South Carolina Law Review

Volume 51
Issue 4 *ANNUAL SURVEY OF SOUTH CAROLINA LAW*

Article 17

Summer 2000

Slocumb, Lyle, and Expert Testimony in South Carolina

Justin Werner

SLOCUMB, LYLE, AND EXPERT TESTIMONY IN SOUTH CAROLINA

I. INTRODUCTION

Nothing in South Carolina evidence law has quite the mantric power as the "*Lyle* exception." Indeed, nearly every question of whether evidence of past bad acts on the part of a defendant may be admitted into evidence turns upon whether the prosecution can successfully wedge the evidence into one of the five exceptions to the general inadmissibility of evidence of other crimes first set forth in *State v. Lyle*.[1] This restrictive conception of the admissibility of evidence of past bad acts is so deeply rooted in South Carolina evidence law that the South Carolina Rules of Evidence directly reject the inclusive standard set forth in the Federal Rules of Evidence.[2] In short, this policy of excluding evidence of past bad acts with only a handful of narrow exceptions under the Lyle rule is a fundamental principle of South Carolina evidence law, bolstered by the weight of over seventy years of precedent.

In August 1999, the South Carolina Court of Appeals arguably added a sixth exception to this long-standing rule. In *State v. Slocumb*,[3] the trial court allowed evidence of the defendant's "bad acts while at DJJ [the Department of Juvenile Justice]"[4] to be heard by the jury during his trial for unrelated charges of burglary, rape, kidnapping, and armed robbery.[5] This evidence of past bad

---

1. 125 S.C. 406, 118 S.E. 803 (1923). The Lyle rule states that 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. *Id.* at 416, 118 S.E. at 807; State v. Nelson, 331 S.C. 1, 6, 501 S.E.2d 716, 718 (1998) (citing *Lyle*).

2. Compare the language of Federal Rule 404(b) with its "illustrative and not exclusionary," United States v. Masters, 622 F.2d 83, 86 (4th Cir. 1980), list of purposes for which evidence of other crimes may be admitted with the explicitly restricted list of purposes found in South Carolina Rule 404(b). *See also* WALTER A. REISER, JR., SOUTH CAROLINA BAR, A COMPARISON OF THE FEDERAL RULES OF EVIDENCE WITH SOUTH CAROLINA EVIDENCE LAW 19 (5th ed. 1993) (writing in reference to 404(b), "South Carolina follows this rule, except that the list of purposes for which the evidence of other crimes, wrongs, or acts may be introduced is not open-ended, as it is under the Federal Rule."); State v. Gagum, 328 S.C. 560, 564 n.2, 492 S.E.2d 822, 823 n.2 (Ct. App. 1997) (noting the distinction between the inclusive Federal Rule 404(b) and the exclusive South Carolina Rule 404(b)).

South Carolina's Rule 404(b) is virtually the direct codification of the Lyle rule. *See* State v. Slocumb, 336 S.C. 619, 632 n.3, 521 S.E.2d 507, 514 n.3 (Ct. App. 1999), *Nelson*, 331 S.C. at 6 n.7, 501 S.E.2d at 718 n.7; *Gagum*, 328 S.C. at 564 n.2, 492 S.E.2d at 823 n.2;. This Note will use the Lyle rule and Rule 404(b) interchangeably to refer to the same rule of evidence under South Carolina law.

3. 336 S.C. 619, 521 S.E.2d 507 (Ct. App. 1999).

4. *Id.* at 624, 521 S.E.2d at 509-10.

5. *Id.* at 623-25, 521 S.E.2d at 509-10.

acts was not admitted under any of Lyle's five traditional bases for presenting past bad act evidence to the jury: (1) to show the defendant's motive for committing the crime at hand, (2) to demonstrate her criminal intent, (3) to indicate the absence of mistake or accident in her actions, (4) to suggest a common scheme or plan of the defendant, or (5) to identify the defendant as the perpetrator of the crime.[6] Rather, the trial court allowed the prosecution to use these reports of the defendant's past misbehavior during its cross-examination of the defendant's expert witness, a psychologist who testified that the defendant was legally insane at the time of the crime.[7]

This evidence appears on its face to be inadmissible under the strict requirements of *Lyle* because it simply does not fit within any of the listed exceptions of Rule 404(b). However, the court of appeals, ruling on the issue for the first time in South Carolina,[8] found the evidence admissible based on South Carolina Rules 703[9] and 705,[10] which address the permissible bases of expert testimony and the disclosure of those bases in court.[11] The court determined that under Rule 705 evidence of past bad acts upon which an expert has based his opinion may be disclosed to the jury during the cross-examination of that expert, subject only to the probative value and prejudicial effect balancing test of Rule 403.[12] In so holding, the court noted that the *Lyle* rule is simply inapplicable to this situation.[13]

This Note will explore the foundations of this decision by evaluating the structural integrity of the court's analysis and suggesting how, if necessary, that analysis might be reinforced. Part II of this Note will discuss the ruling in *State v. Slocumb*, focusing on the court's rationale for its holding and outlining the authorities it used to buttress its ruling. Part III will address the central question of this case: Has the South Carolina Court of Appeals created a new *Lyle*/Rule 404(b) exception? Or, in the alternative, is the court's distinction between the applicability of a Rule 703 and 705 analysis and the applicability of a Rule 404(b) analysis ultimately convincing? Further, Part IV will examine how adequately the court's analysis of the admissibility of such evidence guards against the infringement of the *Lyle* rule, and the strong policy concerns expressed therein. Finally, this Note will conclude with a broader evaluation of both the validity and adequacy of the decision in *Slocumb* and will offer some suggestions regarding how South Carolina might modify its position on this issue in the future.

---

6. *Id.* at 625, 521 S.E.2d at 510.
7. *Id.* at 626, 521 S.E.2d at 511.
8. *Id.* at 629, 521 S.E.2d at 512 ("Our research reveals no South Carolina cases which deal with the precise issue raised in this case.").
9. S.C. R. EVID. 703.
10. S.C. R. EVID. 705.
11. *Slocumb*, 336 S.C. at 631-33, 521 S.E.2d at 513-14.
12. *Id.* at 632-33, 521 S.E.2d at 514-15.
13. *Id.* at 632, 521 S.E.2d at 514.

