THE STATE OF SOUTH CAROLINA
In the Supreme Court

Certiorari to the Court of Appeals
APPEAL FROM BERKELEY COUNTY
Court of General Sessions

Maite Murphy
Circuit Court Judge

Court of Appeals Opinion No. 5908
Court of Appeals Case No. 2019-000687
Supreme Court Case No. 2022-000850

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S.C. SUPREME COURT

The State of South Carolina .....Respondent,

v.

Gabrielle Oliva Lashane Davis-Kocsis .....Petitioner.

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

Susan Barber Hackett
Office of Appellate Defense
1330 Lady Street, Suite 401
Columbia, S.C. 29201
803.734.1330
shackett@sccid.sc.gov

Jason Scott Luck
P.O. Box 47
Bennettsville, SC 29512
843.479.6863
jason@luck.law

Attorneys for Petitioner

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ARGUMENT IN REPLY

I. The Court of Appeals' opinion conflicts with a South Carolina statute and 38-year-old precedent of this Court.

The State does not deny that the plain and ordinary meaning of section 16-3-910 of the South Carolina Code forbids imposition of a sentence for kidnapping on one who has also been convicted of and sentenced for murder, without any limitation on the identity of the alleged murder and kidnapping victims. Petitioner would note her statutory construction argument, set out convincingly in her petition for writ of certiorari, has not been rebutted by the State.

In its return, the State claims the statutory provision prohibiting a sentence for kidnapping for a person also sentenced for murder "merely points out a redundancy" because "a kidnapping conviction used to carry a mandatory minimum of life...and as murder used to also carry either a mandatory minimum of life (or death, of course)." Ret. at 9. With this statement, the State unknowingly makes Petitioner's argument for her. The statutory sentencing ranges for kidnapping and murder have changed numerous times over the intervening years, but the sentencing prohibition has remained the same. Currently, the punishment for murder is death or thirty years to life. S.C. Code Ann. § 16-3-20 (A). The punishment for kidnapping is a sentence not to exceed thirty years. S.C. Code Ann. § 16-3-910. While making these changes to the sentencing schemes, the Legislature left alone the prohibition on sentencing a person for kidnapping when the person has already been sentenced for murder. Thus, the intent of any changes to the statute was *not* to address the alleged redundancy identified by the State. Rather, the Legislature manifested its

intent that any time someone is sentenced for murder, the person shall *not* be sentenced for kidnapping as well.[1]

The State also does not deny that the opinion issued by the Court of Appeals conflicts with two cases issued by this Court that have not been overruled. Nevertheless, the State relies upon this Court's holding in *State v. Vazquez*, 364 S.C. 293, 613 S.E.2d 359 (2005) to conclude the trial court did not err by imposing sentences on Petitioner for kidnapping where Petitioner was sentenced for murder as well. The Court of Appeals also relied on this dictum in *Vazquez* to reach its conclusion, affirming Petitioner's sentence for kidnapping.

Without any consideration to the issue that was *actually* presented in *Vazquez*, the State insists the issue raised in this matter "has already been decided by this Court." Ret. at 7. As noted by Petitioner in his petition for writ of certiorari, the issue before this Court in *Vazquez* was whether "the trial judge erred in sentencing [Vazquez] for the kidnapping of the murder victims." *State v. Vazquez*, 364 S.C. 293, 302 613 S.E.2d 359, 636 (2005). That was the only question resolved by this Court in *Vazquez*. *See State v. Harrison*, 432 S.C. 448, 464, 854 S.E.2d 468, 476 (2021)

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[1] Petitioner reiterates her argument presented in her petition for writ of certiorari that the legislative history and rules of statutory construction show the Legislature intended to prohibit sentences for kidnapping whenever a defendant was convicted of murder regardless of the identity of the victims because the Legislature took no action to amend the prohibition portion of the statute in 1991, when it amended the sentencing range. The Legislature was aware of this Court's opinion in *State v. Livingston*, 282 S.C. 1, 317 S.E.2d 129 (1984) vacating a kidnapping sentence where the defendant was not convicted of murder of the kidnapping victim. When the Legislature fails to alter a statute over a long period of time, "its inaction is evidence the Legislature agrees with th[e] Court's interpretation." *Wigfall v. Tideland Utilities, Inc.*, 354 S.C. 100, 111, 580 S.E.2d 100, 105 (2003).

(explaining that "[c]ourts do not give advisory opinions or answer questions that are not asked"). The issue raised in the instant matter is whether the trial judge erred by sentencing Appellant for kidnapping of individuals who were not the alleged victims of murder. The two issues on appeal are decidedly different.

Disturbingly, the State argues "Petitioner conveniently avoids discussing *Vazquez* (decided in 2005), citing only *Stroman* (1984) and *Livingston* (1984) as reasons why this Court should overturn the Court of Appeals." Ret. at 10. The State is simply wrong. Petitioner does not avoid *Vazquez* in his petition for writ of certiorari; in fact, Petitioner cites *Vazquez* and discusses the Court of Appeals' misplaced reliance on the case. Pet. at 6-7. Additionally, Petitioner does *not* rely "only" on prior controlling precedent from this Court to argue for reversing the decision issued by the Court of Appeals. In her petition for writ of certiorari, Petitioner devotes most of her attention to the well-reasoned and convincing statutory construction argument, which the State "conveniently avoids discussing" in its return. This Court should grant a writ of certiorari on this issue.

