verdicts of guilty on all charges. (8/21T.293; R.387). Judge Henderson sentenced Appellant 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; R. 408-410).

STATEMENT OF FACTS

When the victim was younger[1], she lived with her mother, Appellant, and two younger sisters. (8/21T.43-44; R. 137-138). The victim's sisters were about two and five years younger than her. While she lived with Appellant, the victim believed he was her biological father, but found out later he was not. (8/21T.46; R.140).

Appellant 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. Appellant 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. (8/21T.49-50; R. 143-144). When the victim turned around seven, Appellant 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. (8/21T.50-52; R. 144-146).

The abuse continued to escalate to Appellant 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 Appellant, 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. Appellant then raped the eleven year old victim. (8/21T.47-48; R. 141-142). Later that summer, the victim's mom and sisters went to the store. The victim was in trouble and confined to her room. Appellant entered and again raped the eleven year old girl. She realized the window was open and tried to scream, but Appellant put his hand over her mouth. (8/21T.54-55; R. 148-149). The victim never told anyone because she was scared, did not want to be called a liar, and did not want to be judged. (8/21T.56; R.150).

[1] At the time of trial, the victim was twenty-eight years old. (8/21T.42; R. 136).

After the victim was kicked out of the house with her mother and Appellant, she went to live with her Uncle Jimmy and his girlfriend Michelle. (8/21T.43; 57; R. 137; 151). 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. (8/21T.57; 166-167; R.151; 260-261). The victim disclosed the years of abuse by Appellant.

Appellant also sexually abused the middle sister, the second victim. She believed Appellant 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. Appellant would have her sit on his lap and would touch her under her underwear. The abuse occurred in the home. (8/21T.175-176; R.269-270). When the second victim was eight, Appellant saw that she could not sleep and had her get in the bed with him. Her mom was not home at the time. Appellant lay in the bed behind the second victim and pulled down her pants and underwear. She felt his penis touch her buttocks. (8/21T.178; R. 272). 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. (8/21T.178; R.272).

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001); State v. Butler, 353 S.C. 383, 388, 577 S.E.2d 498, 500 (Ct. App. 2003). "The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Id.

ARGUMENT

I. The trial court did not err in admitting the testimony of the second victim pursuant to Rule 404(b), SCRE. Further, Appellant's trial counsel acknowledged the similarities and waived any issue regarding Rule 404(b). Finally, neither issue raised by Appellant in his brief is preserved for review on appeal. (Appellant's Issues I and II).

Appellant contends the trial court erred in allowing the testimony of a second victim pursuant to Rule 404(b), SCRE, and finding the testimony demonstrated a common scheme or plan. While Appellant's trial counsel initially objected to the testimony as not meeting 404(b) at a pre-trial hearing, once testimony was presented at trial he waived his objection and admitted the testimony was similar. Instead he argued impermissible bolstering based on the similarity of the testimony. As a result, any issue regarding application of 404(b) is waived and not preserved for review on appeal. Additionally, he never maintained State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009), should be overruled or was not the applicable case law. Therefore, the second issue presented by Appellant is not preserved for review on appeal. Finally, the testimony was properly allowed under Rule 404(b) because it demonstrated a common scheme or plan and the trial court properly considered the testimony pursuant to Wallace.

Waiver/Preservation

Appellant's trial counsel waived any issue regarding the admission of the second victim's testimony pursuant to Rule 404(b). While counsel did raise an objection to the second victim testifying at a pre-trial hearing, arguing the testimony was inadmissible under Rule 404(b) and State v. Lyle, 125 S.C. 406, 118 S.E.2d 803 (1923), he waived this ruling at trial.

Initially, the pre-trial hearing regarding the testimony 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 . . . .". (7/26T. 38; R. 113). 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 riling with regards to the testimony of [the second victim], though." (7/26T.38-39; R. 113-114). 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.").

Additionally, once at trial, Appellant'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 Jessica's testimony it appears to be clear that's what it is. So we think that

> the testimony of Lisa is -- will be improper bolstering of Jessica's testimony.

(8/21T.119; R. 213) (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. Accordingly, any issue regarding Lyle and 404(b) was waived and is not preserved for review on appeal. See 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); 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).

Further, as his actual objection to the testimony at trial was based on improper bolstering, Appellant cannot now raise a different issue on appeal. See e.g., 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).

Finally, Appellant never asked the trial judge to rule Wallace inapplicable, nor did he make any assertion the trial court was applying incorrect law when the trial court presented its analysis of the similarities versus the dissimilarities. (8/21T.120; R. 214). As a result, Appellant's Issue II is not preserved for review on appeal. 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).

Merits

On the merits, the trial court properly admitted the testimony of the second victim in order to establish a common scheme or plan and this common scheme or plan was exemplified by looking at the similarities between the victim's testimony and that of the second victim. Properly applying the Supreme Court precedent of Wallace, the trial court considered the similarities and dissimilarities in testimony and found that a common scheme or plan was established.

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It 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.

"When determining whether evidence is admissible as common scheme or plan, the trial court must analyze the similarities and dissimilarities between the crime charged and the bad act evidence to determine whether there is a close degree of similarity. When the similarities outweigh the dissimilarities, the bad act evidence is admissible under Rule 404(b)." Wallace, 384 S.C. at 433, 683 S.E.2d at 277-278. The South Carolina Supreme Court provided some factors to consider including: (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. Id. at 433-434, 683 S.E.2d at 278. Common scheme or plan evidence which is logically relevant to the charged offense should not be excluded merely because it "incidentally reveals the accused's guilt of another crime." State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009) (quoting State v. Green, 261 S.C. 366, 371, 200 S.E.2d 74, 77 (1973)).

This Court explained the common scheme or plan exception:

> Where such a plan exists, the charged and uncharged acts represent individual achievements of the purposes for which the plan was established. See 2 Wigmore, § 304 (stating that where separate offenses are sufficiently similar, there is an inference that they are manifestations of a common scheme or plan). Accordingly, the evidence in such cases speaks to the existence of the defendant's plan, not to the defendant's character. This is so because the jury is not asked to draw an inference that the prior bad acts would evince the defendant's propensity to commit the charged offenses; instead, the jury is asked to infer that the defendant developed a criminal scheme and employed that scheme as probative evidence that the charged acts occurred.

State v. Tutton, 354 S.C. 319, 330-31, 580 S.E.2d 186, 192 (Ct. App. 2003).

In analyzing the factors articulated in Wallace and comparing the similarities and dissimilarities in this case, the trial court properly concluded a common scheme or plan existed. As discussed above, both victims believed Appellant was their dad at the time of the abuse. Appellant took advantage of this relationship for his sexual gratification. They both indicated the abuse began when they were very young, three and four years old. They both testified Appellant 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 Appellant placing his penis against her buttocks. However, this is likely only because of the disclosure by the victim which ended the opportunity of Appellant to do more to the second victim. As the trial court found, and Appellant's counsel conceded, the testimony presented by both victims indicated a clear patter, a common scheme or plan by Appellant to use his position as their alleged father to sexually abuse them while their mother was either out of the home or occupied.

Cases from both this Court and the South Carolina Supreme Court support the trial court's decision. The Supreme Court in State v. McClellan found prior bad acts committed by the defendant against two older daughters admissible under the common scheme or plan exception in a prosecution for similar acts against the youngest daughter because the "experiences of each daughter parallel that of her sisters . . ." State v. McClellan, 283 S.C. 389, 392, 323 S.E.2d 772, 774 (1984). Specifically, the Court noted: "[T]he initial attack occurred around age twelve; Appellant entered their room and chose one of them, who would be forced to submit; he gave to each the same explanation for his actions; and he quoted to each the Biblical verse [to "Honor thy Father"]." Id.[2]

In State v. Blanton, 316 S.C. 31, 446 S.E.2d 438 (Ct. App. 1994), the defendant was charged with molesting his granddaughter. Two other witnesses testified that seven or eight years beforehand, they were molested by the defendant. This Court found the testimony admissible, noting the following:

> . . . All three of the female victims were approximately the same age. Each was subjected to requests both for the performance of cunnilingus and fellatio. All the alleged activities took place in Blanton's house or his vehicle. In each instance, Blanton took advantage of his relationship with the victim for his sexual gratification. The prior acts were **sufficiently similar** to the charged offense to be admissible.

Blanton, 316 S.C. at 32, 446 S.E.2d at 439 (emphasis added).

In State v. Hallman, 298 S.C. 172, 379 S.E.2d 115 (1989), the victim was a foster child in Hallman's home. The trial court allowed testimony of three other women who testified they were abused while they were foster children in Hallman's home. The victim and two other

[2] It should be noted all three of these cases occurred prior to this Court's issuance of Wallace, and all three relied on the significant similarities and the "parallel" of events to find a common scheme or plan.

women each testified that the abuse began shortly after they arrived at Hallman's farm, at either six or seven years of age, and continued while they stayed at the home. In each case, the abuse started with Hallman rubbing the victims on the outside of their clothing and then proceeded to digital penetration. In each case, they were also made to rub Hallman's penis. The events in each case took place in the bedroom, barn or on the tractor, and most frequently during summer. The victim was also abused in the bathroom of the residence when Hallman would remove her clothes and stick his penis between her legs. The remaining victim from prior acts arrived at the farm at four years old and was made to rub his penis four times inside the house. Id., 298 S.C. at 174-175, 379 S.E.2d at 117.

In finding the prior bad acts admissible, the Supreme Court noted the following:

> The prior bad acts here occurred while each of the young women was a foster child to appellant and of **similar** age to the victim. In each instance, appellant took advantage of this relationship for his sexual gratification. The extent of the abuse against the victim was even more reprehensible than that against the previous foster children. It commenced, however, in exactly the **same manner** under **similar circumstances**.

Id., 298 S.C. at 175, 379 S.E.2d at 117 (emphasis added). As in McClellan, Blanton, and Hallman, the testimony in this case established the requisite link and commonality to be admissible as a common scheme or plan.

Appellant also argues this Court should overrule the Supreme Court's precedent of Wallace. The South Carolina Supreme Court has stated: "it is incumbent upon the court of appeals to apply this Court's precedent." State v. Phillips, 416 S.C. 184, 194, 785 S.E.2d 448, 453 (2016). This Court has repeatedly acknowledged the same: "this court lacks the authority to rule against prior published precedent from our supreme court, but is bound by the decisions of the supreme court." State v. Cheeks, 400 S.C. 329, 342, 733 S.E.2d 611, 618 (Ct. App. 2012)

(citing S.C. Const. art. V, § 9 ("The decisions of the Supreme Court shall bind the Court of Appeals as precedents.")); see also, McKenney v. Jack Eckerd Co., 299 S.C. 523, 386 S.E.2d 263 (Ct. App. 1989), rev'd on other grounds, 304 S.C. 21, 402 S.E.2d 887 (1991) (Court of Appeals has no authority to overrule or modify previous decisions of Supreme Court); Shea v. South Carolina Department of Mental Retardation, 279 S.C. 604, 608, 310 S.E.2d 819, 821 (Ct. App. 1983), overruled on other grounds, McCall v. Batson, 285 S.C. 243, 329 S.E.2d 741 (1985) ("Therefore, if the judicial system is to operate efficiently, this court must be bound by decisions of the Supreme Court."). Accordingly, this Court should apply the precedent of Wallace until a majority[3] of the Supreme Court overrules its prior decision.[4]

[3] It is important to note, only two Justices of the Supreme Court indicated their belief Wallace should be overruled and the Court "restore" the common scheme or plan exception as it existed under Lyle. A majority of the Court has not expressed this opinion.

[4] Additionally, the issue of whether to overrule Wallace has been briefed to the South Carolina Supreme Court in State v. Damyon Cotton, Appellate Case No. 2017-002402 (See https://ctrack.sccourts.org/public/caseView.do?csIID=66278).

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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BY: _____
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ATTORNEYS FOR RESPONDENT

January 10, 2019

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lancaster County
Honorable Roger E. Henderson, Circuit Court Judge
Appellate Case Tracking No. 2017-001796

The State, Respondent,

vs.