II. *STATE V. SLOCUMB*

On March 6, 1996, Conrad Slocumb, an inmate at the DJJ, escaped from a corrections officer while returning to DJJ from a doctor's office.[14] Slocumb fled to a nearby apartment complex where he forced his way into the apartment of a female resident.[15] Once inside, he told the victim that he had a gun and threatened to shoot her if she did not give him money, her car keys, and a change of clothes.[16] The victim did as she was asked.[17] Slocumb then raped the victim and stole jewelry from her bedroom.[18] After approximately forty minutes, Slocumb left the victim's apartment.[19] He was apprehended shortly thereafter in the parking lot of the apartment complex.[20] The Richland County Grand Jury indicted Slocumb for first degree burglary, first degree criminal sexual conduct, kidnapping, armed robbery, and escape.[21]

At trial, Slocumb asserted an insanity defense to all charges and called Dr. James Merikangas, an expert witness in neurology and psychiatry, to testify regarding Slocumb's mental capacity at the time of the crime.[22] Dr. Merikangas testified that "Slocumb had organic brain abnormalities as the result of a head injury that he suffered as a child;" that, as a result of that injury, Slocumb had a "'chronic, long-standing' mental illness;" and that, consequently, Slocumb "was legally insane at the time he committed the offenses for which he was on trial."[23] In formulating this opinion, Dr. Merikangas performed medical tests on Slocumb and reviewed "numerous reports and records which included interviews with Slocumb's family members, DJJ psychiatric records, DJJ service notes and behavior reports, DJJ medication and medical records, State hospital evaluations," and the evaluations of several other doctors.[24] He also interviewed Slocumb and conducted a neurological examination on him.[25]

In its cross-examination, the prosecution, over the objection of defense counsel, questioned Dr. Merikangas regarding his use of Slocumb's DJJ incident reports in evaluating Slocumb's mental condition.[26] As a part of this questioning, the assistant solicitor read excerpts from the DJJ incident reports.[27]

---

14. *Id.* at 622, 521 S.E.2d at 509.
15. *Id.*
16. *Id.*
17. *Id.* at 622-23, 521 S.E.2d at 509.
18. *Id.* at 623, 521 S.E.2d at 509.
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.* at 623, 625-26, 521 S.E.2d at 509, 510-11.
23. *Id.* at 626, 521 S.E.2d at 511.
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.* While the court never fully described the content of these reports, it did state that the reports "detailed numerous incidents of Slocumb's inappropriate sexual behavior . . . . [including] sexually graphic comments and letters and sexual conduct directed at

In response to this cross-examination, Dr. Merikangas testified that he had seen the reports prior to the trial, but that the incidents described therein did not affect his opinion regarding Slocumb's sanity.[28] At the conclusion of the trial, the jury found Slocumb guilty of all charges except the armed robbery count, on which the jury instead found Slocumb guilty of common law robbery.[29]

On appeal Slocumb asserted two interrelated objections to the trial court's admission of the DJJ incident reports.[30] First, Slocumb claimed that the reports were inadmissible under *Lyle* as improper evidence of past bad acts.[31] Second, Slocumb argued that the reports should have been excluded as unfairly prejudicial under Rule 403.[32] The South Carolina Court of Appeals, reviewing the trial court's actions only for an abuse of discretion, rejected both of these arguments.[33] To the court, the admission of evidence of past bad acts in the cross-examination of an expert witness is properly analyzed under South Carolina Rules 703 and 705, not under *Lyle*/Rule 404(b).[34] Further, the court found that the trial court did not abuse its discretion in finding that the probative value of that evidence outweighed any unfair prejudicial impact.[35]

To reach this conclusion, the court held that, read together, Rule 703[36] and Rule 705[37] broadly grant admissibility to the evidence of past bad acts sought to be introduced by the prosecution in its cross-examination of Dr.

---

other juvenile inmates and DJJ staff members." *Id.* at 625, 521 S.E.2d at 510.

28. *Id.* at 626, 631, 521 S.E.2d at 511, 514.

29. *Id.* at 623, 521 S.E.2d at 509.

30. *Id.* at 624, 521 S.E.2d at 509-10. In his appeal, Slocumb also raised an objection to the prosecution's use of an MRI report that Dr. Merikangas did not rely upon in forming his opinion to impeach his testimony on cross-examination. *Id.* at 634, 521 S.E.2d at 515. While the court of appeals did find the trial court's admission of this report in cross-examination of Dr. Merikangas to be error, it further held that such error was harmless as the erroneous admission of the report was merely cumulative to properly admitted evidence. *Id.* at 639, 521 S.E.2d at 519. This Note does not address this second issue raised by Slocumb on appeal.

31. *Id.* at 624, 521 S.E.2d at 509-10

32. *Id.* at 624, 521 S.E.2d at 510.

33. *Id.* at 632-33, 521 S.E.2d at 514.

34. *Id.*

35. *Id.* at 633, 521 S.E.2d at 514.

36. South Carolina Rule 703 provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

37. South Carolina Rule 705 provides:

> The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

Merikangas.[38] Dr. Merikangas had properly relied upon the reports in formulating his opinion and the reports were properly used to cross-examine him on the bases of that opinion. Thus, whether the reports would be admissible as direct, substantive evidence is irrelevant under Rule 703 and Rule 705.[39] The court further held that the admission of such evidence is limited by the probative value and prejudicial effect balancing test of Rule 403 of the South Carolina Rules of Evidence.[40] Here, the relevance of these reports to a proper cross-examination of the expert witness lent the reports a probative value that arguably outweighed any unfair prejudicial effect of those reports.[41]

As to the *Lyle* objection raised by the defense, the court rejected any conflict between the admission of the DJJ reports in cross-examination under Rule 705 and the general inadmissibility of evidence of past bad acts spelled out in Rule 404(b).[42] First, the court found the language of Rule 404(b) to apply only when past bad acts are admitted as improper character evidence to prove the commission of the crime charged.[43] In the present case, "the evidence [of past bad acts] was not offered to prove the crimes for which Slocumb was charged or to prove Slocumb had a propensity to commit these crimes . . . . [instead] the evidence was elicited as part of proper cross-examination of Dr. Merikanga's opinion that Slocumb was insane."[44] Accordingly, that evidence did not constitute the improper character evidence prohibited by Rule 404(b).[45] Second, the court noted on a more pragmatic level that the prosecution had not infringed upon the strictures of Rule 404(b) because the prosecution "in its case-in-chief did not refer to [the] incident reports, nor did it attempt to admit Slocumb's prior criminal sexual conduct conviction for which he was incarcerated at DJJ."[46] In sum, the court found that the prosecution had neither introduced nor used the evidence of Slocumb's past bad acts for the improper purposes defined in Rule 404(b).

---

38. *Slocumb*, 336 S.C. at 631-33, 521 S.E.2d at 513-14. However, as mentioned above, *see supra* note 8, this issue is one of first impression in South Carolina, and as a result, the court's analysis relied heavily upon two Fourth Circuit cases. *Id.* at 629-31, 521 S.E.2d at 512-13. (interpreting United States v. Gillis, 773 F.2d 549 (4th Cir. 1985) and United States v. A & S Council Oil Co., 947 F.2d 1128 (4th Cir. 1991)). The opinion also cites case law reaching analogous results from Arizona, Hawaii, New Jersey, North Carolina, and West Virginia. *Id.* at 633-34, 521 S.E.2d at 515.

39. *Slocumb*, 536 S.C. at 628, 521 S.E.2d at 512.

