**THE STATE OF SOUTH CAROLINA**
**In the Supreme Court**

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S.C. SUPREME COURT

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

**Maite Murphy**
**Circuit Court Judge**

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

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

**v.**

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

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# BRIEF OF PETITIONER

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## QUESTIONS PRESENTED

I. Whether the Court of Appeals' opinion, which relied on *State v. Vazquez*, 364 S.C. 293, 613 S.E.2d 359 (2005) to affirm Kocsis's sentences for kidnapping in spite of a sentence for murder, conflicts with S.C. Code § 16-3-910 and the Court's holdings in *State v. Livingston*, 282 S.C. 1, 317 S.E.2d 129 (1984) and *State v. Stroman*, 281 S.C. 508, 316 S.E.2d 395 (1984), all of which prohibit a defendant from being sentenced for both murder and kidnapping.

II. Whether the Court of Appeals erred in affirming the trial court's admission into evidence of an unfairly prejudicial 911 call recording "for corroborative purposes and establishing the elements of the offense" when the record contains no support for this position and the trial court never listened to the recording before ruling.

## STATEMENT OF THE CASE

Petitioner Gabrielle Oliva Lashane Davis-Kocsis ("Kocsis") was arrested for murder, burglary, two counts of kidnapping, and criminal conspiracy. (R 503-512). These charges arose out of Kocsis' alleged effort on September 27, 2015, to recover approximately $1,700.00 and a motorcycle stolen by Mark Connor, who was hiding out in a well-known "trap house" located at 512 McCrystal Circle, Moncks Corner, SC 29461 ("McCrystal Circle"). During this alleged recovery effort an armed man in the party fell through the rotten floor of the house, causing his handgun to discharge and resulting in the death of Connor. (R 341-343).

Kocsis was tried on April 8-10, 2019 before Circuit Court Judge Maite Murphy in Moncks Corner, South Carolina. (R 1). The State was represented by Bart Stegall and Jordan Smith of the Ninth Circuit Solicitor's Office, and Kocsis was represented by Grant Smaldone and Jason Luck. (R 2). The jury found Kocsis guilty of all charges, and Judge Murphy sentenced Kocsis to fifty years' imprisonment for murder, fifty years for burglary, thirty years for each count of kidnapping, and five years for conspiracy. (R 488-489). Judge Murphy ordered these terms to be served concurrently. (R 488-489). Kocsis timely served her notice of appeal on April 18, 2019.

The Court of Appeals entertained oral arguments on February 16, 2022. The panel of Acting Judge Lockemy, Judge Geathers, and Judge Hill affirmed the Circuit Court by published opinion dated May 4, 2022 ("Opinion"). Kocsis timely filed a petition for rehearing in this matter, which the Court of Appeals denied on May 25,

2022. Kocsis timely filed a petition for certiorari on June 20, 2022, which this Court granted on November 23, 2022.

## STANDARD OF REVIEW

### Sentencing

"A sentence will not be overturned absent an abuse of discretion when the ruling is based on an error of law or a factual conclusion without evidentiary support." *In re M.B.H.*, 387 S.C. 323, 326, 692 S.E.2d 541, 542 (2010). Errors of law are reviewed by this Court *de novo*. *E.g.*, *State v. Adams*, 409 S.C. 641, 763 S.E.2d 341 (2014); *State v. Bash*, 412 S.C. 420, 772 S.E.2d 537 (Ct. App. 2015). The interpretation of a statute is also reviewed *de novo*. *Catawba Indian Tribe of S.C. v. State*, 372 S.C. 519, 642 S.E.2d 751 (2007).

### Admission of Evidence

"The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." *State v. Hatcher,* 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) (quoting *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.*; *see also State v. Brockmeyer*, 406 S.C. 324, 340, 751 S.E.2d 645, 653 (2013).

## ARGUMENT

### I. The Court of Appeals' opinion conflicts with a South Carolina statute and 39-year-old precedent of this Court.

Kocsis was convicted of the kidnapping of Alexis Murray and Whitney Chance, and the murder[1] of Mark Connor during the events of September 27, 2015. (R 484-485). The trial court sentenced her to 30 years imprisonment for each kidnapping, and 50 years for murder. (R 488-489). It is the position of Kocsis, which is supported by the plain language of South Carolina's kidnapping statute and precedent of this Court, that a defendant may not be sentenced for both kidnapping and murder. The Court of Appeals, however, held this prohibition is limited to situations where the kidnapping victim and the murder victim are the same. (Opinion p. 15).

The South Carolina Code states a defendant convicted of kidnapping "…must be imprisoned for a period not to exceed thirty years unless sentenced for murder as provided in Section 16-3-20." S.C. Code § 16-3-910. The plain language of this statute does not require the kidnapping victim and murder victim be the same person. This Court, citing this statute, came to the same conclusion in two opinions, neither of which have been restricted, vacated, or overruled. *See State v. Livingston,* 282 S.C. 1, 8, 317 S.E.2d 129, 133 (1984); *State v. Stroman*, 281 S.C. 508, 514, 316 S.E.2d 395, 400 (1984).

In *Livingston*, this Court vacated five kidnapping sentences (where only four murders occurred), directly holding: "We agree with Livingston that § 16-3-910 of the

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[1] Kocsis was found culpable for murder under the doctrine of "the hand of one is the hand of all". *See, e.g., State v. Langley*, 334 S.C. 643, 515 S.E.2d 98 (1999).