Guadalupe Guzman Morales, Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled, "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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ATTORNEYS FOR RESPONDENT

January 10, 2019

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lancaster County
Honorable Roger E. Henderson, Circuit Court Judge
Appellate Case Tracking No. 2017-001796

The State, Respondent,

vs.

Guadalupe Guzman Morales, Appellant.

PROOF OF SERVICE

I, Sally Ellison, certify that I have served the within Final Brief of Respondent on Appellant by depositing copies of the same in the United States mail, postage prepaid, addressed to:

Kathrine H. Hudgins, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
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Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.
This 10th day of January 2019.

Sally Ellison

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Guadalupe Guzman Morales, Appellant.

Appellate Case No. 2017-001796

Appeal From Lancaster County
Roger E. Henderson, Circuit Court Judge

Unpublished Opinion No. 2020-UP-001
Submitted November 1, 2019 – Filed January 8, 2020

AFFIRMED

Appellate Defender Kathrine Haggard Hudgins, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Senior Assistant Deputy Attorney General William M. Blitch, Jr., both of Columbia, for Respondent.

PER CURIAM: Guadalupe Guzman Morales appeals his convictions for assault with intent to commit criminal sexual conduct (CSC) with a minor, second degree, CSC with a minor, second degree, and CSC with a minor, first degree. On appeal, Morales argues (1) the trial court erred in admitting testimony from the victim's

sister as evidence of a common scheme or plan and (2) *State v. Wallace*, 384 S.C. 428, 683 S.E.2d 275 (2009),[1] is contrary to *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923), and thus should be overruled. We affirm pursuant to Rule 220(b), SCACR, and the following authorities:

1. The trial court properly exercised its discretion in admitting the disputed evidence. *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006) ("The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion."); *id.* ("An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law."); Rule 404(b), SCRE ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent."); *Wallace*, 384 S.C. at 433-34, 683 S.E.2d at 277-78 ("Rule 404(b) allows the admission of evidence of a common scheme or plan. Such evidence is relevant because proof of one is strong proof of the other. When determining whether evidence is admissible as common scheme or plan, the trial court must analyze the similarities and dissimilarities between the crime charged and the bad act evidence to determine whether there is a close degree of similarity . . . . When the similarities outweigh the dissimilarities, the bad act evidence is admissible under Rule 404(b). Although not a complete list, in this type of case, the trial court should consider the following factors when determining whether there is a close degree of similarity between the bad act and the crime charged: (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."); Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . .").

2. This court does not have the authority to overturn supreme court precedent. *State v. Cheeks*, 400 S.C. 329, 342, 733 S.E.2d 611, 618 (Ct. App. 2012) ("[T]his court lacks the authority to rule against prior published precedent from our

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[1] We recognize our supreme court noted in *State v. King* that *Wallace* incorrectly explained the Rule 403, SCRE, balancing test; however, *King* does not impact the portions of *Wallace* used in this case. *See King*, 424 S.C. 188, 200, 818 S.E.2d 204, 210 n.6 (2018).

supreme court, but is bound by the decisions of the supreme court."), *aff'd as modified on other grounds*, 408 S.C. 198, 758 S.E.2d 215 (2014).

AFFIRMED.[2]

LOCKEMY, C.J., and KONDUROS and HILL, JJ., concur.

[2] We decide this case without oral argument pursuant to Rule 215, SCACR.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

GUADALUPE GUZMAN MORALES,

APPELLANT

APPELLATE CASE NO 2017-001796

Appeal from Lancaster County

Honorable Roger E. Henderson, Circuit Court Judge

Opinion No. 2020-UP-001

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, counsel for Guadalupe Guzman Morales petitions the Court for rehearing and respectfully submits that this Court overlooked the fact that the record fails to establish that the prior bad act testimony from a younger sister, Witness B, was admissible as evidence of a common scheme or plan pursuant to Rule 404(b). The dissimilarities between Witness B's testimony and the prosecuting Witness A's testimony outweighed the similarities. Additionally, this Court overlooked the fact that the probative value of the testimony is substantially outweighed by the danger of unfair prejudice. Finally, counsel respectfully submits

that while this Court lacks the authority to overturn the supreme court precedent of State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009), this Court should find that the Wallace similarities analysis is inconsistent with the traditional interpretation of Rule 404(b) and State v. Lyle, 125 S.C. 406, 118 S.E.2d 803 (1923).

Between December of 1999 to September of 2001, Witness A, her sister, Witness B, and another younger sister lived with their mother and Appellant. During this time Witness A believed that Appellant was her biological father but was later told he was not. (R. p. 139, lines 6-19). Witness B also believed that Appellant was her father but at the time of trial it was unclear if Appellant is Witness B's biological father. (R. p. 274, line 21 – p. 275, lines 1-25). At the time of trial in 2017, fifteen years after arrest warrants issued, Witness A was twenty-eight years of age. (R. p. 136, lines 10-11). At the time of trial Witness B was twenty- five years of age. (R. p. 267, lines 15-16).

At trial Witness A testified that in 2002, when she was thirteen years of age, she went to live with her uncle and his girlfriend and his two daughters because her mother "kicked her out of the house." (R. p. 137, lines 7-11; p. 159, lines 14-21). Witness A testified that after living with her uncle for about a month, upon questioning by the uncle's girlfriend Michelle, she told Michelle that Appellant had been touching her. (R. p. 151, line 4- p. 152, lines 1-2). As a result of the disclosure by Witness A, the maternal grandmother questioned Witness B and the younger sister. (R. p. 272, lines 15-18). Upon questioning by the maternal grandmother, Witness B told "what happened." (R. p. 272, lines 11-18). At trial Witness B admitted that she later recanted the accusation against Appellant. (R. p. 273, lines 17-19).

On July 26, 2017, prior to trial, the State moved before Judge Henderson for a conditional ruling on the admission of testimony from Witness B, during the trial for charges involving

Witness A. (R. pp.76-114). The State argued that the testimony from Witness B should be admitted as the common scheme or plan exception contained in Rule 404(b). (R. p. 81, lines 8-19). Witness B testified that Appellant touched her sexually on three different occasions. (R. p. 91, line 20- p. 92, lines 1-12). Witness A did not testify at the hearing. After Witness B testified, the State argued that Witness B's testimony was admissible pursuant to State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009); State v. Hallman, 298 S.C. 172, 379 S.E.2d 115 (1989); State v. McClellan, 283 S.C. 389, 323 S.E.2d 772 (1984); State v. Blanton, 316 S.C. 31, 33, 446 S.E.2d 438, 439 (Ct. App. 1994); State v. Adams, 332 S.C. 139, 143, 504 S.E.2d 124, 126 (Ct. App. 1998) and State v. Henry, 313 S.C. 106, 108–09, 432 S.E.2d 489, 491 (Ct. App. 1993). (R. pp. 101 – 105). The State argued that there were strong similarities between Witness B's testimony and the testimony the State expected from Witness A at trial. (R. p. 105, lines 15-25). Counsel for Appellant argued that Rule 404(b) prohibited admission of the testimony from Witness B and cited State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). (R. p. 106, lines 5-15). The attorney for the State replied, "I don't believe I actually printed Lyle. We've all heard Lyle so much and to be candid I haven't read it in awhile." (R. p. 106, lines 16-18).

The judge ruled, "Again it is a conditional ruling but at this point in time I find that it would follow the guidelines set forth in Lyle's [sic] and the other cases that have come since then. So, therefore, at least at this point, I would find it to could be admissible as common scheme or plan." (R. p. 113, lines 15-21). It is unclear how the court concluded that the testimony from Witness B was admissible as common scheme or plan without hearing the testimony from Witness A.

After Witness A testified at trial, the State sought a **final** ruling on the admission of testimony from Witness B. (R. p. 211, line 21 – p. 212, 213, lines 1-2). The State argued that

the similarities outweighed the dissimilarities. (R. p. 212, lines 17-21). Appellant objected to the testimony from Witness B. (R. p. 213, lines 4-21). The judge ruled, "Okay. Well, I heard the testimony. I heard the testimony from Witness B at the hearing in Chesterfield and now that I've heard Witness A's testimony, everything else aside their testimony does have a number of similarities and I do find that the similarities outweigh the dissimilarities and taking their testimony would tend to show a common scheme or plan by Mr. Morales." (R. p. 213, line 22 – p. 214, lines 1-5). The judge allowed Witness B's testimony. (R. p. 214, lines 9-12). The trial judge erred. The dissimilarities between Witness B's testimony and Witness A's testimony outweighed the similarities and the prejudicial effect of the testimony substantially outweighed its probative value.

In State v. Lyle, 125 S.C. 406, 118 S.E. 803, 811 (1923), the South Carolina Supreme Court wrote:

> 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. If, as we have seen, no such connection was shown to exist between the separate Georgia offenses and the Aiken crime as would constitute them practically "a continuous transaction" (State v. Weldon, 39 S. C. 321, 17 S. E. 688, 24 L. R. A. 126), or as would otherwise render this evidence relevant to prove identity, and if, as we have held, the evidence was not competent on the question of intent, it follows that it was not admissible merely to show plan or system. See Shaffner v. Com., 72 Pa. 63, 13 Am. Rep. 651, State v. Kenny, supra, and full discussion by Justice Werner in People v. Molineux, supra.

Rule 404(b) provides that, "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however,

be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." Over time two different approaches emerged in terms of analyzing the admissibility of prior bad acts as a common scheme or plan. See State v. Wallace, 364 S.C. 130, 139, 611 S.E.2d 332, 337, n. #2 (Ct. App. 2005), rev'd, 384 S.C. 428, 683 S.E.2d 275 (2009). The first approach adhered to the traditional requirement of a connection between the charged crime and the prior bad act, as discussed in Lyle. The second approach focused on the close degree of similarity between the charged crime and the prior bad act. In Wallace, the South Carolina Supreme Court wrote, "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. State v. Parker, 315 S.C. 230, 433 S.E.2d 831 (1993). When the similarities outweigh the dissimilarities, the bad act evidence is admissible under Rule 404(b)." 384 S.C. at 433, 683 S.E.2d at 277–78. The Court then went on to write:

> Although not a complete list, in this type of case, the trial court should consider the following factors when determining whether there is a close degree of similarity between the bad act and the crime charged: (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. See State v. Hallman, 298 S.C. 172, 379 S.E.2d 115 (1989) (evidence admissible as common scheme or plan where all victims were foster children of similar age and the types of sexual batteries were similar); State v. McClellan, 283 S.C. 389, 323 S.E.2d 772 (1984) (evidence admissible as common scheme or plan where both victims were defendant's daughters, were the same age at time of the initial attack, and defendant gave same explanation for his actions). We emphasize that these factors are set out merely for guidance and that other factors may be relevant in weighing the similarities and the dissimilarities between the crime charged and the bad act evidence.

Wallace, 384 S.C. at 433–34, 683 S.E.2d at 278. The Wallace decision appears to have veered away from the traditional connection analysis in Lyle and carved out an exception for sexual

abuse cases, as will be discussed further in issue two. Pursuant to a Wallace analysis, the trial judge abused his discretion in allowing the testimony of Witness B because the similarities did not outweigh the dissimilarities.

Testimony of Witness B.

During the pre-trial hearing on July 26, 2017, Witness B testified that beginning when she was three years old until the third grade Appellant touched her in a sexual way three times. (R. p. 88, lines 1-10). She testified that the incidents took place inside the home. (R. p. 92, lines 13-25). Witness B testified that the touching stopped when she was in the third grade. (R. p. 89, lines 19-23). According to Witness B, the last time it happened she was unable to sleep and Appellant told her to come in the room with him and watch television. (R. p. 86, lines 11-18). Witness B testified that while they were laying down on the bed he pulled her pants and underwear down and she felt his penis touch her butt. (R. p. 86, line 23 – p. 87, lines 1-14). Witness B testified that her sisters were asleep in another room. (R. p. 88, lines 21-24). According to Witness B, her mother was working when the incident took place. (R. p. 89, lines 3-10).