40. *Id.* at 633, 521 S.E.2d at 514.

41. *Id.*

42. *Id.* at 632, 521 S.E.2d at 514.

43. *Id.*; *see* S.C. R. EVID. 404(b) (providing that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith").

44. *Slocumb*, 336 S.C. at 632, 521 S.E.2d at 514.

45. *Id.*

46. *Id.*

Finding Slocumb's objections to the admission of the DJJ incident reports to be unjustified under the South Carolina Rules of Evidence, the court of appeals affirmed his convictions from the court below.[47]

III. A NEW *LYLE* EXCEPTION?

The core issue raised by the *Slocumb* case is whether the South Carolina Court of Appeals created a new, sixth exception to the general inadmissibility of evidence of past bad acts under South Carolina law. A full response to this question necessitates a three-part analysis of the court's decision in *Slocumb* and how that decision comports with prior South Carolina evidence law. First, as a threshold matter, it must be determined whether a genuine conflict exists between the "*Slocumb* rule" and the *Lyle* rule regarding the admissibility of the evidence of past bad acts in question. If the two rules do not conflict—if, for example, the *Slocumb*/Rule 705 analysis is applicable only to this evidence—then the court's decision in *Slocumb* does not create a new exception to the *Lyle* rule. Rather, *Slocumb* would simply cover a sphere of evidentiary decisions unrelated to those governed by *Lyle*/Rule 404(b). However, if such a conflict does exist and the evidentiary concerns covered by each rule do overlap, then two questions follow. First, did the court, in sorting out that conflict, create an exception to one of the rules? Second, if such an exception was created, is that exception a valid extension of existing law?

A. Slocumb *versus* Lyle

In *Slocumb* the court of appeals found no conflict exists between the admission of evidence under Rule 705 and the strictures of the *Lyle* rule.[48] To the court, the admission on cross-examination of the facts or data underlying an expert opinion as governed by Rule 705 is an evidentiary decision that falls beyond the scope of *Lyle* and Rule 404(b).[49] The determinative factor for the court in reaching this conclusion is the purpose for which the evidence of past bad acts is to be used at trial.[50]

The *Slocumb* court primarily relied upon the following formulation of the *Lyle* rule found in *State v. Peake*[51] to describe those uses of past bad acts evidence that *Lyle* holds to be inadmissible: "Evidence of prior criminal acts which are independent and unconnected to the crime for which an accused is on trial is inadmissible for purposes of proving that the accused possesses a criminal character or has a propensity to commit the crime for which he is

47. *Id.* at 641, 521 S.E.2d at 519.
48. *Id.* at 632, 521 S.E.2d at 514.
49. *Id.*
50. *Id.*
51. 302 S.C. 378, 396 S.E.2d 362 (1990).

charged."[52] The court later implicitly defined the impermissible uses of evidence of past bad acts to include offering evidence "to prove the crimes for which [the defendant] was charged or to prove [the defendant] had a propensity to commit these crimes."[53] Thus, under this conception of the *Lyle* rule, evidence of past bad acts may be introduced for any relevant purpose other than to "prove" the crime charged or prove the defendant has a propensity to commit such crimes. The court of appeals applied this conception of the *Lyle* rule to the admission of the DJJ reports in *Slocumb*. Because the evidence of Slocumb's past bad acts was properly introduced to cross-examine an expert witness under Rule 705, the court found that its admission did not implicate the *Lyle* rule.[54]

This interpretation of the *Lyle* rule is not without textual support in South Carolina law, nor without analogous support from the law of other jurisdictions. A purely literal reading of Rule 404(b) would suggest the same result as that reached by the court of appeals.[55] On its face, Rule 404(b) seems only to preclude evidence of past bad acts when introduced to demonstrate the character of a person "in order to show action in conformity therewith," and thus appears to allow evidence of past bad acts introduced for other, non-character-related purposes, such as the cross-examination of an expert witness, to be freely admissible.[56] Likewise, several formulations of the *Lyle* rule in South Carolina case law use language that tends to support the *Slocumb* court's broad reading of *Lyle*.[57] Further, each of the other jurisdictions the court relied upon in making its determination allows evidence of other crimes to be introduced for any relevant purpose other than an improper character inference.[58]

---

52. *Slocumb*, 336 S.C. at 632 n.3, 521 S.E.2d at 514 n.3 (quoting *Peake*, 302 S.C. at 380, 396 S.E.2d at 363).

53. *Slocumb*, 336 S.C. at 632, 521 S.E.2d at 514.

54. *Id.*

55. South Carolina Rule of Evidence 404(b) reads:

> (b) Other crimes, wrongs, or acts. 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.

56. *Id.*

57. *See, e.g.*, State v. Nelson, 331 S.C. 1, 6, 501 S.E.2d 716, 718 (1998) ("[E]vidence of other crimes or bad acts is generally inadmissible to prove the crime charged . . . ."); State v. Adams, 322 S.C. 114, 118, 470 S.E.2d 366, 368 (1996) ("South Carolina law precludes evidence of a defendant's prior crimes or other bad acts to prove the defendant's guilt for the crime charged . . . ."); State v. Peake, 302 S.C. 378, 380, 396 S.E.2d 362, 363 (1990) (ruling that "[e]vidence of prior criminal acts . . . is inadmissible for purposes of proving that the accused possesses a criminal character or has a propensity to commit the crime with which he is charged").

58. *See* United States v. Gillis, 773 F.2d 549 (4th Cir. 1985); United States v. A & S Council Oil Co., 947 F.2d 1128 (4th Cir. 1991); State v. Stabler, 783 P.2d 816 (Ariz. Ct. App. 1989); State v. Samuel, 838 P.2d 1374 (Haw. 1992); State v. Clowney, 690 A.2d 612 (N.J.

Nonetheless, the justification the court of appeals offered for its conclusion is suspect on at least two grounds. First, it is not entirely clear that the evidence of other crimes being offered in cross-examination of the defendant's expert witness goes solely to probe the basis of that expert's opinion and not for a purpose covered under Rule 404(b). Indeed, even in the limited context of cross-examination, this evidence does, in a very important way, go to prove the crime charged. Second, the court's reading of Rule 404(b) as allowing evidence of past bad acts so long as that evidence is not used to prove the crime charged or to show the character of the defendant does not seem to comport with the restrictive, exclusive interpretation generally given to the *Lyle* rule.[59]

The court of appeals rested its analysis of the admissibility of Slocumb's past bad acts on the grounds that the DJJ incident reports were "elicited as part of proper cross-examination of Dr. Merikangas's opinion that Slocumb was insane" and that "[t]he State's cross-examination [was] focused on establishing that Slocumb was sane, and the records were directly related to an evaluation of Slocumb's state of mind."[60] To the court, these details indicated that the reports were admitted to probe the bases and test the validity of an expert opinion, not to prove Slocumb's commission of the crime or to show his criminal propensity.[61]

