THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM GREENWOOD COUNTY
Court of General Sessions
Edward W. Miller, Circuit Court Judge

Appellate Case No. 2021-000643

The State, ...Respondent-Petitioner,

v.

Ontavious Derenta Plumer,.....Petitioner-Respondent.

BRIEF OF RESPONDENT

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STATE'S STATEMENT OF QUESTION PRESENTED

Did the Court of Appeals commit an error of law that warrants review and correction by ignoring South Carolina's well-established issue preservation requirements and vacating Plumer's concurrent—and unobjected-to—five-year sentence for possession of a firearm during the commission of a violent crime based on a sentencing error that was neither raised to nor ruled upon by the trial judge and, thus, was not properly preserved for appellate review?

MR. PLUMER'S STATEMENT OF QUESTION PRESENTED

The Court of Appeals' opinion vacating the five-year sentence for possession of a firearm during the commission of a violent crime is consistent with the Court's precedent, and the Court of Appeals did not commit an error of law that warrants review by this Court. Additionally, the State was not prejudiced by the alleged error.

STATEMENT OF CASE

A detailed Statement of Case appears in Mr. Plumer's Brief of Petitioner, at 1-3.

STATEMENT OF FACTS

A detailed Statement of Facts appears in Mr. Plumer's Brief of Petitioner, at 3-7.

STANDARD OF REVIEW

"In criminal cases, this Court sits to review errors of law only and is bound by factual findings of the trial court unless an abuse of discretion is shown." *State v. Blackwell*, 420 S.C. 127, 136, 801 S.E.2d 713, 718 (2017) (internal quotations omitted). An abuse of discretion occurs when the court's decision is unsupported by the evidence or controlled by an error of law. *Id.*

ARGUMENT

The Court of Appeals' opinion vacating the five-year sentence for possession of a firearm during the commission of a violent crime is consistent with the Court's precedent, and the Court of Appeals did not commit an error of law that warrants review by this Court. Additionally, the State was not prejudiced by the alleged error.

Four facts or legal principles are beyond dispute. First, the sentence for possession of a firearm during the commission of a violent crime "does not apply in cases where the

death penalty or a life sentence without parole is imposed for the violent crime." S.C. Code Ann. § 16-23-490(A). Second, the trial judge imposed a five-year sentence for violation of section 16-23-490(A), even though imposing a sentence of life without the possibility of parole. R. 430, 446-47. Third, trial counsel did not object to the imposition of this additional five-year sentence for violation of section 16-23-490(A). R. 430. Fourth, as will be discussed below, the additional five-year sentences for violation of section 16-23-490(A) ultimately will be vacated—either by this Court affirming the Court of Appeals or the grant of post-conviction relief. *See* S.C. Code Ann. § 17-27-10, *et. seq.*; *see also, e.g*. *State v. Palmer*, 415 S.C. 502, 525, 783 S.E.2d 823, 835 (Ct. App. 2016) (vacating "sentence for possession of a weapon during the commission of a violent crime" when Palmer was sentenced to life without the possibility of parole for murder); *State v. Owens*, 346 S.C. 637, 666–67, 552 S.E.2d 745, 760 (2001) ("vacat[ing] the five year sentence for possession of a firearm during the commission of a violent crime" when Owens received death penalty for murder) *overruled by State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005).

Although acknowledging the absence of a contemporaneous objection to the imposition five-year sentence for possession of a firearm during the commission of a violent crime, the Court of Appeals vacated that sentence based on this Court's holding in *State v. Johnston*, 333 S.C. 459, 462, 510 S.E.2d 423, 425 (1999). A. 10. The State does not argue the trial court properly imposed this sentence, but rather argues it is not preserved for appeal and should be addressed in post-conviction relief.[1] *See, e.g.,* State's Brief of Petitioner at 4, 6, 8 10, 11, 13, 17.

[1] The State does not articulate a valid reason for forcing this issue into post-conviction-relief. The legal principle is not disputed, and there could be no valid strategic reasons for not objecting to a patently illegal sentence.