Witness B testified that the other two times she was sitting on Appellant's lap and he would put his hands down her pants but there was no digital penetration. (R. p. 87, lines 15-25). She testified that when these other two incidents occurred her sisters were home but in a different room. She testified that her mother was not home. (R. p. 88, line 25 -p. 89, lines 1-18). Later, when Witness B was in the fifth grade, her grandmother questioned her, after Witness A alleged abuse, and Witness B disclosed the incidents to her grandmother. (R. p. 91, lines 1-15).

Testimony of Witness A.

At trial Witness A testified that when she was four Appellant rubbed his groin area against her groin area on the outside of her clothing. (R. p. 143, line 23 – p. 144, lines 1-14). Witness A testified that when she was in first grade digital penetration took place on a daily basis. (R. p. 145, lines 12-19). She said the digital penetration took place mainly at home but also in the car and at the river. (R. p. 145, lines 20-23). Witness A testified that her mom was usually not home when the touching took place and if she was home she was in the shower. (R. p. 146, lines 2-5). Sometimes her sisters would be at home and other times they would not be at home. (R. p. 146, lines 6-9).

Witness A testified that Appellant had intercourse with her on her eleventh birthday in the bedroom Appellant shared with Witness A's mother. (R. p. 140, line 17 – p. 141, 142, lines 1-18). According to Witness A, the whole family was going to Carowinds for her birthday and Appellant threatened not to take them to Carowinds unless she got in bed with him. (R. p. 141, line 2 – p. 142, lines 1-2). Witness A testified that at the time her sisters were getting ready in the room they shared and her mother was in the shower. (R. p. 142, lines 11-14). According to witness A, Appellant continued to have sex with her after her eleventh birthday. (R. p. 142, lines 17-19).

Witness A testified that Appellant had sex with her in her room in the summer after she turned eleven. (R. p. 148, line 15 – p. 149, lines 1-3). Witness A testified that, at the time, she was in trouble, confined to her room and her mom had taken her sisters to Walmart. (R. p. 148, lines 15-21). Witness A also testified that one time when she was at home from school because she was sick Appellant asked her to lie on the couch with him and he put his hands down her

pants. (R. p. 149, lines 9-25). According to Witness A, Appellant told her that if she told her mother, her mother would kill her. (R. p. 150, lines 16-19).

Dissimilarities outweigh similarities.

The allegations made by Witness B were substantially different from the allegations made by Witness A. The three instances of sexual touching alleged by Witness B never progressed to digital penetration and always took place in the home. Witness A alleged digital penetration on an almost daily basis that progressed to instances of sexual intercourse. The incidents took place mainly in the home but also in the car and at the river. Viewing the factors listed in Wallace, while both witnesses allege the abuse began when they were young, three or four years old, Witness B testified that the abuse ended when she was in the third grade. Witness A testified that the abuse continued after her eleventh birthday. Appellant was a father figure to both, but the type of alleged abuse was different. The locations were different. While the State argued that Appellant used coercion in the form of his role as a father figure, (R. p. 103, lines 8-15), only witness A testified about a threat. Witness B testified that her mother was not home during the three alleged instances but Witness A testified that her mother was in the shower during at least one of the alleged incidents.

The present case is distinguished from Wallace. In Wallace both the prosecuting witness and the Lyle witness were stepdaughters of Wallace, the abuse began around the same time with the fondling of breasts, the abuse of both occurred in the family home when the mother was not home and Wallace admonished both not to tell as nobody would believe them. The degree of similarity present in Wallace is not present in this case.

The present case is also distinguished from State v. Hallman, 298 S.C. 172, 379 S.E.2d 115 (1989). In Hallman the extent of the abuse of the prosecuting witness was greater than that

of the Lyle witnesses, as in the present case, but the type of abuse in Hallman was similar for all, starting with rubbing outside of the clothes, digital penetration and forcing the witnesses to rub his penis. In the present case the type of abuse alleged by Witness B was limited to sexual touching with no digital penetration and no intercourse as alleged by Witness A.

The present case is also distinguished from State v. McClellan, 283 S.C. 389, 323 S.E.2d 772 (1984). In McClellan three daughters testified that beginning on their twelfth birthday their father would come into their bedroom at night, wake one of them and take her to his bedroom where he would explain the Biblical verse that children are to "Honor thy Father" and he would explain that he was teaching them how to be with their husbands. No such similarity exists in the present case.

The case is also distinguished from State v. Blanton, 316 S.C. 31, 33, 446 S.E.2d 438, 439 (Ct. App. 1994), where the South Carolina Court of Appeals wrote, "All three of the female victims were approximately the same age. Each was subjected to requests both for the performance of cunnilingus and fellatio. All of the alleged activities took place in Blanton's house or his vehicle. In each instance, Blanton took advantage of his relationship with the victim for his sexual gratification. The prior acts were sufficiently similar to the charged offense to be admissible." Unlike in Blanton, the type of and location of the abuse alleged in the present case is different.

The present case is distinguished from State v. Adams, 332 S.C. 139, 143, 504 S.E.2d 124, 126 (Ct. App. 1998), where the Court of Appeals wrote:

> Here, Adams used his relationship as stepfather to control the girls; the girls were approximately the same age; the attacks began in the back-yard hammock; both girls were molested in Adams's truck; both girls were forced to place their hands on Adams's genitals while in his truck; Adams picked locks to both girls' bedrooms to watch them change clothes; Adams entered the bathroom while both girls were showering and pulled the shower curtain aside while they were bathing;

> Adams offered to show both girls a pornographic videotape; Adams repeatedly asked both girls when they could have sex; and, to control both girls from disclosing his abuse, Adams threatened both girls with the same line: "If you tell, you'll go down with me."

Again, the similarities present in Adams are not present in this case.

In State v. Henry, 313 S.C. 106, 108–09, 432 S.E.2d 489, 491 (Ct. App. 1993), the South Carolina Court of Appeals wrote:

> We hold that the testimony of the oldest step-daughter, Nayenda, is clearly admissible under Lyle. Both Jenne and Nayenda experienced similar acts of abuse from the defendant which occurred in the same places and during the same time frame. We hold that the probative value of Nayenda's testimony substantially outweighs any danger of unfair prejudice. Thus, her testimony falls within the Lyle common scheme exception.
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> The testimony of the youngest step-daughter, Tenita, is a much closer question. Tenita was not subjected to the alleged abusive conduct to the extent of her sisters. The crimes committed on Jenne and Tenita are not "so related to each other that proof of one tends to establish the other." State v. Wilson, 274 S.C. 635, 637, 266 S.E.2d 426, 427 (1980), citing State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). There must be a connection between the crime charged and the prior bad act or the accused should be given the benefit of the doubt. State v. Rivers, 273 S.C. 75, 254 S.E.2d 299 (1979). Accordingly, we hold that Tenita's testimony should be excluded to prevent undue prejudice.

The testimony of Witness B in the present case is analogous to the testimony of the youngest step-daughter in Henry and should have been excluded. Witness B was not subjected to the alleged abusive conduct to the extent of her sister, just as the younger sister in Henry, and the alleged crimes committed on both witnesses are not so related to each other that proof of one tends to establish the other. While Henry was decided prior to Wallace, and used a connection analysis rather than a similarities analysis, under either analysis the testimony should be excluded as the similarities do not outweigh the dissimilarities and there was no connection between the alleged incidents. Witness B's testimony was inadmissible propensity evidence and the admission of the testimony was not harmless.

Even if the prior bad act evidence is clear and convincing[1] and falls within a Lyle exception, the trial judge must exclude it if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. State v. Tutton, 354 S.C. 319, 325, 580 S.E.2d 186, 189 (Ct. App. 2003). Rule 403, SCRE provides that, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." In Old Chief v. United States, 519 U.S. 172, 180, 117 S. Ct. 644, 650, 136 L. Ed. 2d 574 (1997) the Court defined unfair prejudice writing:

> The term "unfair prejudice," as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged. See generally 1 J. Weinstein, M. Berger, & J. McLaughlin, Weinstein's Evidence ¶ 403[03] (1996) (discussing the meaning of "unfair prejudice" under Rule 403). So, the Committee Notes to Rule 403 explain, " 'Unfair prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." Advisory Committee's Notes on Fed. Rule Evid. 403, 28 U.S.C.App., p. 860.

In the present case, the testimony from Witness B did not meet the similarities test of Wallace and should have been excluded. Alternatively, the testimony should have been excluded because the probative value is substantially outweighed by the danger of unfair prejudice.

In affirming the convictions this Court wrote:

> The trial court properly exercised its discretion in admitting the disputed evidence. State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006) ("The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion."); *id.* ("An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law."); Rule 404(b), SCRE ("Evidence of other crimes,

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[1] An argument was not made at trial that Witness B's testimony did not meet the clear and convincing standard required for uncharged conduct although Witness B at one point recanted the allegations.

> wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent."); Wallace, 384 S.C. at 433-34, 683 S.E.2d at 277-78 ("Rule 404(b) allows the admission of evidence of a common scheme or plan. Such evidence is relevant because proof of one is strong proof of the other. When determining whether evidence is admissible as common scheme or plan, the trial court must analyze the similarities and dissimilarities between the crime charged and the bad act evidence to determine whether there is a close degree of similarity . . . . When the similarities outweigh the dissimilarities, the bad act evidence is admissible under Rule 404(b). Although not a complete list, in this type of case, the trial court should consider the following factors when determining whether there is a close degree of similarity between the bad act and the crime charged: (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."); Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . .").

State v. Morales, Op. No. 2020-UP-01 (S.C. Ct.App. Filed January 8, 2020).

Counsel respectfully submits that this Court overlooked the fact that, as discussed above, the dissimilarities between Witness B's testimony and the prosecuting Witness A's testimony outweighed the similarities. Additionally, counsel respectfully submits that this Court overlooked the fact that the probative value of the testimony is substantially outweighed by the danger of unfair prejudice. The trial judge erred in allowing the testimony and the error is not harmless.

Additionally, counsel respectfully submits that while this Court lacks the authority to overturn the supreme court precedent of State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009), this Court should find that the Wallace similarities analysis is inconsistent with the traditional interpretation of Rule 404(b) and State v. Lyle, 125 S.C. 406, 118 S.E.2d 803 (1923). The judge allowed the testimony from Witness B stating, "Okay. Well, I heard the testimony. I heard the testimony from Witness B at the hearing in Chesterfield and now that I've heard Witness A's

testimony, everything else aside their testimony does have a number of similarities and I do find that the similarities outweigh the dissimilarities and taking their testimony would tend to show a common scheme or plan by Mr. Morales." (R. p. 213, line 22 – p. 214, lines 1-5). The similarities analysis used by the trial judge in the present case derives from the Wallace case. The Wallace similarities analysis for sexual abuse cases, however, is contrary to Lyle and Rule 404, SCRE, a rule of exclusion that only provides for limited exceptions as provided in Rule 404(b). The testimony of Witness B should have been excluded pursuant to Lyle and Rule 404(b), SCRE.

The dissent in Wallace wrote:

> I respectfully dissent. In my opinion, our 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. *Compare, e.g.,* Vogel v. State, 315 Md. 458, 554 A.2d 1231 (Ct.App.1989). We have repeatedly held in non-sexual offense cases that, "the mere presence of similarity only serves to enhance the potential for prejudice," State v. Tuffour, 364 S.C. 497, 613 S.E.2d 814 (Ct.App.2005) *vacated on other grounds* 371 S.C. 511, 641 S.E.2d 24 (2007) *internal citations omitted,* yet under the majority's view, similarity is the touchstone of admissibility in child sexual offense cases. In my view, if we are to permit the admission of propensity evidence in these types of cases, then we should propose a new rule of evidence, and encourage public comment. *See e.g.* Rules 413 and 414, Fed.R.Evid.; Rule 404(c), Az. R. Evid. In light of the controversy engendered by these rules in other jurisdictions, I believe that thorough scrutiny is warranted.

Wallace, 384 S.C. at 435–36, 683 S.E.2d at 279.