The matter is not quite so simple. Even leaving aside questions of improper or prejudicial inferences potentially made by the jury and accepting the use of these reports in the limited setting of cross-examination, the prosecution's use of these DJJ incident reports directly goes to prove Slocumb's "guilt for the crime charged,"[62] and may go indirectly to show an impermissible character inference. The prosecution introduced the DJJ reports to directly challenge Dr. Merikangas's opinion that Slocumb was insane at the time of the crime.[63] The prosecution was then, in effect, arguing that Slocumb was in fact sane at the time of the crime. Beyond questioning the basis of Dr. Merikangas's opinion, such an argument tends to establish a critical part of the proof necessary to find Slocumb guilty of the crime charged: whether Slocumb had the requisite

---

1997); State v. Lyons, 468 S.E.2d 204 (N.C. 1996); State v. DeGraw, 470 S.E.2d 215 (W. Va. 1996). In all of these cases but one (*State v. DeGraw*), evidence of past bad acts on the part of the defendant was admitted during the prosecution's cross-examination of the defendant's expert witness without the mere suggestion of a potential conflict with Rule 404(b), whether the Federal version or the state equivalent (all of which are substantively similar to the Federal rule in these jurisdictions). *See* ARIZ. R. EVID. 404(b); HAW. R. EVID. 404(b); N.J. R. EVID. 404(b); N.C. R. EVID. 404(b); W. VA. R. EVID. 404(b). In *DeGraw*, the issue of a potential conflict between Rule 705 and 404(b) was not reviewed by the appellate court because the defense had not properly preserved the claim of error from the trial court. *DeGraw*, 470 S.E.2d at 226.

59. *See* Reiser, *supra* note 2, at 19.

60. *Slocumb*, 336 S.C. at 632, 521 S.E.2d at 514.

61. *Id.*

62. *Adams*, 322 S.C. at 118, 470 S.E.2d at 368.

63. *Slocumb*, 336 S.C. at 632, 521 S.E.2d at 514.

mental capacity to commit the crime.[64] Here, the prosecution is clearly using evidence of Slocumb's past bad acts to prove, albeit not in its case-in-chief, Slocumb's responsibility for the alleged crime, and such a use of evidence of other crimes is arguably governed by *Lyle*.[65]

Even if one accepts as valid the distinction the court of appeals made between introducing evidence of past bad acts for the purpose of cross-examining an expert and introducing such evidence for the purpose of proving the defendant's guilt or bad character, this distinction may be essentially meaningless when determining admissibility under *Lyle*, unless that proposed use implicates at least one of the five exceptions to *Lyle*. The *Slocumb* court basically treated South Carolina's Rule 404(b) as an inclusive rule like its counterpart in the Federal Rules of Evidence, and determined that, because the evidence of Slocumb's past bad acts was used for a purpose that did not involve an improper character inference, the admission of that evidence did not implicate the *Lyle* rule.[66] However, South Carolina's Rule 404(b) is distinctly exclusionary. Rather than simply giving a list of examples of permissible purposes (i.e., relevant, non-character related purposes) for which evidence of

---

64. Indeed, under South Carolina law, "when the defendant offers evidence of insanity, the presumption [of sanity] disappears and it is [i]ncumbent on the State to present evidence from which a jury could find the defendant sane." State v. Milian-Hernandez, 287 S.C. 183, 185, 336 S.E.2d 476, 477 (1985). With this burden, the prosecution's reading of the reports of the defendant's past bad acts to the jury seems more akin to "proving" the crime charged than merely attacking the credibility of an expert witness.

65. *See State v. Lyle*, 125 S.C. 406, 416, 118 S.E. 803, 807 (1923) ("evidence of other distinct crimes committed by the accused may not be adduced merely to raise an inference or *to corroborate the prosecution's theory of the defendant's guilt of the particular crime charged*") (emphasis added).

This argument is not meant to categorically reject the position taken by the court of appeals. A use of evidence of past bad acts that did not go so directly toward proving the guilt of the accused might better support a claim that the evidence of other crimes is being used for a purpose not governed by *Lyle*. For example, the use of evidence of past bad acts *dissimilar* to the crime charged merely to negate an expert opinion on cross-examination (e.g., using the evidence to show that the expert did not have enough credible information upon which to base an opinion) would be much easier to place beyond the scope of *Lyle* than the use of evidence used in *Slocumb*—evidence of prior bad acts similar to the crime charged that is used to make a positive argument (i.e. that Slocumb was sane) on a matter central to proving the guilt of the defendant. *See Slocumb*, 336 S.C. at 632, 521 S.E.2d at 514 ("The State's cross-examination *focused on establishing that Slocumb was sane . . . .*") (emphasis added).

66. *Id.* The court's analysis would clearly be correct if the admissibility of the past bad acts evidence was governed by Federal Rule 404(b) or its substantive equivalent. *See, e.g.*, United States v. Masters, 622 F.2d 83, 85-86 (4th Cir. 1980) (noting that Federal Rule 404(b) "'admits all evidence of other crimes (or acts) relevant to an issue in a trial except that which tends to prove only criminal disposition'" and that the list of permissible purposes therein "is merely illustrative and not exclusionary"); United States v. Long, 574 F.2d 761, 766 (3d Cir. 1978) ("The draftsmen of Rule 404(b) intended it to be construed as one of 'inclusion,' and not 'exclusion'. . . . [T]hey intended to emphasize admissibility of 'other crime' evidence"); State v. Wood, 881 P.2d 1158, 1167 (Ariz. 1994) (noting that the list of permissible purposes for introducing evidence of other crimes under ARIZ. R. EVID. 404(b) (which is substantively identical to the Federal Rule) "is merely illustrative, not exclusive").

past bad acts can be introduced, the South Carolina rule acts as a positive rule of relevancy and limits the permissible purposes for the introduction of evidence of past bad acts to demonstrating "motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent."[67] Thus, under South Carolina law, evidence of past bad acts is inadmissible regardless of the purpose for which it is introduced, unless that purpose complies with *Lyle* and Rule 404(b). Admitting evidence for the sole purpose of cross-examining an expert witness, as allowed under Rule 705, appears to directly conflict with *Lyle*, because such a purpose is not recognized in the exceptions to *Lyle*.

In sum, it is clear that a direct and substantial conflict exists between the standard for admitting past bad act evidence under Rule 705 and the standard for such admission under *Lyle*.

B. The Creation of a Lyle *Exception*

Having determined that a conflict does exist between Rule 705 and Rule 404(b), the question remains regarding whether, in resolving this conflict, the court of appeals created a new exception to the *Lyle* rule in *Slocumb*. Given the court's decision to admit the evidence of Slocumb's past bad acts under Rule 705 over a *Lyle* objection,[68] it appears that the court has created a sixth *Lyle* exception.