Because it relied on *Johnston*, the Court of Appeals did not commit an error of law. In addition to *Johnston*, numerous appellate court decisions militate in favor of correcting a patent error of law in sentencing. In *State v. Vick*, the Court of Appeals vacate the clearly erroneous kidnapping sentence. 384 S.C. 189, 203, 682 S.E.2d 275, 282 (Ct. App. 2009). *Vick* recognized, "Our courts have long held, where an appellant has been sentenced for murder of a victim, this code section precludes a sentence for kidnapping of that victim, and any such sentence should be vacated." 384 S.C. at 201-02, 682 S.E.2d at 281 (citing *Owens v. State,* 331 S.C. 582, 584–85, 503 S.E.2d 462, 463 (1998); *State v. McCall,* 304 S.C. 465, 470, 405 S.E.2d 414, 416–17 (Ct.App.1991), *overruled on other grounds by Brightman v. State,* 336 S.C. 348, 352, 520 S.E.2d 614, 616 (1999); *State v. Livingston,* 282 S.C. 1, 8, 317 S.E.2d 129, 133 (1984); *State v. Perry,* 278 S.C. 490, 495, 299 S.E.2d 324, 327 (1983); and *State v. Copeland,* 278 S.C. 572, 597, 300 S.E.2d 63, 77–78 (1982)). Even though "correctly note[ing]" the issue was not preserved for appellate review, "the State concede[d] that it is error to sentence a defendant for the kidnapping of a victim whom he is also convicted of murdering," "any such sentence for kidnapping should be vacated," and "if determined to be unreviewable on direct appeal, will in all likelihood be addressed in a post-conviction relief proceeding." *Id*., 384 S.C. at 202, 682 S.E.2d at 281-82. *Vick* and the case at bar are indistinguishable.

The Court of Appeals addressed a similar issue in *State v. Bonner*, where the State conceded "it was error for the trial court to sentence Bonner to [life without the possibility of parole] for burglary in the first degree"[2] but "contend[ed] the sentencing issue is not

[2] Because Bonner was seventeen years old at the time of the offense, *Graham v. Florida,* 560 U.S. 48 (2010) "forbid the imposition of a LWOP sentence for a non-homicide crime committed by a juvenile." *Bonner*, 400 S.C. at 564, 735 S.E.2d at 526.

preserved for appellate review because Bonner never objected to the sentence imposed for burglary in the first degree, nor did he raise any issue with the sentence in a post-trial motion" and "the most appropriate avenue for addressing Bonner's claim is a post-conviction relief (PCR) proceeding." 400 S.C. 561, 565, 735 S.E.2d 525, 527 (Ct. App. 2012). "Bonner acknowledge[d] the sentencing issue is not preserved for appellate review" but "asserted that the court should address the sentencing issue in the interest of judicial economy." *Id*. Relying on *Johnston*, the Court of Appeals agreed with Bonner and "remand the matter to the circuit court for resentencing." *Id*., 400 S.C. at 567, 735 S.E.2d at 528. *Bonner* and the case at bar are indistinguishable.

Both *Vick* and *Bonner* "considered a matter in the interest of judicial economy when the issue would be raised to the court at some future time and both parties had fully briefed the issue." *Bonner*, 400 S.C. at 567, 735 S.E.2d at 527-28 (citing *Vick,* 384 S.C. at 202, 682 S.E.2d at 282). *Vick* and *Bonner* are consistent with this Court's precedent in other settings. *See, e.g*., *Jeter v. S.C. Dep't of Transp.*, 369 S.C. 433, 441, n.6, 633 S.E.2d 143, 147, n. 6 (2006) ("Regardless of any preservation problems we address this issue in the interest of judicial economy."); *S. Bell Tel. & Tel. Co. v. Hamm*, 306 S.C. 70, 75, 409 S.E.2d 775, 778 (1991) ("since this issue would be raised to the Court at some future time and since both parties have fully briefed the issue, we find that it is in the interest of judicial economy to decide the matter now"). Because the parties fully briefed the issue and because a post-conviction court would vacate the additional five-year sentences for violation of section 16-23-490(A), the State is not prejudiced by the Court of Appeals holding on this issue.

Next, this Court must reject the State's argument that Johnston is available only in situations where there is "real threat" the accused would be incarcerated beyond the "permissible sentencing range" for the offense. *See, e.g.,* State's Brief of Petitioner at 8, 10, 11, 13. Both *Vick* and *Bonner* rejected the identical argument. *Bonner*, 400 S.C. at 567, 735 S.E.2d at 528 ("Even though the court recognized Vick's case presented only one exceptional circumstance because there was no threat Vick would be incarcerated beyond the legal sentence, it nevertheless referenced that exceptional circumstance as the determinative factor in its decision to address the sentencing issue in the interest of judicial economy." (citing *Vick*, at 384 S.C. at 202-03, 682 S.E.2d at 282)).

Finally, the State's chief complaint seems to be the Court of Appeals use of the term "criminal equity." *See, e.g.,* State's Brief of Petitioner at 11-16. The use of this term is consistent with this Court's recognition of "exceptional circumstance" in *Johnston*. 333 S.C. at 463, 510 S.E.2d at 425. If this Court disagrees with the Court of Appeals use of the term "criminal equity," then this Court should affirm as modified.

CONCLUSION

For the foregoing reasons, this Court should affirm the Court of Appeals on this question. Because the Court of Appeals holding on this question is consistent with *Johnston* and numerous other appellate decisions, the Court of Appeals did not commit an error of law.

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Respectfully Submitted,

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