Recently, in a concurring opinion in State v. Perez, 423 S.C. 491, 816 S.E.2d 550, 556–57 (2018), the Court wrote:

> Accordingly, I would overrule Wallace and restore the common scheme or plan exception in sexual misconduct cases to its original purpose as articulated in Lyle whereby proof of a common plan or system requires "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." Just as

> mere similarities between the prior bad act and the crime charged would be insufficient in the case of all other crimes, it should likewise be insufficient when sexual misconduct is involved.

As noted by the Wallace dissent, the similarities analysis for the admission of prior bad act evidence in sexual abuse cases is impossible to reconcile with the traditional Lyle connection analysis used in non-sexual abuse cases. For example, in State v. Timmons, 327 S.C. 48, 52, 488 S.E.2d 323, 325 (1997), a murder, armed robbery case, the South Carolina Supreme Court found that prior robberies were inadmissible and wrote:

> In the case of the common scheme or plan exception under Lyle, a close degree of similarity or connection between the prior bad act and the crime is necessary. State v. Parker, 315 S.C. 230, 433 S.E.2d 831 (1993). *See also* State v. Douglas, 302 S.C. 508, 397 S.E.2d 98 (1990). The connection between the prior bad act and the crime must be more than just a general similarity. State v. Stokes, 279 S.C. 191, 304 S.E.2d 814 (1983). A common scheme or plan concerns more than the commission of two similar crimes; some connection between the crimes is necessary. Id.

While the Court in Timmons discussed similarities, the Court relied on the traditional connection analysis of Lyle as noted above. See also State v. Fletcher, 379 S.C. 17, 23, 664 S.E.2d 480, 483 (2008) (Homicide by child abuse case - "Under Rule 404(b), SCRE, evidence of other crimes, wrongs, or acts is generally not admissible to prove the defendant's guilt for the crime charged. Such evidence is, however, admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent. State v. Pagan, 369 S.C. 201, 631 S.E.2d 262 (2006); State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). To be admissible, the bad act must logically relate to the crime with which the defendant has been charged.). Additionally, the Wallace similarities analysis for the admission of prior bad act evidence in sexual abuse cases is impossible to reconcile with sexual abuse cases decided prior to Wallace

that used the traditional Lyle connection analysis. See State v. Henry, 313 S.C. 106, 108–09, 432 S.E.2d 489, 491 (Ct. App. 1993).

In State v. Nelson, 331 S.C. 1, 6, 501 S.E.2d 716, 718–19 (1998), the South Carolina Supreme Court wrote:

> In a criminal case, the State cannot attack the character of the defendant unless the defendant first places his character in issue. Mitchell v. State, 298 S.C. 186, 379 S.E.2d 123 (1989) (per curiam). 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. State v. Stokes, 279 S.C. 191, 304 S.E.2d 814 (1983); State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923).[7] 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." State v. Peake, 302 S.C. 378, 380, 396 S.E.2d 362, 363 (1990).

The admission of prior bad act evidence based on similarities alone allows the admission of inadmissible propensity evidence. The Wallace opinion should be overruled and the traditional connection test of Lyle and Rule 404(b) applied in all cases, including cases involving sexual abuse allegations. In State v. Brooks, 341 S.C. 57, 61, 533 S.E.2d 325, 327–28 (2000), the South Carolina Supreme Court wrote, "The record must support a logical relevance between the prior bad act and the crime for which the defendant is accused. State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996). '[I]f the court does not clearly perceive the connection between the extraneous criminal transaction and the crime charged, that is, its logical relevancy, the accused should be given the benefit of the doubt, and the evidence should be rejected.' Lyle, 125 S.C. at 417, 118 S.E. at 807."

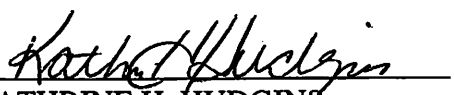
Applying the traditional connection test of Lyle and Rule 404(b) to the testimony of Witness B in the present case, the record fails to establish a logical relevance or connection between the allegations made by Witness B and the crimes for which Appellant stood trial. The

alleged crimes committed on both witnesses are not so related to each other that proof of one tends to establish the other. State v. Wilson, 274 S.C. 635, 637, 266 S.E.2d 426, 427 (1980) citing State v. Lyle, 125 S.C. 406, 118 S.E.803 (1923). The testimony of Witness B constituted inadmissible propensity evidence. The testimony of Witness B should have been excluded. The error in admitting the propensity evidence was not harmless. As the South Carolina Supreme Court noted in State v. Wilson, 274 S.C. 635, 637–38, 266 S.E.2d 426, 427 (1980), "The Lyle court emphasized that evidence of other crimes must be strictly scrutinized before its admission, since 'the inevitable tendency of such evidence is to raise a legally spurious presumption of guilt in the minds of the jurors.' Lyle at 125 S.C. 412, 118 S.E. at 807. If there is any doubt as to the connection between the acts, the accused is to be given the benefit of the doubt and the evidence should not be admitted." The trial judge abused his discretion in admitting Witness B's testimony as evidence of a common scheme or plan.

This Court did not address the inconsistencies between the similarity analysis in Wallace and the traditional analysis of Rule 404(b) and Lyle. Instead, this Court wrote, "This court does not have the authority to overturn supreme court precedent. State v. Cheeks, 400 S.C. 329, 342, 733 S.E.2d 611, 618 (Ct. App. 2012) ("[T]his court lacks the authority to rule against prior published precedent from our supreme court, but is bound by the decisions of the supreme court."), *aff'd as modified on other grounds*, 408 S.C. 198, 758 S.E.2d 215 (2014)." State v. Morales, Op. No. 2020-UP-01 (S.C. Ct.App. Filed January 8, 2020). While this Court lacks the authority to overturn the supreme court precedent of Wallace, this Court should find that the Wallace similarities analysis is inconsistent with the traditional interpretation of Rule 404(b) and State v. Lyle, 125 S.C. 406, 118 S.E.2d 803 (1923).

Counsel respectfully seeks rehearing and a finding that the trial judge erred in admitting the testimony of Witness B as evidence of a common scheme or plan pursuant to Rule 404(b) when the dissimilarities between Witness B's testimony and the prosecuting Witness A's testimony outweighed the similarities and the probative value of the testimony is substantially outweighed by the danger of unfair prejudice. Additionally this Court should find that the Wallace similarities analysis is inconsistent with the traditional interpretation of Rule 404(b) and State v. Lyle, 125 S.C. 406, 118 S.E.2d 803 (1923).

Respectfully Submitted,



KATHRINE H. HUDGINS
Appellate Defender

This 23rd day of January, 2020.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lancaster County

Honorable Roger E. Henderson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

GUADALUPE GUZMAN MORALES,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon William M. Blitch, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Guadalupe Guzman Morales, #373639, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 23rd day of January, 2020.

Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO BEFORE
ME this 23rd day of January, 2020.

(L.S)
Notary Public for South Carolina
My Commission Expires: September 30, 2029

The South Carolina Court of Appeals

The State, Respondent,

v.

Guadalupe Guzman Morales, Appellant.

Appellate Case No. 2017-001796

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

_____ C.J.

_____ J.

_____ J.

Columbia, South Carolina

FILED

February 20, 2020

cc:
Alan McCrory Wilson, Esquire
Kathrine Haggard Hudgins, Esquire
William M. Blitch, Jr., Esquire

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Lancaster County
Honorable Roger E. Henderson, Circuit Court Judge

Opinion No. 2020-UP-001 (S.C. Ct. App. Filed January 8, 2020)

THE STATE,

RESPONDENT,

V.

GUADALUPE GUZMAN MORALES,

PETITIONER

APPELLATE CASE NO 2017-001796

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

KATHRINE H. HUDGINS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

INDEX

CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on February 20, 2020.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in finding that the trial judge properly exercised his discretion in admitting the testimony of Witness B as evidence of a common scheme or plan pursuant to Rule 404(b), SCRE, and State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009), when the judge made no specific findings as to any purported similarities between Witness B's testimony and the prosecuting witness, Witness A's testimony, the record reflects that the dissimilarities outweighed the similarities and the probative value of Witness B's testimony was substantially outweighed by the danger of unfair prejudice?

2. Did the Court of Appeals err in declining to recognize that the Wallace similarities analysis used by the trial judge is inconsistent with the traditional interpretation of Rule 404(b), SCRE, and State v. Lyle, 125 S.C. 406, 118 S.E.2d 803 (1923), and failing to find that the testimony of Witness B should have been excluded pursuant to Lyle and Rule 404(b)?

STATEMENT OF THE CASE

In October of 2002, Petitioner, Guadalupe Guzman Morales, was arrested for two counts of criminal sexual conduct with a minor second degree and one count of attempted criminal sexual conduct with a minor second degree, arrest warrants #H-067093, 94, 95. In 2016, fourteen years later, the Lancaster County Grand Jury indicted Petitioner for criminal sexual conduct with a minor first degree, criminal sexual conduct with a minor second degree and assault with intent to commit criminal sexual conduct with a minor, indictments #2016-GS-29-559, 564, 565. On May 26, 2017, Petitioner appeared before the Honorable Brian Gibbons and moved to quash the indictment based on pre-indictment delay as a due process violation. (R. pp. 1- 74). Ned Gregory represented Petitioner. Megan Burchstead with the South Carolina Attorney General Office represented the State. The State argued that Petitioner had been indicted in 2003, but the indictments were not available because of a fire in the Lancaster Courthouse in 2008. (R. p. 6, line 6 – p. 7, lines 1-25). Judge Gibbons denied the motion to quash the indictment and instead treated the motion as a speedy trial motion.[1] Judge Gibbons did not dismiss the indictment for violation of Petitioner's speedy trial rights but scheduled the trial for August 21, 2017. (R. pp. 68-74).

On August 21, 2017, Petitioner proceeded to jury trial before the Honorable Roger E. Henderson. Ned Gregory again represented Petitioner. Megan Burchstead and Joel Kazak represented the State. The jury returned verdicts of guilty as indicted. Judge Henderson sentenced Petitioner to thirty (30) years for criminal sexual conduct first degree, ten (10) years consecutive for assault with intent to commit criminal sexual conduct with a minor and ten (10) years concurrent for criminal sexual conduct with a minor second degree. A timely notice of

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[1] Counsel for Petitioner stated that he did not want a speedy trial (R. p. 63, lines 7-16). This issue may need to be raised in post-conviction relief.

intent to appeal was served on August 25, 2017. The direct appeal was perfected and on January 8, 2020, the South Carolina Court of Appeals filed an unpublished opinion affirming the convictions and sentence. State v. Morales, Op. No. 2020-UP-1796 (S.C. Ct.App. filed January 8, 2020). A timely petition for rehearing was filed on January 23, 2020. The petition for rehearing was denied on February 20, 2020. This petition for writ of certiorari follows.

REASON WHY CERTIORARI SHOULD BE GRANTED

This Court should grant the petition for writ of certiorari in order to address the inconsistency between the Wallace similarity analysis and the traditional interpretation of Rule 404(b) and Lyle and then overrule Wallace.

ARGUMENTS

1. **The Court of Appeals erred in finding that the trial judge properly exercised his discretion in admitting the testimony of Witness B as evidence of a common scheme or plan pursuant to Rule 404(b), SCRE, and State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009), when the judge made no specific findings as to any purported similarities between Witness B's testimony and the prosecuting witness, Witness A's testimony, the record reflects that the dissimilarities outweighed the similarities and the probative value of Witness B's testimony was substantially outweighed by the danger of unfair prejudice.**

Between December of 1999 to September of 2001, Witness A, her sister, Witness B, and another younger sister lived with their mother and Petitioner. During this time Witness A believed that Petitioner was her biological father but was later told he was not. (R. p. 139, lines 6-19). Witness B also believed that Petitioner was her father but at the time of trial it was unclear if Petitioner is Witness B's biological father. (R. p. 274, line 21 – p. 275, lines 1-25). At the time of trial in 2017, fifteen years after arrest warrants issued, Witness A was twenty-eight years of age. (R. p. 136, lines 10-11). At the time of trial Witness B was twenty- five years of age. (R. p. 267, lines 15-16).