If one accepts the proposition that *Lyle* limits evidence of past bad acts to five exceptions,[69] and that the evidence of other crimes introduced against

---

67. S.C. R. EVID. 404(b). Note the clear absence in the South Carolina rule of the "such as" language of Federal Rule 404(b).

Courts and commentators alike have consistently recognized the exclusionary nature of the South Carolina rule. *See, e.g.*, State v. Nelson, 331 S.C. 1, 6, 501 S.E.2d 716, 718 (1998) ("[E]vidence 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. Adams, 322 S.C. 114, 118, 470 S.E.2d 366, 368 (1996) ("South Carolina law precludes evidence of a defendant's prior crimes or other bad acts to prove the defendant's guilt for the crime charged except to establish (1) motive, (2) intent, (3) absence of mistake or accident, (4) a common scheme or plan, or (5) identity."); State v. Brooks, 235 S.C. 344, 350, 111 S.E.2d 686, 689 (1959) ("Ordinarily, in a criminal prosecution evidence of his commission of another, independent crime is not admissible against the defendant if he objects."); *Lyle*, 125 S.C. at 416, 118 S.E. at 807 ("[E]vidence of other crimes is competent to prove the specific crime when it tends to establish (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan . . . ; (5) the identity of the person charged . . . ."); JUSTIN KAHN, SOUTH CAROLINA EVIDENCE HANDBOOK ANNOTATED 15 (1998) (noting that "unlike the federal rule which does not limit the purposes for which evidence of other crimes may be admitted, the South Carolina rule limits the use of evidence of other crimes, wrongs, or acts to those enumerated in [*Lyle*]"); REISER, *supra* note 2, at 19 ("South Carolina follows this rule [404(b)], except that the list of purposes for which the evidence of other crimes, wrongs, or acts may be introduced is not open-ended, as it is under the Federal Rule.").

68. *Slocumb*, 336 S.C. at 632, 521 S.E.2d at 514.

69. *See supra* note 67 and accompanying text.

Slocumb does not fit into one of those exceptions,[70] then the admission of the evidence of Slocumb's past bad acts at trial can be construed in only two possible ways: (1) as a mistaken interpretation of the law on the part of the court; or (2) as a decision to create a new exception to *Lyle*. Here, the first of these possible interpretations of the court's action is patently inapplicable—the court undertook a studied analysis of the law on this point and certainly did not fail to consider *Lyle* and Rule 404(b) in forming its opinion.[71] Therefore, the *Slocumb* court, in deliberately allowing evidence of Slocumb's past bad acts to be introduced for a purpose not permitted under the current formulation of the *Lyle* rule, did indeed create a new exception to *Lyle*.[72]

C. *The Validity of the New* Lyle *Exception*

Assessing the validity of this new exception to *Lyle* is a difficult proposition. South Carolina courts concern themselves much more frequently with the question of whether a particular piece of evidence falls properly within one of the *Lyle* exceptions than with the question of whether that list of exceptions should be expanded. However, those rare comments of South Carolina courts that do shed some light on the issue of whether *Lyle* should be expanded lend themselves to the conclusion that such new exceptions are not to be created lightly, if at all.

---

70. Slocumb's DJJ incident reports were introduced regarding the issue of his sanity at the time of the commission of the crime. *Slocumb*, 336 S.C. at 632, 521 S.E.2d at 514. The resolution of this issue does not implicate several of the *Lyle* exceptions: Slocumb's "identity" as the perpetrator of the crime was not contested; it was not argued that the attack was a "mistake or accident"; and a "common scheme or plan" was not alleged. While the evidence of Slocumb's other inappropriate sexual behavior might seem to border on this "common scheme" exception, the previous DJJ incidents are clearly not similar enough to the alleged crime to meet the high standard required for the admission of other crimes evidence under this exception. *See, e.g.*, State v. Carter, 323 S.C. 465, 467, 476 S.E.2d 916, 918 (Ct. App. 1996).

The issue of Slocumb's sanity might seem to fall close to the *Lyle* exceptions of either "motive" or "intent." However, it must be remembered that insanity is entered not to dispute the substantive elements of the crime but as an affirmative defense. *See* State v. Lewis, 328 S.C. 273, 277, 494 S.E.2d 115, 117 (1997); 22 C.J.S. *Criminal Law* § 100 (1989). Therefore, the issue at trial is not whether Slocumb had a motive to commit the crime or whether he committed the crime with the required intent, but rather, whether he did in fact "lack sufficient mental capacity to conform his conduct to the requirements of the law." *Slocumb*, 336 S.C. at 626, 521 S.E.2d at 511. In short, the DJJ reports do not fit into any of the five *Lyle* exceptions.

71. *See id.* at 632, 521 S.E.2d at 514.

72. Depending upon how one chooses to read the *Slocumb* opinion, this potential sixth exception can be conceived either very narrowly (strictly tailoring the exception to the precise holding of the case and limiting the exception to the admission of other crimes evidence for cross-examination under Rule 705) or quite broadly (using the court's implication that evidence of past bad acts is admissible as long as it is not used to "prove" the crime charged or the character of the accused to expand the *Lyle* rule nearly to the same level of inclusiveness as the Federal Rule). Given the strictures of the *Lyle* rule, the first of these possible interpretations would seem to be the preferred interpretation of the exception created in *Slocumb*.

An analogous problem to the one faced by the *Slocumb* court was presented to the court of appeals in *State v. Gagum*.[73] In *Gagum*, the court addressed the question of whether the common law *res gestae* exception to the general inadmissibility of evidence of past bad acts survived the adoption of Rule 404(b).[74] The court was faced with a conflict between "South Carolina's version of Rule 404(b) . . . [that] allows the admission of evidence of prior crimes or bad acts *only* if the evidence shows [one of the *Lyle* exceptions]" and the long-standing *res gestae* exception to the inadmissibility of other crimes evidence that, while clearly not listed as an exception under *Lyle*, might "be properly viewed as independent of *Lyle*."[75] While the court of appeals did not resolve the conflict between these two competing evidentiary doctrines,[76] and although the *Gagum* decision does not suggest any analytical framework for making such a decision, some important insights into the sort of rigor required to make an exception to *Lyle* can be gleaned from the court's discussion of the problem. Indeed, what is most striking about the *Gagum* decision is that despite the existence of South Carolina precedent for the *res gestae* exception,[77] the general admissibility of *res gestae* evidence under the Federal Rules of Evidence,[78] and language from the South Carolina Supreme Court indicating that the *res gestae* exception might fall outside the scope of *Lyle*,[79] the question of "whether, given Rule 404(b)'s strict limitation of when evidence of other crimes is admissible, the doctrine of *res gestae* remains viable under the South Carolina Rules of Evidence" was a question that the court could not easily resolve.[80]

The problem raised in *Gagum*, however, is distinguishable from that raised in *Slocumb* in several ways. First, *Gagum* involves a conflict between a pre-existing common law doctrine and newly-adopted Rules of Evidence, whereas *Slocumb* involves a conflict within the Rules of Evidence themselves. It is far easier to argue that one rule of a comprehensive code of rules is inherently limited by another applicable rule in that same code than to decide to what extent such a set of rules pre-empts a portion of the common law. Second, *Gagum* deals with an exception to the inadmissibility of other crimes evidence

---

73. 328 S.C. 560, 492 S.E.2d 822 (Ct. App. 1997).