II. Admission of the 911 call recording conflicts with Rule 403, SCRE and this Court's precedent interpreting it.

In a footnote, the State claims that "Petitioner's argument that the trial court erred by admitting the 911 call without listening to it first...is not preserved for appellate review" because "Petitioner did not raise this issue to the Court of Appeals in [her] initial, final, or reply brief, at oral argument, or in [her] petition for rehearing." Ret. at 11 n.4. The State is simply wrong on all accounts. First, and foremost, Petitioner informed the Court of Appeals in his reply brief that "it appears the trial court did not listen to this recording before ruling it admissible."[2] Reply at 3 n.1. Additionally, the trial court's failure to listen to the 911 call prior to admitting it is *not* a separate basis for reversal. Rather, the trial court's failure to listen to the 911 call shows *how* the trial court abused her discretion when she allowed the State to introduce it over objection.

"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. Douglas,* 369 S.C. 424, 429, 632 S.E.2d 845, 847–48 (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.* at 429–30, 632 S.E.2d at 848. "A failure to exercise discretion amounts to an abuse of that discretion." *State v. Hawes,* 411 S.C. 188, 191,

[2] The Court of Appeals also noted in its opinion, without objection by the state: "[t]he [trial] court had not listened to [the 911 call] at the time of the pretrial ruling." Opinion p. 4 n. 1.

767 S.E.2d 707, 708 (2015) (internal quotation omitted). The trial judge's failure to listen to the 911 recording was a complete abdication of the judge's duty to exercise discretion. How could the trial judge determine the probative value and danger of unfair prejudice of the 911 recording without listening to it?

In a desperate effort to rebut Petitioner's argument that the danger of unfair prejudice posed by the admission of the 911 recording substantially outweighed its probative value, the State cited *State v. Shuler*, 353 S.C. 176, 577 S.E.2d 438 (2003), a capital case where this Court affirmed a trial court's decision to admit a 911 call. Ret. at 12 n.5. The State's reliance on *Shuler* is misplaced.

Shuler was charged with three counts of capital murder for the deaths of his girlfriend, her thirteen-year-old daughter, and her mother. *State v. Shuler*, 353 S.C. 176, 180, 577 S.E.2d 438, 440 (2003). During the guilt phase, the trial judge allowed a *redacted* tape of several 911 calls to be played for the jury. *Id.* at 181, 577 S.E.2d at 440. During the sentencing phase, the trial judge allowed the State to introduce the unredacted 911 calls. *Id.* at 182, 577 S.E.2d at 441. On appeal, this Court affirmed the trial court's decision to allow the jury to hear the unredacted 911 calls during the sentencing phase. *Id.* at 184, 577 S.E.2d at 442.

This Court's ruling was based upon "*the purpose of the sentencing phase in a capital trial.*" *Id.* (emphasis added). This Court explained that the purpose of the sentencing phase "is to direct the jury's attention to the specific circumstances of the crime and the characteristics of the offender." *Id.* Most important for consideration in the instant matter, this Court explained that "[e]vidence which would ordinarily

be *inadmissible* in the *guilt phase* of trial may be introduced during the penalty phase" due to the unique purpose of the sentencing phase in a capital trial. *Id.* (emphasis added).

This Court further explained that the 911 tape was relevant to establish a statutory aggravating circumstance of physical torture, which the State alleged supported imposition of the death penalty. *Id.* at 185, 577 S.E.2d at 442. Consideration of the State's burden to prove the aggravating circumstance beyond a reasonable doubt weighed heavily in this Court's analysis of the 911 tape's relevancy and probative value. *Id.*

The key to understanding this Court's decision in *Shuler* is recognizing that the Rule 403, SCRE analysis performed by this Court concerned determining the probative value of evidence for purposes of a capital sentencing proceeding. When a jury is tasked with determining whether a defendant is sentenced to death, the jury must turn its attention to the specific circumstances of the crime and the characteristics of that particular defendant. As the *Shuler* case itself demonstrates, the Rule 403, SCRE analysis is markedly different for a guilt phase proceeding. The trial judge permitted only the redacted version of the 911 calls to be played for the jury in the guilt phase as the probative value of the calls was substantially outweighed by the danger of unfair prejudice of certain extremely emotional portions of the calls. In the instant matter, the jury was not considering the specific circumstances of the crime and the characteristics of Petitioner in order to determine a sentence; instead, the jury was deciding whether the State carried its burden of

proof. Thus, the Rule 403, SCRE analysis used in *Shuler* is inapplicable to Petitioner's issue presented.

CONCLUSION

The petition should be granted.

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Susan Barber Hackett
Appellate Defender
Office of Appellate Defense
1330 Lady Street, Suite 401
Columbia, S.C. 29201
803.734.1330
shackett@sccid.sc.gov

Jason Scott Luck
P.O. Box 47
Bennettsville, SC 29512
843.479.6863
jason@luck.law

Attorneys for Petitioner