At trial Witness A testified that in 2002, when she was thirteen years of age, she went to live with her uncle and his girlfriend and his two daughters because her mother "kicked her out of the house." (R. p. 137, lines 7-11; p. 159, lines 14-21). Witness A testified that after living with her uncle for about a month, upon questioning by the uncle's girlfriend Michelle, she told Michelle that Petitioner had been touching her. (R. p. 151, line 4- p. 152, lines 1-2). As a result of the disclosure by Witness A, the maternal grandmother questioned Witness B and the younger sister. (R. p. 272, lines 15-18). Upon questioning by the maternal grandmother, Witness B told "what happened." (R. p. 272, lines 11-18). At trial Witness B admitted that she later recanted the accusation against Petitioner. (R. p. 273, lines 17-19).

On July 26, 2017, prior to trial, the State moved before Judge Henderson for a conditional ruling on the admission of testimony from Witness B, during the trial for charges involving Witness A. (R. pp.76-114). The State argued that the testimony from Witness B should be admitted as the common scheme or plan exception contained in Rule 404(b). (R. p. 81, lines 8-19). Witness B testified that Petitioner touched her sexually on three different occasions. (R. p. 91, line 20- p. 92, lines 1-12). Witness A did not testify at the hearing. After Witness B testified, the State argued that Witness B's testimony was admissible pursuant to State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009); State v. Hallman, 298 S.C. 172, 379 S.E.2d 115 (1989); State v. McClellan, 283 S.C. 389, 323 S.E.2d 772 (1984); State v. Blanton, 316 S.C. 31, 33, 446 S.E.2d 438, 439 (Ct. App. 1994); State v. Adams, 332 S.C. 139, 143, 504 S.E.2d 124, 126 (Ct. App. 1998) and State v. Henry, 313 S.C. 106, 108–09, 432 S.E.2d 489, 491 (Ct. App. 1993). (R. pp. 101 – 105). The State argued that there were strong similarities between Witness B's testimony and the testimony the State expected from Witness A at trial. (R. p. 105, lines 15-25). Counsel for Petitioner argued that Rule 404(b) prohibited admission of the testimony from Witness B and cited State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). (R. p. 106, lines 5-15). The attorney for the State replied, "I don't believe I actually printed Lyle. We've all heard Lyle so much and to be candid I haven't read it in awhile." (R. p. 106, lines 16-18).

The judge ruled, "Again it is a conditional ruling but at this point in time I find that it would follow the guidelines set forth in Lyle's [sic] and the other cases that have come since then. So, therefore, at least at this point, I would find it to could be admissible as common scheme or plan." (R. p. 113, lines 15-21). It is unclear how the judge concluded that the testimony from Witness B was admissible as common scheme or plan without hearing the testimony from Witness A.

After Witness A testified at trial, the State sought a **final** ruling on the admission of testimony from Witness B. (R. p. 211, line 21 – p. 212, 213, lines 1-2). The State argued that the similarities outweighed the dissimilarities. (R. p. 212, lines 17-21). Petitioner objected to the testimony from Witness B. (R. p. 213, lines 4-21). The judge ruled, "Okay. Well, I heard the testimony. I heard the testimony from Witness B at the hearing in Chesterfield and now that I've heard Witness A's testimony, everything else aside their testimony does have a number of similarities and I do find that the similarities outweigh the dissimilarities and taking their testimony would tend to show a common scheme or plan by Mr. Morales." (R. p. 213, line 22 – p. 214, lines 1-5). The judge allowed Witness B's testimony. (R. p. 214, lines 9-12). The trial judge erred. The judge failed to make specific findings about how the testimony from Witness B was similar to the testimony from Witness A. The record reflects that the dissimilarities between Witness B's testimony and Witness A's testimony outweighed the similarities and the prejudicial effect of the testimony substantially outweighed its probative value.

In State v. Lyle, 125 S.C. 406, 118 S.E. 803, 811 (1923), the South Carolina Supreme Court wrote:

> 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. If, as we have seen, no such connection was shown to exist between the separate Georgia offenses and the Aiken crime as would constitute them practically "a continuous transaction" (State v. Weldon, 39 S. C. 321, 17 S. E. 688, 24 L. R. A. 126), or as would otherwise render this evidence relevant to prove identity, and if, as we have held, the evidence was not competent on the question of intent, it follows that it was not admissible merely to show plan or system. See Shaffner v. Com., 72 Pa. 63, 13

Am. Rep. 651, State v. Kenny, supra, and full discussion by Justice Werner in People v. Molineux, supra.

Rule 404(b) provides that, "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." Over time two different approaches emerged in terms of analyzing the admissibility of prior bad acts as a common scheme or plan. See State v. Wallace, 364 S.C. 130, 139, 611 S.E.2d 332, 337, n. #2 (Ct. App. 2005), rev'd, 384 S.C. 428, 683 S.E.2d 275 (2009). The first approach adhered to the traditional requirement of a connection between the charged crime and the prior bad act, as discussed in Lyle. The second approach focused on the close degree of similarity between the charged crime and the prior bad act. In Wallace, the South Carolina Supreme Court wrote, "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. State v. Parker, 315 S.C. 230, 433 S.E.2d 831 (1993). When the similarities outweigh the dissimilarities, the bad act evidence is admissible under Rule 404(b)." 384 S.C. at 433, 683 S.E.2d at 277–78. The Court then went on to write:

> Although not a complete list, in this type of case, the trial court should consider the following factors when determining whether there is a close degree of similarity between the bad act and the crime charged: (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. See State v. Hallman, 298 S.C. 172, 379 S.E.2d 115 (1989) (evidence admissible as common scheme or plan where all victims were foster children of similar age and the types of sexual batteries were similar); State v. McClellan, 283 S.C. 389, 323 S.E.2d 772 (1984) (evidence admissible as common scheme or plan where both victims were defendant's daughters, were the same age at time of the initial attack, and defendant gave same explanation for his

> actions). We emphasize that these factors are set out merely for guidance and that other factors may be relevant in weighing the similarities and the dissimilarities between the crime charged and the bad act evidence.

Wallace, 384 S.C. at 433–34, 683 S.E.2d at 278. The Wallace decision appears to have veered away from the traditional connection analysis in Lyle and carved out an exception for sexual abuse cases, as will be discussed further in issue two. Pursuant to a Wallace analysis, the trial judge abused his discretion in allowing the testimony of Witness B because the similarities did not outweigh the dissimilarities.

Testimony of Witness B.

During the pre-trial hearing on July 26, 2017, Witness B testified that beginning when she was three years old until the third grade Petitioner touched her in a sexual way three times. (R. p. 88, lines 1-10). She testified that the incidents took place inside the home. (R. p. 92, lines 13-25). Witness B testified that the touching stopped when she was in the third grade. (R. p. 89, lines 19-23). According to Witness B, the last time it happened she was unable to sleep and Petitioner told her to come in the room with him and watch television. (R. p. 86, lines 11-18). Witness B testified that while they were laying down on the bed he pulled her pants and underwear down and she felt his penis touch her butt. (R. p. 86, line 23 – p. 87, lines 1-14). Witness B testified that her sisters were asleep in another room. (R. p. 88, lines 21-24). According to Witness B, her mother was working when the incident took place. (R. p. 89, lines 3-10).

Witness B testified that the other two times she was sitting on Petitioner's lap and he would put his hands down her pants but there was no digital penetration. (R. p. 87, lines 15-25). She testified that when these other two incidents occurred her sisters were home but in a different room. She testified that her mother was not home. (R. p. 88, line 25 -p. 89, lines 1-18). Later,

when Witness B was in the fifth grade, her grandmother questioned her, after Witness A alleged abuse, and Witness B disclosed the incidents to her grandmother. (R. p. 91, lines 1-15).

Testimony of Witness A.

At trial Witness A testified that when she was four Petitioner rubbed his groin area against her groin area on the outside of her clothing. (R. p. 143, line 23 – p. 144, lines 1-14). Witness A testified that when she was in first grade digital penetration took place on a daily basis. (R. p. 145, lines 12-19). She said the digital penetration took place mainly at home but also in the car and at the river. (R. p. 145, lines 20-23). Witness A testified that her mom was usually not home when the touching took place and if she was home she was in the shower. (R. p. 146, lines 2-5). Sometimes her sisters would be at home and other times they would not be at home. (R. p. 146, lines 6-9).

Witness A testified that Petitioner had intercourse with her on her eleventh birthday in the bedroom Petitioner shared with Witness A's mother. (R. p. 140, line 17 – p. 141, 142, lines 1-18). According to Witness A, the whole family was going to Carowinds for her birthday and Petitioner threatened not to take them to Carowinds unless she got in bed with him. (R. p. 141, line 2 – p. 142, lines 1-2). Witness A testified that at the time her sisters were getting ready in the room they shared and her mother was in the shower. (R. p. 142, lines 11-14). According to witness A, Petitioner continued to have sex with her after her eleventh birthday. (R. p. 142, lines 17-19).

Witness A testified that Petitioner had sex with her in her room in the summer after she turned eleven. (R. p. 148, line 15 – p. 149, lines 1-3). Witness A testified that, at the time, she was in trouble, confined to her room and her mom had taken her sisters to Walmart. (R. p. 148, lines 15-21). Witness A also testified that one time when she was at home from school because

she was sick Petitioner asked her to lie on the couch with him and he put his hands down her pants. (R. p. 149, lines 9-25). According to Witness A, Petitioner told her that if she told her mother, her mother would kill her. (R. p. 150, lines 16-19).

Dissimilarities outweigh similarities.

While the trial judge failed to make specific findings as to similarities, the record reflects that the allegations made by Witness B were substantially different from the allegations made by Witness A. The three instances of sexual touching alleged by Witness B never progressed to digital penetration and always took place in the home. Witness A alleged digital penetration on an almost daily basis that progressed to instances of sexual intercourse. The incidents took place mainly in the home but also in the car and at the river. Viewing the factors listed in Wallace, while both witnesses allege the abuse began when they were young, three or four years old, Witness B testified that the abuse ended when she was in the third grade. Witness A testified that the abuse continued after her eleventh birthday. Petitioner was a father figure to both, but the type of alleged abuse was different. The locations were different. While the State argued that Petitioner used coercion in the form of his role as a father figure, (R. p. 103, lines 8-15), only witness A testified about a threat. Witness B testified that her mother was not home during the three alleged instances but Witness A testified that her mother was in the shower during at least one of the alleged incidents.

The present case is distinguished from Wallace. In Wallace both the prosecuting witness and the Lyle witness were stepdaughters of Wallace, the abuse began around the same time with the fondling of breasts, the abuse of both occurred in the family home when the mother was not home and Wallace admonished both not to tell as nobody would believe them. The degree of similarity present in Wallace is not present in this case.

The present case is also distinguished from State v. Hallman, 298 S.C. 172, 379 S.E.2d 115 (1989). In Hallman the extent of the abuse of the prosecuting witness was greater than that of the Lyle witnesses, as in the present case, but the type of abuse in Hallman was similar for all, starting with rubbing outside of the clothes, digital penetration and forcing the witnesses to rub his penis. In the present case the type of abuse alleged by Witness B was limited to sexual touching with no digital penetration and no intercourse as alleged by Witness A.

The present case is also distinguished from State v. McClellan, 283 S.C. 389, 323 S.E.2d 772 (1984). In McClellan three daughters testified that beginning on their twelfth birthday their father would come into their bedroom at night, wake one of them and take her to his bedroom where he would explain the Biblical verse that children are to "Honor thy Father" and he would explain that he was teaching them how to be with their husbands. No such similarity exists in the present case.

The case is also distinguished from State v. Blanton, 316 S.C. 31, 33, 446 S.E.2d 438, 439 (Ct. App. 1994), where the South Carolina Court of Appeals wrote, "All three of the female victims were approximately the same age. Each was subjected to requests both for the performance of cunnilingus and fellatio. All of the alleged activities took place in Blanton's house or his vehicle. In each instance, Blanton took advantage of his relationship with the victim for his sexual gratification. The prior acts were sufficiently similar to the charged offense to be admissible." Unlike in Blanton, the type of and location of the abuse alleged in the present case is different.