74. *Id.* at 564 n.2, 492 S.E.2d at 823 n2.

75. *Id.* The concept of res gestae has been defined as follows: the "collection of primary facts constituting the necessary and immediate field of a judicial inquiry may be designated as the res gestae, and within this field of immediate inquiry the court will receive evidence of all the facts." 31A C.J.S. *Evidence* § 342 (1996).

76. The court felt compelled to leave the issue unresolved because not only had the South Carolina Supreme Court not "address[ed] the effect of the adoption of the Rules [of Evidence] on the viability of the doctrine [i.e., res gestae]," but also Gagum had "never argued at trial that res gestae did not survive the adoption of the Rules of Evidence . . . ." *Gagum*, 328 S.C. at 564 n.2, 492 S.E.2d at 823 n.2.

77. *Id.*

78. *Id.*; *see Masters*, 622 F.2d at 86-87.

79. *Gagum*, 328 S.C. at 564 n.2, 492 S.E.2d at 823 n.2.

80. *Id.*

that has a higher potential for the introduction of unfair prejudice than the exception discussed in *Slocumb*. It stands to reason that a jury would be more likely to co-mingle res gestae evidence of the circumstances surrounding a crime with the alleged crime itself when determining the guilt of a defendant than to allow such improper prejudice to color its evaluation of evidence of the more remote "bad acts" that often form the bases of expert opinions. Third, the *Gagum* court did not actually resolve the issue of whether the res gestae doctrine survived the adoption of Rule 404(b),[81] and, therefore, one cannot determine whether the *Slocumb* court's resolution of the problem put before it conflicts with the way in which the *Gagum* court would have resolved the issue.

Nonetheless, the *Gagum* opinion does have relevance to an evaluation of the *Slocumb* decision. While *Slocumb* does involve a conflict within the Rules of Evidence, like *Gagum*, it also involves the resolution of a conflict between those Rules and a long-standing common law evidentiary doctrine. The *Slocumb* court and the *Gagum* court faced similar complexities in their attempts to balance the language of the Rules of Evidence against the precedential weight of the common law. Further, regardless of the relative prejudicial effects of various sorts of *res gestae* and past bad acts evidence, it seems likely that evidence admitted under *Slocumb* merely to challenge an expert opinion would have less relevance towards proving the crime charged than *res gestae* evidence that places the commission of the crime in its proper factual context. If this highly relevant *res gestae* evidence is suspect under Rule 404(b), what then of evidence of other crimes that is distinctly less relevant to an adequate presentation of the prosecution's case such as that used in the cross-examination of an expert witness? Finally, while the *Gagum* court did not eventually make a decision on the conflict between the *res gestae* doctrine and Rule 404(b), this indecision alone indicates that the resolution of such a conflict is not an act to be taken lightly by the courts. In short, the issues faced by the *Gagum* court are sufficiently similar to those dealt with by the court of appeals in *Slocumb* that the latter ought to have recognized the *Gagum* opinion as recommending, if not implicitly requiring, the use of a greater degree of caution in creating exceptions to *Lyle* and Rule 404(b) than that found in the *Slocumb* opinion.[82]

Beyond *Gagum*, South Carolina courts have indicated that the *Lyle* rule is intended to be only a limited exception to the general inadmissibility of evidence of past bad acts, and that the boundaries of the *Lyle* rule are to be strictly construed. Indeed, in *Lyle* itself, the court noted that "the dangerous tendency and misleading probative force of this class of evidence [evidence of

---

81. *Id.*

82. Note that the *Slocumb* court addressed and resolved its conflict between Rule 705 and *Lyle* with half the amount of discussion that the *Gagum* court used merely to raise the issue of a conflict between the res gestae doctrine and Rule 404(b). *See Slocumb*, 336 S.C. at 632, 521 S.E.2d at 514; *Gagum*, 328 S.C. at 564 n.2, 492 S.E.2d at 823 n.2.

past bad acts] require that its admission should be subjected by the courts to rigid scrutiny."[83] The *Lyle* court was willing to adopt five exceptions to the inadmissibility of evidence of other crimes, but it equally recognized that any exceptions to the rule should be carefully guarded by the court for fear of the abuse of these exceptions.[84] As one commentator has noted, the South Carolina Supreme Court has followed its own mandate to strictly construe the *Lyle* exceptions: "Since *Lyle*," the supreme court has applied this rule strictly, testing the evidence in each case on the basis of whether or not it is relevant to any one of the enumerated exceptions."[85] Clearly, the *Lyle* exceptions are not to be loosely applied. Even as recently as 1996, the court of appeals felt compelled to warn trial judges against such loose applications of the *Lyle* exceptions:

> We can appreciate the difficulties encountered by trial judges in charting the amorphous area of the law created by the *Lyle* exceptions. When motive, intent, common scheme or plan, lack of accident or mistake, or identity cannot be shown by other means, *Lyle* can be used to provide a link between the prior bad act and the crime for which the defendant is being tried. However, *Lyle is intended only to provide an exception to the general rule of inadmissibility.*[86]

South Carolina courts have recognized that the *Lyle* rule is one of limited applicability to be used only for the narrow purposes for which it was intended. Thus, the addition of new exceptions should only be attempted when absolutely necessary and after the most searching of legal analyses. It is not clear that the *Slocumb* court acted with such caution in its adoption of a new exception to the *Lyle* rule; consequently, the *Slocumb* court's decision to broaden Lyle should be viewed with some concern.

IV. THE ADEQUACY OF THE *SLOCUMB* SOLUTION

Another issue arising from the *Slocumb* decision involves whether the decision adequately protects the policy concerns that underlie *Lyle*. Certainly the court of appeals was bound to take into consideration the "inevitable tendency of such evidence . . . to raise a legally spurious presumption of guilt

---

83. *Lyle*, 125 S.C. at 417, 118 S.E. at 807.

84. For example, if the court does not "clearly perceive" the relevance of the proffered evidence of past bad acts, the *Lyle* court held that "the accused should be given the benefit of the doubt, and the evidence should be rejected." *Id.*

85. Walter A. Reiser, Jr., *Evidence of Other Criminal Acts in South Carolina*, 28 S.C. L. REV. 125, 126 (1976).

86. State v. Carter, 323 S.C. 465, 469, 476 S.E.2d 916, 918-19 (Ct. App. 1996) (emphasis added).

in the minds of the jurors"[87] when crafting its standard for the admission of other crimes evidence in the cross-examination of expert witnesses.

This is no idle concern. The circumstances that gave rise to *Slocumb* are capable of repetition in nearly every case in which a defendant asserts an insanity defense. Indeed, because insanity is an affirmative defense, the burden of proof on the issue is placed first upon the defendant to rebut the legal presumption of sanity.[88] While the defendant may establish insanity with lay testimony,[89] often the more effective course involves the use of expert testimony.[90] However, once the defendant has successfully rebutted that presumption of sanity, the burden then shifts to the prosecution to present evidence of sanity.[91] Thus, through this mechanism of shifting burdens, the assertion of an insanity defense must lead quite often to a situation like that in *Slocumb*, where the defendant is compelled to present expert testimony to satisfy his burden of proof and the prosecution is compelled to challenge that testimony with evidence sufficient to meet its burden.

The risk of the improper introduction of past bad acts evidence is greatest during the cross-examination of the defendant's expert witness. The defendant surely wants an expert opinion that is procedurally sound enough to withstand credibility attacks based upon the methodology used by the expert. With regard to psychological evaluations, proper methodology includes the consideration of the defendant's past bad acts, whether found in official records like prison reports or in more intimate sources such as family interviews. Yet, while the defendant does want his expert to be credible, he does not wish to see his *Lyle* protection against the introduction of other crimes evidence waived by his use of this credible psychological expert.

The prosecution, on the other hand, has a strong interest not only in effectively challenging the bases of the opinion given by the defendant's psychological expert, but also in presenting as much evidence of the defendant's sanity as possible. In nearly every insanity case both sides will want to use evidence of the defendant's past bad acts in some fashion. The court must decide just what uses of such evidence are permissible and what uses are impermissible so that the interests of both the State and the criminal defendant are adequately protected.

---

87. *Lyle*, 125 S.C. at 417, 118 S.E. at 807.

88. *See* State v. Milian-Hernandez, 287 S.C. 183, 185, 336 S.E.2d 476, 477 (1985); State v. Lewis, 328 S.C. 273, 277, 494 S.E.2d 115, 117 (1997).

89. *Lewis*, 328 S.C. at 278, 494 S.E.2d at 117.

90. The defendant's own assessment of his mental state and the testimony of lay witnesses are often insufficient to rebut the presumption of sanity and to establish that the defendant could not distinguish between right and wrong. *See id.* at 278-79, 494 S.E.2d at 117.

91. *Milian-Hernandez*, 287 S.C. at 185, 336 S.E.2d at 477. The State must take care to meet this burden because the failure of the State to present enough evidence of sanity to create a jury question is grounds for a directed verdict in favor of the defendant. *Id.* at 186, 336 S.E.2d at 477-78 (holding that a directed verdict was appropriate where the only evidence presented by the State to contradict the defendant's showing of insanity was evidence of the defendant's flight from the crime scene and the legal presumption of sanity).

The *Slocumb* court's solution to this problem seems to adequately protect these interests. Regardless of the validity of the decision to circumvent *Lyle*, the *Slocumb* opinion establishes adequate safeguards regarding the admission of evidence of past bad acts so that neither the State's interest in a proper cross-examination of the defendant's witnesses nor the defendant's interest in preserving the evidentiary protections that lie at the root of *Lyle* are significantly infringed.

A. Rule 403

As the *Slocumb* court noted early in its analysis, "[e]ven if admissible under Rule 703 or Rule 705 . . . the determination of whether an expert may testify to the facts underlying an opinion must include an analysis under Rule 403, SCRE."[92] Courts and commentators have agreed with the *Slocumb* court that the admission of evidence under Rule 705 should be limited by the probative value versus prejudicial effect balancing test of Rule 403.[93] Thus, the court has broad power under Rule 403 to prevent evidence of past bad acts that underlie an expert's opinion from being revealed during cross-examination if the probative value of that revelation is outweighed by the prejudicial impact of the evidence of other crimes on the jury, by the potential confusion of issues that the evidence might create with the jury, or even by considerations of time and necessity.[94]

B. Rule 705

As the *Slocumb* court notes, cross-examination of an expert with regard to the bases of his opinion under Rule 705 ensures fairness in the use of expert testimony.[95] It would be fundamentally unfair to allow one party to introduce

---

92. *Slocumb*, 336 S.C. at 627, 521 S.E.2d at 511. S.C. R. EVID. 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

93. *See Gillis*, 773 F.2d at 554 ("[I]n determining whether to allow an expert to testify to the facts underlying an opinion, the court must inquire whether, under Fed. R. Evid. 403, the testimony should be excluded because its probative value is substantially outweighed by the danger of unfair prejudice."); 4 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 705.05 (Joseph M. McLaughlin ed., Matthew Bender 2d ed. 1999) ("A court has authority to limit questioning if, on balance, the probative value of the information is outweighed by its prejudicial effect under Rule 403...."); 29 CHARLES ALAN WRIGHT & VICTOR JAMES GOLD, FEDERAL PRACTICE AND PROCEDURE § 6293, at 418 (1997) ("[W]here examination of an expert may delve into matters that may be confusing, unfairly prejudicial, or a waste of time, admissibility may be governed by Rule 403."); 2 STEPHEN A. SALTZBURG ET AL., FEDERAL RULES OF EVIDENCE MANUAL 1438 (7th ed. 1998) ("This right [of cross-examination of an expert] should be subject to limitation under Rules 403 and 611(a), however.").

94. S.C. R. EVID. 403.

95. *Slocumb*, 336 S.C. at 631-32, 521 S.E.2d at 513-14.

expert testimony that was based upon inadmissible evidence and then to deny the opposing party a proper opportunity to challenge that testimony, because such a challenge would require the admission of the inadmissible evidence upon which the expert's opinion is based. The Fourth Circuit further explained in *United States v. A & S Council Oil Co.*[96] that "Rule 703 creates a shield by which a party may enjoy the benefit of inadmissible evidence by wrapping it in an expert's opinion; Rule 705 is the cross-examiner's sword, and, within very broad limits, he may wield it as he likes."[97]

Thus, in a situation such as that in *Slocumb*, evidence of the accused's past bad acts will not be admitted against him unless the accused brings that evidence into court himself through the use of an expert that has relied upon those past bad acts in forming his opinion.[98] Admittedly, this "fairness" safeguard does little to assist a defendant like Slocumb in keeping past bad acts evidence from the jury once he has presented his expert witness. However, this right to cross-examination does protect the concerns of the Lyle rule by preventing the abuse of evidence of past bad acts by either side. Typically, a court applying Rule 705 will bar the prosecution from using other crimes evidence against the accused unless the accused has opened that door by his own actions.[99] Likewise, the court will not allow the defendant to use other crimes evidence to bolster his case and then deny the prosecution the opportunity to challenge the use of that evidence. Rule 705, like *Lyle*, is concerned with ensuring that evidence is used in a fair and just manner.