The present case is distinguished from State v. Adams, 332 S.C. 139, 143, 504 S.E.2d 124, 126 (Ct. App. 1998), where the Court of Appeals wrote:

> Here, Adams used his relationship as stepfather to control the girls; the girls were approximately the same age; the attacks began in the back-yard hammock; both

> girls were molested in Adams's truck; both girls were forced to place their hands on Adams's genitals while in his truck; Adams picked locks to both girls' bedrooms to watch them change clothes; Adams entered the bathroom while both girls were showering and pulled the shower curtain aside while they were bathing; Adams offered to show both girls a pornographic videotape; Adams repeatedly asked both girls when they could have sex; and, to control both girls from disclosing his abuse, Adams threatened both girls with the same line: "If you tell, you'll go down with me."

Again, the similarities present in Adams are not present in this case.

In State v. Henry, 313 S.C. 106, 108–09, 432 S.E.2d 489, 491 (Ct. App. 1993), the South Carolina Court of Appeals wrote:

> We hold that the testimony of the oldest step-daughter, Nayenda, is clearly admissible under Lyle. Both Jenne and Nayenda experienced similar acts of abuse from the defendant which occurred in the same places and during the same time frame. We hold that the probative value of Nayenda's testimony substantially outweighs any danger of unfair prejudice. Thus, her testimony falls within the Lyle common scheme exception.
>
> The testimony of the youngest step-daughter, Tenita, is a much closer question. Tenita was not subjected to the alleged abusive conduct to the extent of her sisters. The crimes committed on Jenne and Tenita are not "so related to each other that proof of one tends to establish the other." State v. Wilson, 274 S.C. 635, 637, 266 S.E.2d 426, 427 (1980), citing State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). There must be a connection between the crime charged and the prior bad act or the accused should be given the benefit of the doubt. State v. Rivers, 273 S.C. 75, 254 S.E.2d 299 (1979). Accordingly, we hold that Tenita's testimony should be excluded to prevent undue prejudice.

The testimony of Witness B in the present case is analogous to the testimony of the youngest step-daughter in Henry and should have been excluded. Witness B was not subjected to the alleged abusive conduct to the extent of her sister, just as the younger sister in Henry, and the alleged crimes committed on both witnesses are not so related to each other that proof of one tends to establish the other. While Henry was decided prior to Wallace, and used a connection analysis rather than a similarities analysis, under either analysis the testimony should be excluded as the similarities do not outweigh the dissimilarities and there was no connection

between the alleged incidents. Witness B's testimony was inadmissible propensity evidence and the admission of the testimony was not harmless.

Even if the prior bad act evidence is clear and convincing[2] and falls within a Lyle exception, the trial judge must exclude it if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. State v. Tutton, 354 S.C. 319, 325, 580 S.E.2d 186, 189 (Ct. App. 2003). Rule 403, SCRE provides that, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." In Old Chief v. United States, 519 U.S. 172, 180, 117 S. Ct. 644, 650, 136 L. Ed. 2d 574 (1997) the Court defined unfair prejudice writing:

> The term "unfair prejudice," as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged. See generally 1 J. Weinstein, M. Berger, & J. McLaughlin, Weinstein's Evidence ¶ 403[03] (1996) (discussing the meaning of "unfair prejudice" under Rule 403). So, the Committee Notes to Rule 403 explain, " 'Unfair prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." Advisory Committee's Notes on Fed. Rule Evid. 403, 28 U.S.C.App., p. 860.

In the present case, the testimony from Witness B did not meet the similarities test of Wallace and should have been excluded. Alternatively, the testimony should have been excluded because the probative value is substantially outweighed by the danger of unfair prejudice.

In affirming the convictions this Court wrote:

> The trial court properly exercised its discretion in admitting the disputed evidence. State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006) ("The

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[2] An argument was not made at trial that Witness B's testimony did not meet the clear and convincing standard required for uncharged conduct although Witness B at one point recanted the allegations.

> admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion."); *id.* ("An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law."); Rule 404(b), SCRE ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent."); Wallace, 384 S.C. at 433-34, 683 S.E.2d at 277-78 ("Rule 404(b) allows the admission of evidence of a common scheme or plan. Such evidence is relevant because proof of one is strong proof of the other. When determining whether evidence is admissible as common scheme or plan, the trial court must analyze the similarities and dissimilarities between the crime charged and the bad act evidence to determine whether there is a close degree of similarity . . . . When the similarities outweigh the dissimilarities, the bad act evidence is admissible under Rule 404(b). Although not a complete list, in this type of case, the trial court should consider the following factors when determining whether there is a close degree of similarity between the bad act and the crime charged: (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."); Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . .").

State v. Morales, Op. No. 2020-UP-01 (S.C. Ct.App. Filed January 8, 2020).

The Court of Appeals erred in finding that the trial judge properly exercised his discretion in admitting the testimony of Witness B as evidence of a common scheme or plan pursuant to Rule 404(b), SCRE, and State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009), when the judge made no specific findings as to any purported similarities between Witness B's testimony and the prosecuting witness, Witness A's testimony, the record reflects that the dissimilarities outweighed the similarities and the probative value of Witness B's testimony was substantially outweighed by the danger of unfair prejudice. The trial judge abused his discretion in failing to specifically consider the factors listed in Wallace and included the opinion by the Court of Appeals. Additionally, the trial judge's general ruling that, "Well, I heard the testimony. I heard the testimony from Witness B at the hearing in Chesterfield and now that I've heard Witness A's testimony, everything else aside their testimony does have a number of similarities and I do find

that the similarities outweigh the dissimilarities and taking their testimony would tend to show a common scheme or plan by Mr. Morales." (R. p. 213, line 22 – p. 214, lines 1-5), is not supported by the record. In reviewing a trial court's ruling on the admissibility of evidence, appellate courts recognize that the trial judge has considerable latitude in this regard and will not disturb such rulings absent a prejudicial abuse of discretion. State v. Whitner, 399 S.C. 547, 557, 732 S.E.2d 861, 866 (2012); State v. Clasby, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." Whitner, 399 S.C. at 557, 732 S.E.2d at 866. The trial judge abused his discretion in admitting the testimony of Witness B. The error is not harmless.

2. The Court of Appeals erred in declining to recognize that the Wallace similarities analysis used by the trial judge is inconsistent with the traditional interpretation of Rule 404(b), SCRE, and State v. Lyle, 125 S.C. 406, 118 S.E.2d 803 (1923), and failing to find that the testimony of Witness B should have been excluded pursuant to Lyle and Rule 404(b).

The judge allowed the testimony from Witness B stating, "Okay. Well, I heard the testimony. I heard the testimony from Witness B at the hearing in Chesterfield and now that I've heard Witness A's testimony, everything else aside their testimony does have a number of similarities and I do find that the similarities outweigh the dissimilarities and taking their testimony would tend to show a common scheme or plan by Mr. Morales." (R. p. 213, line 22 – p. 214, lines 1-5). The similarities analysis used by the trial judge in the present case derives from the Wallace case. The Wallace similarities analysis for sexual abuse cases, however, is contrary to Lyle and Rule 404, SCRE, a rule of exclusion that only provides for limited

exceptions as provided in Rule 404(b). The testimony of Witness B should have been excluded pursuant to Lyle and Rule 404(b), SCRE.

The dissent in Wallace wrote:

> I respectfully dissent. In my opinion, our 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. *Compare, e.g.,* Vogel v. State, 315 Md. 458, 554 A.2d 1231 (Ct.App.1989). We have repeatedly held in non-sexual offense cases that, "the mere presence of similarity only serves to enhance the potential for prejudice," State v. Tuffour, 364 S.C. 497, 613 S.E.2d 814 (Ct.App.2005) *vacated on other grounds* 371 S.C. 511, 641 S.E.2d 24 (2007) *internal citations omitted,* yet under the majority's view, similarity is the touchstone of admissibility in child sexual offense cases. In my view, if we are to permit the admission of propensity evidence in these types of cases, then we should propose a new rule of evidence, and encourage public comment. *See e.g.* Rules 413 and 414, Fed.R.Evid.; Rule 404(c), Az. R. Evid. In light of the controversy engendered by these rules in other jurisdictions, I believe that thorough scrutiny is warranted.

Wallace, 384 S.C. at 435–36, 683 S.E.2d at 279.

Recently, in a concurring opinion in State v. Perez, 423 S.C. 491, 816 S.E.2d 550, 556–57 (2018), the Court wrote:

> Accordingly, I would overrule Wallace and restore the common scheme or plan exception in sexual misconduct cases to its original purpose as articulated in Lyle whereby proof of a common plan or system requires "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." Just as mere similarities between the prior bad act and the crime charged would be insufficient in the case of all other crimes, it should likewise be insufficient when sexual misconduct is involved.

As noted by the Wallace dissent, the similarities analysis for the admission of prior bad act evidence in sexual abuse cases is impossible to reconcile with the traditional Lyle connection analysis used in non-sexual abuse cases. For example, in State v. Timmons, 327 S.C. 48, 52, 488

S.E.2d 323, 325 (1997), a murder, armed robbery case, the South Carolina Supreme Court found that prior robberies were inadmissible and wrote:

> In the case of the common scheme or plan exception under Lyle, a close degree of similarity or connection between the prior bad act and the crime is necessary. State v. Parker, 315 S.C. 230, 433 S.E.2d 831 (1993). *See also* State v. Douglas, 302 S.C. 508, 397 S.E.2d 98 (1990). The connection between the prior bad act and the crime must be more than just a general similarity. State v. Stokes, 279 S.C. 191, 304 S.E.2d 814 (1983). A common scheme or plan concerns more than the commission of two similar crimes; some connection between the crimes is necessary. Id.

While the Court in Timmons discussed similarities, the Court relied on the traditional connection analysis of Lyle as noted above. See also State v. Fletcher, 379 S.C. 17, 23, 664 S.E.2d 480, 483 (2008) (Homicide by child abuse case - "Under Rule 404(b), SCRE, evidence of other crimes, wrongs, or acts is generally not admissible to prove the defendant's guilt for the crime charged. Such evidence is, however, admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent. State v. Pagan, 369 S.C. 201, 631 S.E.2d 262 (2006); State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). To be admissible, the bad act must logically relate to the crime with which the defendant has been charged.). Additionally, the Wallace similarities analysis for the admission of prior bad act evidence in sexual abuse cases is impossible to reconcile with sexual abuse cases decided prior to Wallace that used the traditional Lyle connection analysis. See State v. Henry, 313 S.C. 106, 108–09, 432 S.E.2d 489, 491 (Ct. App. 1993).

In State v. Nelson, 331 S.C. 1, 6, 501 S.E.2d 716, 718–19 (1998), the South Carolina Supreme Court wrote:

> In a criminal case, the State cannot attack the character of the defendant unless the defendant first places his character in issue. Mitchell v. State, 298 S.C. 186, 379 S.E.2d 123 (1989) (per curiam). 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. State v. Stokes, 279 S.C. 191, 304 S.E.2d 814 (1983); State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923).[7] 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." State v. Peake, 302 S.C. 378, 380, 396 S.E.2d 362, 363 (1990).

The admission of prior bad act evidence based on similarities alone allows the admission of inadmissible propensity evidence. The Wallace opinion should be overruled and the traditional connection test of Lyle and Rule 404(b) applied in all cases, including cases involving sexual abuse allegations. In State v. Brooks, 341 S.C. 57, 61, 533 S.E.2d 325, 327–28 (2000), the South Carolina Supreme Court wrote, "The record must support a logical relevance between the prior bad act and the crime for which the defendant is accused. State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996). '[I]f the court does not clearly perceive the connection between the extraneous criminal transaction and the crime charged, that is, its logical relevancy, the accused should be given the benefit of the doubt, and the evidence should be rejected.' Lyle, 125 S.C. at 417, 118 S.E. at 807."

Applying the traditional connection test of Lyle and Rule 404(b) to the testimony of Witness B in the present case, the record fails to establish a logical relevance or connection between the allegations made by Witness B and the crimes for which Petitioner stood trial. The alleged crimes committed on both witnesses are not so related to each other that proof of one tends to establish the other. State v. Wilson, 274 S.C. 635, 637, 266 S.E.2d 426, 427 (1980) citing State v. Lyle, 125 S.C. 406, 118 S.E.803 (1923). The testimony of Witness B constituted inadmissible propensity evidence. The testimony of Witness B should have been excluded. The error in admitting the propensity evidence was not harmless. As the South Carolina Supreme Court noted in State v. Wilson, 274 S.C. 635, 637–38, 266 S.E.2d 426, 427 (1980), "The Lyle court emphasized that evidence of other crimes must be strictly scrutinized before its admission,

since 'the inevitable tendency of such evidence is to raise a legally spurious presumption of guilt in the minds of the jurors.' Lyle at 125 S.C. 412, 118 S.E. at 807. If there is any doubt as to the connection between the acts, the accused is to be given the benefit of the doubt and the evidence should not be admitted." The trial judge abused his discretion in admitting Witness B's testimony as evidence of a common scheme or plan.

The Court of Appeals did not address the inconsistencies between the similarity analysis in Wallace and the traditional analysis of Rule 404(b) and Lyle. Instead, the Court of Appeals wrote, "This court does not have the authority to overturn supreme court precedent. State v. Cheeks, 400 S.C. 329, 342, 733 S.E.2d 611, 618 (Ct. App. 2012) ("[T]his court lacks the authority to rule against prior published precedent from our supreme court, but is bound by the decisions of the supreme court."), *aff'd as modified on other grounds*, 408 S.C. 198, 758 S.E.2d 215 (2014)." State v. Morales, Op. No. 2020-UP-01 (S.C. Ct.App. Filed January 8, 2020). While the Court of Appeals lacked the authority to overturn this Court's precedent of Wallace, the Court of Appeals erred in declining to recognize that the Wallace similarities analysis is inconsistent with the traditional interpretation of Rule 404(b) and State v. Lyle, 125 S.C. 406, 118 S.E.2d 803 (1923). Additionally, the Court of Appeals erred in failing to find that the testimony of Witness B should have been excluded pursuant to the traditional Lyle and Rule 404(b) analysis.

CONCLUSION

Based on the arguments above, this Court should grant the petition for writ of certiorari to allow further briefing on the issue.

Respectfully Submitted,

Susan B. Hackett for
Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 17th day of March, 2020.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Lancaster County
Honorable Roger E. Henderson, Circuit Court Judge

Opinion No. 2020-UP-001 (S.C. Ct. App. Filed January 8, 2020)

THE STATE,

RESPONDENT,

V.

GUADALUPE GUZMAN MORALES,

PETITIONER

CERTIFICATE OF SERVICE

I certify that a copy of the Petition for Writ of Certiorari and a copy of the Appendix in this case has been served on William M. Blitch, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Guadalupe Guzman Morales, #373639, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010; and the Court of Appeals, at 1220 Senate Street, Columbia, SC 29201, this 17th day of March, 2020.

Susan S. Hackett for
Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO BEFORE
ME this 17th day of March, 2020.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: September 30, 2029

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
Appellate Case Tracking No. 2020-000498

The State, Respondent,

v.

Guadalupe Guzman Morales, Petitioner.

Opinion No. 2020-UP-001 (S.C. Ct. App. filed January 8, 2020)

RETURN TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF QUESTIONS PRESENTED

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II. The Court of Appeals properly concluded it could not overrule this Court's decision in State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009). Further, there is no reason to overrule the decision in Wallace because it is entirely consistent with this state's prior case law. Finally, the issue is not preserved for review on appeal.

STATEMENT OF THE CASE

Procedural History

In October 2002, Petitioner 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. (5/26T.6-7; R. 6-7) Petitioner 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; R. 402-407).

After two pretrial hearings, Petitioner proceeded to trial before the Honorable Roger E. Henderson and a jury. The jury returned verdicts of guilty on all charges. (8/21T.293; R.387). Judge Henderson sentenced Petitioner 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; R. 408-410).

Petitioner timely served and filed his Notice of Appeal on August 25, 2017. After briefing and without oral argument, the Court of Appeals affirmed Petitioner's convictions and sentences. State v. Morales, Op. No. 2020-UP-001(filed January 8, 2020). Petitioner filed a Petition for Rehearing, which was denied on February 20, 2020. A Petition for Writ of Certiorari was served on March 17, 2020. This Return follows.

Factual Background

When the victim was younger[1], she lived with her mother, Petitioner, and two younger sisters. (8/21T.43-44; R. 137-138). The victim's sisters were about two and five years younger than her. While she lived with Petitioner, the victim believed he was her biological father, but found out later he was not. (8/21T.46; R.140).

Petitioner 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. Petitioner 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. (8/21T.49-50; R. 143-144). When the victim turned around seven, Petitioner 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. (8/21T.50-52; R. 144-146).

The abuse continued to escalate to Petitioner 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 Petitioner, 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. Petitioner then raped the eleven year old victim. (8/21T.47-48; R. 141-142). Later that summer, the victim's mom and sisters went to the store. The victim was in trouble and confined to her room. Petitioner entered and again raped the eleven year old girl. She realized the window was open and tried to scream, but Petitioner put his hand over her mouth. (8/21T.54-55; R. 148-149). The victim never told anyone because she was scared, did not want to be called a liar, and did not want to be judged. (8/21T.56; R.150).

[1] At the time of trial, the victim was twenty-eight years old. (8/21T.42; R. 136).

After the victim was kicked out of the house with her mother and Petitioner, she went to live with her Uncle Jimmy and his girlfriend Michelle. (8/21T.43; 57; R. 137; 151). 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. (8/21T.57; 166-167; R.151; 260-261). The victim disclosed the years of abuse by Petitioner.

Petitioner also sexually abused the middle sister, the second victim. She believed Petitioner 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. Petitioner would have her sit on his lap and would touch her under her underwear. The abuse occurred in the home. (8/21T.175-176; R.269-270). When the second victim was eight, Petitioner saw that she could not sleep and had her get in the bed with him. Her mom was not home at the time. Petitioner lay in the bed behind the second victim and pulled down her pants and underwear. She felt his penis touch her buttocks. (8/21T.178; R. 272). 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. (8/21T.178; R.272).

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001); State v. Butler, 353 S.C. 383, 388, 577 S.E.2d 498, 500 (Ct. App. 2003). "The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice." State v. Kromah, 401 S.C. 340, 349, 737 S.E.2d 490, 494–95 (2013) (quoting State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847–48 (2006)). "The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Id.

ARGUMENT

I. The Court of Appeals properly determined the trial court did not err in admitting the testimony of the second victim pursuant to Rule 404(b), SCRE. However, the Court of Appeals should have concluded any issue was waived and not preserved for review on appeal because Petitioner's trial counsel acknowledged the similarities and waived any issue regarding Rule 404(b).

The Court of Appeals correctly found the trial court did not err in admitting testimony by a second victim pursuant to Rule 404(b), SCRE. However, the Court of Appeals should not have addressed the merits because the issue was expressly waived by Petitioner's trial counsel and was not properly preserved for review on appeal.

Waiver/Preservation

Petitioner's trial counsel waived any issue regarding the admission of the second victim's testimony pursuant to Rule 404(b). While counsel did raise an objection to the second victim testifying at a pre-trial hearing, arguing the testimony was inadmissible under Rule 404(b) and State v. Lyle, 125 S.C. 406, 118 S.E.2d 803 (1923), he waived this ruling at trial.

Initially, the pre-trial hearing regarding the testimony 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 . . . .". (7/26T. 38; R. 113). 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." (7/26T.38-39; R. 113-114). 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.").

Additionally, once at trial, Petitioner'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 and waived any objection on the basis now being raised on appeal.

> 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 Jessica's testimony it appears to be clear that's what it is. So we think that the testimony of Lisa is -- will be improper bolstering of Jessica's testimony.

(8/21T.119; R. 213) (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. Accordingly, any issue regarding Lyle and 404(b) was waived and is not preserved for review on appeal. See 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); 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).

Further, as his actual objection to the testimony at trial was based on improper bolstering, Petitioner cannot now raise a different issue on appeal. See e.g., 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).

Merits

On the merits, the trial court properly admitted the testimony of the second victim in order to establish a common scheme or plan and this common scheme or plan was exemplified by looking at the similarities between the victim's testimony and that of the second victim. Properly applying this Court's precedent of Wallace, the trial court considered the similarities and dissimilarities in testimony and found that a common scheme or plan was established.

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It 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.

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

outweigh the dissimilarities, the bad act evidence is admissible under Rule 404(b)." Wallace, 384 S.C. at 433, 683 S.E.2d at 277-278. This Court provided some factors to consider including: (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. Id. at 433-434, 683 S.E.2d at 278. Common scheme or plan evidence which is logically relevant to the charged offense should not be excluded merely because it "incidentally reveals the accused's guilt of another crime." State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009) (quoting State v. Green, 261 S.C. 366, 371, 200 S.E.2d 74, 77 (1973)).

The Court of Appeals, then Chief Judge Hearn, explained the common scheme or plan exception:

> Where such a plan exists, the charged and uncharged acts represent individual achievements of the purposes for which the plan was established. See 2 Wigmore, § 304 (stating that where separate offenses are sufficiently similar, there is an inference that they are manifestations of a common scheme or plan). Accordingly, the evidence in such cases speaks to the existence of the defendant's plan, not to the defendant's character. This is so because the jury is not asked to draw an inference that the prior bad acts would evince the defendant's propensity to commit the charged offenses; instead, the jury is asked to infer that the defendant developed a criminal scheme and employed that scheme as probative evidence that the charged acts occurred.

State v. Tutton, 354 S.C. 319, 330-31, 580 S.E.2d 186, 192 (Ct. App. 2003).

In analyzing the factors articulated in Wallace and comparing the similarities and dissimilarities in this case, the trial court properly concluded a common scheme or plan existed. As discussed above, both victims believed Petitioner was their dad at the time of the abuse. Petitioner took advantage of this relationship for his sexual gratification. They both indicated the abuse began when they were very young, three and four years old. They both testified Petitioner

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 Petitioner placing his penis against her buttocks. However, this is likely only because of the disclosure by the victim which ended the opportunity of Petitioner to do more to the second victim. As the trial court found, and Petitioner's counsel conceded, the testimony presented by both victims indicated a clear pattern, a common scheme or plan by Petitioner to use his position as their alleged father to sexually abuse them while their mother was either out of the home or occupied.

Cases from both appellate courts support the trial court's decision. The Supreme Court in State v. McClellan found prior bad acts committed by the defendant against two older daughters admissible under the common scheme or plan exception in a prosecution for similar acts against the youngest daughter because the "experiences of each daughter parallel that of her sisters . . ." State v. McClellan, 283 S.C. 389, 392, 323 S.E.2d 772, 774 (1984). Specifically, the Court noted: "[T]he initial attack occurred around age twelve; Petitioner entered their room and chose one of them, who would be forced to submit; he gave to each the same explanation for his actions; and he quoted to each the Biblical verse [to "Honor thy Father"]." Id.[2]

In State v. Blanton, 316 S.C. 31, 446 S.E.2d 438 (Ct. App. 1994), the defendant was charged with molesting his granddaughter. Two other witnesses testified that seven or eight years beforehand, they were molested by the defendant. The Court of Appeals found the testimony admissible, noting the following:

[2] It should be noted all three of these cases occurred prior to this Court's issuance of Wallace, and all three relied on the significant similarities and the "parallel" of events to find a common scheme or plan.

> . . . All three of the female victims were approximately the same age. Each was subjected to requests both for the performance of cunnilingus and fellatio. All the alleged activities took place in Blanton's house or his vehicle. In each instance, Blanton took advantage of his relationship with the victim for his sexual gratification. The prior acts were **sufficiently similar** to the charged offense to be admissible.

Blanton, 316 S.C. at 32, 446 S.E.2d at 439 (emphasis added).