C. Rule 703

While the *Slocumb* court did not address the issue, several commentators have suggested that the permission granted by Rule 703 for experts to rely upon "facts or data . . . not admissible in evidence"[100] is not as broad as one might suspect. Charles Wright and Victor Gold argue that the rationale for "this

---

96. 947 F.2d 1128 (4th Cir. 1991).

97. *Id.* at 1135.

98. The court in *Gillis* similarly relied upon this "live by the sword, die by the sword" fairness argument, noting that:

> the entire area of questioning [of the other crimes the defendant's expert used to form his opinion] could easily have been avoided by the [defendant] . . . . [as] [t]he court had prohibited the government from eliciting this testimony in its case-in-chief, and had warned [the defendant] of the dangers of opening the door by asking Dr. Custer's diagnosis.

Gillis, 773 F.2d at 554.

99. *See Gillis*, 773 F.2d at 554; *Slocumb*, 336 S.C. at 629, 521 S.E.2d at 512-13. In both cases, the court refused to allow the prosecution to elicit the other crimes evidence in its case-in-chief, but did allow such evidence to come in on cross-examination of a defense expert witness.

100. S.C. R. EVID. 703.

aspect of Rule 703 is that experts in the field can be presumed to know when evidence is sufficiently trustworthy and probative to merit reliance."[101] However, this rationale raises a difficult question of "whether an expert can give opinion testimony based on evidence excludable under rules rooted in policies extrinsic to reliability or relevance concerns . . . . [such as] rules excluding character evidence, offers to compromise or plead, subsequent remedial measures, liability insurance, privileged matters, and the like."[102] Wright and Gold resolve this question to the exclusion of expert testimony based on evidence inadmissible under rules founded on policies extrinsic to reliability, claiming that "[a]ny other reading of Rule 703 brings it into direct conflict either with those rules or with the interest in providing a fair opportunity for cross-examination."[103] Likewise, Michael Graham notes that

> [f]acts, data, or opinions reasonably relied upon by the expert witness in forming his opinion on the subject matter which have not been admitted into evidence are also subject to exclusion on the basis of attendant trial concerns . . . . Thus facts, data, or opinions which would be inadmissible under, for example, Rules 404, 405, 608, 609 . . . do not automatically become admissible if offered solely as forming part of the basis of an expert witness' opinion under Rule 703.[104]

Thus, Rule 703 is implicitly limited by other rules of evidence that may sometimes, if not always, preclude expert testimony based on evidence inadmissible under those rules.[105] Included prominently among such rules is Rule 404. Accordingly, a court applying this implicit limitation of Rule 703 may, regardless of Rule 403 balancing, disallow expert testimony based on evidence of past bad acts of the accused if such an admission would significantly frustrate the policies underlying Rule 404.

D. Limiting Instructions

The most common but least effective safeguard against the improper use of evidence of past crimes by the jury is the judge's limiting instruction. The

---

101. 29 WRIGHT & GOLD, *supra* note 93, § 6273, at 311-12.

102. *Id.* at 313. The authors specifically mention Rule 404 as such a "rule rooted in policies extrinsic to reliability and relevance concerns." *Id.* at 313 n.23.

103. *Id.* at 316.

104. MICHAEL GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 703.1, at 644-45 (3d ed. 1991).

105. *See also* Bryan v. John Bean Div. of FMC Corp., 566 F.2d 541 (5th Cir. 1978) (holding that the conclusions of nontestifying experts that the testifying experts had relied upon in forming their opinions were not admissible under Rule 703 and 705 because of hearsay concerns).

Slocumb court mentions that "the trial judge instructed the jury that evidence of bad reputation may not be considered as evidence of guilt" as a part of its rationale for holding that the trial court did not abuse its discretion by admitting the evidence of Slocumb's past bad acts.[106] However, other South Carolina courts have gone further, not merely finding limiting instructions to be relevant to whether a judge abused his discretion, but instead holding that the failure of a judge to give such a limiting instruction with regard to other crimes evidence constitutes reversible error under the "general rule . . . that when evidence of other crimes is admitted for a specific purpose, the judge is required to instruct the jury to limit their consideration of this evidence for the particular purpose for which it is offered."[107] Thus, under South Carolina law, a judge is generally required to provide the minimal safeguard of a limiting instruction concerning the jury's use of evidence of the defendant's past bad acts. In a case such as *Slocumb*, a limiting instruction is critical if the jurors are to fully understand their duty to consider the evidence of the defendant's past bad acts only in their evaluation of the credibility of the defendant's expert witness, and not for any other purpose.

These four safeguards—Rule 403's protection against undue prejudice, the implicit limitation of Rule 705 and Rule 703, and the limiting instruction - are both sufficiently powerful to guard against any gross violations of the policies underlying the *Lyle* rule when evidence of past bad acts is sought to be introduced under Rule 705 and sufficiently tailored to prevent the significant infringement of the prosecution's right to cross-examination under that same rule.

V. CONCLUSION

What, then, to make of the ruling in *Slocumb*? On one hand, *Slocumb* appears to circumvent much of the exclusionary nature of the *Lyle* rule by mere reference to Rule 705. Yet, on the other, *Slocumb* seems to protect against any egregious infringements of the *Lyle* rule through a number of effective evidentiary safeguards. At root, any determination of the ultimate adequacy of the *Slocumb* court's resolution of the evidentiary conflict placed before it must turn on the validity of the court's attempts to define its ruling as beyond the scope of *Lyle*.

Given the weight of precedent behind the *Lyle* rule and its apparent applicability to the *Slocum* case, the *Slocumb* court's discussion of the conflict between Rule 705 and *Lyle* seems underdeveloped and overly conclusory. In many ways, any weaknesses in the court's opinion are not so much the result

106. *Slocumb*, 336 S.C. at 633, 521 S.E.2d at 514.

107. State v. Timmons, 327 S.C. 48, 54-55, 488 S.E.2d 323, 326 (1997); *see also* State v. Warren, 330 S.C. 584, 611, 500 S.E.2d 128, 142 (Ct. App. 1998) (applying *Timmons* to hold that the failure to grant a limiting instruction regarding *Lyle* evidence of a common scheme was reversible error).

of faulty legal analysis, but are more akin to a failure of proof. The court simply did not convincingly rebut the presumptive applicability of *Lyle* to the admission of evidence of Slocumb's past bad acts. To be fair, much of this "failure of proof" stems from the fact that not only was this problem an issue of first impression in South Carolina, but further, case law and commentary from other jurisdictions with their broader conception of the admissibility of evidence of other crimes was of little help to the court in resolving this issue. Yet, these problems of resolving an issue of first impression demand the sort of extended, searching analysis that the *Slocumb* opinion simply does not undertake. In sum, *Slocumb* may not be in need of revision or rejection, but it does certainly need more explanation and justification to sustain the significant new standards for the admissibility of evidence of past bad acts that it proposes.

Justin Werner