In State v. Hallman, 298 S.C. 172, 379 S.E.2d 115 (1989), the victim was a foster child in Hallman's home. The trial court allowed testimony of three other women who testified they were abused while they were foster children in Hallman's home. The victim and two other women each testified that the abuse began shortly after they arrived at Hallman's farm, at either six or seven years of age, and continued while they stayed at the home. In each case, the abuse started with Hallman rubbing the victims on the outside of their clothing and then proceeded to digital penetration. In each case, they were also made to rub Hallman's penis. The events in each case took place in the bedroom, barn or on the tractor, and most frequently during summer. The victim was also abused in the bathroom of the residence when Hallman would remove her clothes and stick his penis between her legs. The remaining victim from prior acts arrived at the farm at four years old and was made to rub his penis four times inside the house. Id., 298 S.C. at 174-175, 379 S.E.2d at 117.

In finding the prior bad acts admissible, this Court noted the following:

> The prior bad acts here occurred while each of the young women was a foster child to appellant and of **similar** age to the victim. In each instance, appellant took advantage of this relationship for his sexual gratification. The extent of the abuse against the victim was even more reprehensible than that against the previous foster children. It commenced, however, in exactly the **same manner** under **similar circumstances.**

Id., 298 S.C. at 175, 379 S.E.2d at 117 (emphasis added). As in McClellan, Blanton, and Hallman, the testimony in this case established the requisite link and commonality to be admissible as a common scheme or plan. The Court of Appeals properly concluded on the merits that the testimony of the second victim was admissible as a common scheme or plan and the Petition for Writ of Certiorari as to Question I should be denied. If this Court grants the Petition as to Question I, it should only be to vacate the Court of Appeals opinion and find that it should not have addressed an issue that was waived and not properly preserved for review on appeal.

II. The Court of Appeals properly concluded it could not overrule this Court's decision in State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009). Further, there is no reason to overrule the decision in Wallace because it is entirely consistent with this state's prior case law. Finally, the issue is not preserved for review on appeal.

The Court of Appeals correctly found it did not have authority to overrule this Court's decision in State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009). Further, the issue is not properly preserved for review on appeal. Even if properly presented, this Court should not overrule Wallace because it is entirely consistent with the prior case law in this state.

Preservation

Petitioner never asked the trial judge to rule Wallace inapplicable, nor did he make any assertion the trial court was applying an incorrect standard in determining whether a common scheme or plan was established when the trial court presented its analysis of the similarities versus the dissimilarities. (8/21T.120; R. 214). As a result, Petitioner's Question II is not preserved for review on appeal. 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).

Merits

There is no reason for this Court to overrule its decision in Wallace or to reverse this case based on an application of the then appropriate case law. The decision in Wallace is entirely consistent with prior case law in which a common scheme or plan was found and cases in which the appellate courts concluded the evidence failed to demonstrate a common scheme or plan.

The Courts of this state have long held prior bad acts admissible when they serve to prove some fact or element related to the crime charged. See e.g., State v. Houston, 17 S.C.L. 300, 301, 1 Bail. 300 (S.C. App. L. & Eq. 1829) (admitting evidence of prior forgeries in a forgery

case "to shew that the prisoner has passed other counterfeit notes of a similar character" . . . "for although these may be the foundation of other prosecutions, yet they afford evidence, and sometimes very strong evidence, of the knowledge of the falsity of the paper, on which the indictment is founded."). "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It 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.

"When determining whether evidence is admissible as common scheme or plan, the trial court must analyze the similarities and dissimilarities between the crime charged and the bad act evidence to determine whether there is a close degree of similarity. When the similarities outweigh the dissimilarities, the bad act evidence is admissible under Rule 404(b)." Wallace, 384 S.C. at 433, 683 S.E.2d at 277-278. This Court provided some factors to consider including: (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. Id. at 433-434, 683 S.E.2d at 278. Common scheme or plan evidence which is logically relevant to the charged offense should not be excluded merely because it "incidentally reveals the accused's guilt of another crime." State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009) (quoting State v. Green, 261 S.C. 366, 371, 200 S.E.2d 74, 77 (1973)).

This Court's decision in Wallace did not change the admissibility of prior bad act evidence. Instead, it merely clarified this Court's long-standing consideration of prior bad act evidence. Under common law in America, as in England, "there never did exist any rule of evidence . . . excluding proof of other offences of the accused where such proof was relevant to

a fact in issue. All that there was to be found was a very narrow rule excluding proof where the relevance was merely to the evil disposition of the accused." Julius Stone, The Rule of Exclusion of Similar Fact Evidence: America, 51 Harv. L. Rev. 988, 990 (1938). South Carolina case law supports this conclusion. See e.g., State v. Petty, 16 S.C.L. 59, 62, Harp. 59 (S.C. Const. App. 1823) (finding admissible proof of prior instances when a defendant passed forged notes during trial for passing a forged note and holding: "But let it be admitted that it is a crime, yet if the proof of it has a tendency to support the issue, in the case before the court, it is admissible. It has been determined, as to this very offence, that proof of a man's having passed other forged notes, may be given in evidence."); State v. Winter, 83 S.C. 251, 65 S.E. 243, 245 (1909) (finding evidence of prior similar acts—buying stolen goods—provided proof defendant received stolen goods knowing them to be stolen); see also, State v. Odel, 2 Tread. 758, 3 Brev.552 (1816) (finding if prior bad act had been the same as current crime it would have been admissible into evidence, but since significant dissimilarities existed it was inadmissible).

In State v. Lyle, 125 S.C. 406, 416, 118 S.E. 803, 807 (1923), this Court articulated five reasons for admitting evidence of other bad acts: "Generally speaking, evidence of other crimes is competent to prove the specific crime charged when it tends to establish, (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others; (5) the identity of the person charged with the commission of the crime on trial." State v. Lyle, 125 S.C. 406, 118 S.E. 803, 807 (1923) (quoting People v. Molineux, 168 N. Y. 264, 61 N. E. 286 (1901)). "If it is logically pertinent in that it reasonably tends to prove a material fact in issue, it is not to be rejected merely because it incidentally proves the defendant guilty of another crime." State v. Lyle, 125 S.C. 406, 118 S.E. 803, 807 (1923).

This Court in Wallace merely explained that the logical relevance in a case considering a common scheme or plan can usually be found in the fact the other bad act and the act for which the defendant is on trial are similar. A review of some of the cases from this Court and the Court of Appeals in which evidence was found inadmissible is apposite to proper application of Rule 404(b) and Lyle, especially when those cases are juxtaposed to cases in which prior bad act evidence was admissible as a common scheme or plan.

In State v. Stokes, 279 S.C. 191, 304 S.E.2d 814 (1983), evidence was presented establishing Stokes committed a lewd act upon his juvenile victim when the child came to his house to purchase a frozen treat. Id. at 192, 304 S.E.2d at 814. Over objection, the trial judge admitted testimony indicating Stokes once asked another child to meet him at the railroad tracks for an undisclosed purpose, which the child speculated Stokes intended to rape her. Id. On appeal, this Court reversed, finding no connection between the acts, which were in no way similar, and determining the trial judge erred in admitting the evidence. Id. at 193, 304 S.E.2d at 815.

The Court of Appeals decision in Tutton is another example of when the dissimilarities were so great that they precluded a finding of a common scheme or plan. In Tutton, two sisters testified Tutton rubbed their butts and private parts with his hands while they were sleeping near him. Tutton, 354 S.C. at 323, 580 S.E.2d at 188. Over objection, one of the sisters also testified Tutton performed oral sex on her, forced her to perform oral sex on him, and threatened her not to tell several years prior to the charged incidents. Id. at 324, 580 S.E.2d at 189. The Court found:

> The balancing of the similarities in cases concerning the admission of common scheme or plan evidence is a difficult task. While inferential leaps are at the heart of such decisions, we are compelled to find that the similarities in this case are insufficient to

> support the inference that Tutton employed a common scheme or plan to commit the assaults alleged in this case.

Id. at 333, 580 S.E.2d at 194.

In State v. Timmons, 327 S.C. 48, 488 S.E.2d 323 (1997), which came years before Wallace, this Court reviewed the similarities of two armed robberies. The Court found "the only point of similarity with any merit is the alleged similar clothing worn by the robbers." Id. at 53, 488 S.E.2d at 326. As a result, this Court found: "We find there is insufficient similarity between the two crime sprees to prove a common scheme or plan under Lyle." Id.; see also, State v. Berry, 332 S.C. 214, 219, 503 S.E.2d 770, 773 (Ct. App. 1998) ("In this case, there are insufficient similarities between the attack on the victim and the attack on Polite to connect the incidents as part of a common scheme or plan. The incidents occurred fifteen months apart, under different circumstances, at different times, in different places, and in different ways. That both women coincidentally wore glasses and both claimed Berry grabbed their throats does not render the attacks sufficiently connected or similar to justify admission of evidence of the Polite incident under the common scheme or plan exception."); State v. Davenport, 321 S.C. 134, 138, 467 S.E.2d 258, 260–61 (Ct. App. 1996) (finding "to be admissible under the common scheme exception, the similarity or connection between the prior bad act and the current charge must be close" and concluding the use of a knife and the lack of a connection between the victims and Davenport was insufficient to establish a common scheme or plan).

These cases can be juxtaposed to some of the cases in which the Courts have found the similarities sufficient to establish a common scheme or plan. In State v. Hallman, 298 S.C. 172, 379 S.E.2d 115 (1989); State v. McClellan, 283 S.C. 389, 392, 323 S.E.2d 772, 774 (1984); and State v. Blanton, 316 S.C. 31, 446 S.E.2d 438 (Ct. App. 1994)—as discussed above—the

appellate courts relied on the similarities in actions to justify admission as a common scheme or plan.

Wallace did not change the standard for finding a common scheme or plan, nor did it create a new standard for sexual assault and similar cases. It merely clarified the longstanding findings of the appellate courts which demonstrated that when sufficient and logical similarities existed, the connection required to find a common scheme or plan existed. The Court in Wallace provided some guidance to the courts regarding the type of similarities which provided the necessary connection between events. Nothing in Wallace should be overturned and, even if it were the incorrect standard and this Court would find the language in Tutton or similar articulated a different standard, it would not warrant reversal in this case where a clear connection has been established. As a result, this Court should deny the Petition for Writ of Certiorari as to Petitioner's Question II.

CONCLUSION

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

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

April 10, 2020

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
Appellate Case Tracking No. 2020-000498

The State, Respondent,

v.

Guadalupe Guzman Morales, Petitioner.

PROOF OF SERVICE

I, Caroline Collins, certify that I have served the within Return to Petition For Writ of Certiorari to the Court of Appeals by electronic mail to the address listed in AIS and by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Kathrine H. Hudgins, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.
This 10th day of April, 2020.

CAROLINE COLLINS
Administrative Coordinator
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Post Office Box 11549
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THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Guadalupe Guzman Morales, Petitioner.

Appellate Case No. 2020-000498

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Lancaster County
The Honorable Roger E. Henderson, Circuit Court Judge

Memorandum Opinion No. 2020-MO-009
Submitted August 26, 2020 – Filed September 23, 2020

REVERSED AND REMANDED

Assistant Appellate Defender Kathrine H. Hudgins, of Columbia, for Petitioner.

Attorney General Alan Wilson and Senior Assistant Deputy Attorney General William M. Blitch, Jr., of Columbia, for Respondent.

PER CURIAM: Petitioner has filed a petition for a writ of certiorari seeking review of the court of appeals' decision in *State v. Morales*, Op. No. 2020-UP-001 (S.C. Ct. App. filed Jan. 8, 2020). We grant the petition for a writ of certiorari, dispense with further briefing, reverse the decision of the court of appeals, and remand the case to the court of appeals for reconsideration of the substantive and procedural issues in light of this Court's decision in *State v. Perry*, 430 S.C. 24, 824 S.E.2d 654 (2020).

REVERSED AND REMANDED.

BEATTY, C.J., KITTREDGE, HEARN, FEW and JAMES, JJ., concur.