Code prevents the imposition of a life sentence for kidnapping where an accused is sentenced for murder pursuant to § 16-3-20 of the Code." *Livingston*, 282 S.C. at 8, 317 S.E.2d at 133. *Stroman* similarly held, in a case where this Court vacated five sentences for kidnapping (where only four murders occurred): "...S.C. Code Ann. § 16-3-910...prevents the imposition of a life imprisonment sentence for kidnapping if the defendant has also been sentenced for murder pursuant to S.C. Code Ann. § 16-3-20..." *Stroman*, 281 S.C. at 514, 316 S.E.2d at 400.

In the face of *Livingston*, *Stroman*, and the clear and unambiguous language of § 16-3-910, the Court of Appeals held the prohibition of sentences for both kidnapping and murder in § 16-3-910 only applied if the victim of the murder and kidnapping were the same person. (Opinion p. 15). The Court of Appeals' limitation of § 16-3-910 has no basis in the language of the statute; it was instead based on dictum from *State v. Vazquez*, 364 S.C. 293, 302, 613 S.E.2d 359, 363 (2005). The issue before the *Vazquez* court was whether "the trial judge erred in sentencing [the defendant] for the kidnapping of the murder victims." *Id.* (emphasis added). What was <u>not</u> before the *Vazquez* court was the general proposition of whether a defendant may be sentenced for the kidnapping of persons other than the murder victim(s) under § 16-3-910. The Court of Appeals erred in affirming the trial court's sentence, and Kocsis is entitled to, at a minimum, vacatur of her kidnapping sentences.

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Assuming, *arguendo*, § 16-3-910 was ambiguous, there exists substantial evidence of the Legislature's intent to prohibit sentences for both kidnapping and murder. "The cardinal rule of statutory construction is to ascertain and effectuate the

intent of the legislature." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). The reviewing court must "seek a construction that gives effect to every word of a statute rather than adopting an interpretation that renders a portion meaningless." *Hinton v. South Carolina Dept. of Probation, Parole and Pardon Services*, 357 S.C. 327, 342, 592 S.E.2d 335, 343 (Ct. App. 2004). The court "must read the statute so that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous." *CFRE, LLC v. Greenville County Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) (internal quotations omitted). Importantly, a penal statute is "construed strictly against the State and in favor of the defendant." *Rainey v. State*, 307 S.C. 150, 151-52, 414 S.E.2d 131, 132 (1992). Where there is "any doubt" about a statute's scope, the interpreting court is "required" to resolve it in the defendant's favor. *State v. Miles*, 421 S.C. 154, 164, 805 S.E.2d 204, 210 (Ct. App. 2017).

Pursuant to S.C. Code § 16-3-910:

> [w]hoever shall unlawfully seize, confine, inveigle, decoy, kidnap, abduct or carry away any other person by any means whatsoever without authority of law, except when a minor is seized or taken by a parent, is guilty of a felony and, upon conviction, must be imprisoned for a period not to exceed thirty years **unless sentenced for murder as provided in Section 16-3-20**.

(emphasis added). The plain reading of the statute requires vacatur of Kocsis's sentences for kidnapping, as she was also sentenced for murder as provided in Section 16-3-20. Had the Legislature intended for the "unless" portion of the statute to apply only when the victim of the kidnapping is also the victim of the murder, the Legislature could have said so easily; yet, the Legislature did not. Thus, interpreting

the statute exactly as it is written, which this Court is obligated to do, requires vacatur of Kocsis's sentences for kidnapping.

Furthermore, the Legislature amended § 16-3-910 in 1991. *See* 1991 Act No. 117, § 1. This amendment decreased the penalty for kidnapping from a maximum sentence of life imprisonment to thirty years. *Id.* This Court decided *Livingston* roughly seven years before this amendment. *State v. Livingston*, 282 S.C. 1, 317 S.E.2d 129 (1984). In *Livingston*, the defendant was convicted of four counts of murder and five counts of kidnapping, among other offenses. *Id.* at 4, 317 S.E.2d at 130. He was sentenced to four life sentences for murder and five life sentences for kidnapping. *Id.* at 4, 317 S.E.2d at 131. Based upon § 16-3-910, this Court vacated "[t]he sentences for kidnapping." *Id.* at 8, 317 S.E.2d at 133. This Court made no distinction between the sentences for kidnapping that concerned murder victims and the sentence for kidnapping that did not. *Id.* At the time of Livingston's trial and appeal, South Carolina's kidnapping statute provided:

> [w]hoever shall unlawfully seize, confine, inveigle, decoy, kidnap, abduct or carry away any other person by any means whatsoever without authority of law, except when a minor is seized by a parent thereof, shall be guilty of a felony and, upon conviction, shall suffer the punishment of life imprisonment unless sentenced for murder as provided in § 16-3-20.

S.C. Code § 16-3-910 (1985).

"The Legislature is presumed to be aware of [the appellate courts'] interpretation of its statutes." *Wigfall v. Tideland Utilities, Inc.*, 354 S.C. 100, 111, 580 S.E.2d 100, 105 (2003). "There is a presumption that the legislature has knowledge of previous legislation as well as of judicial decisions construing that

legislation when later statutes are enacted concerning related subjects." *State v. McKnight*, 352 S.C. 635, 648, 576 S.E.2d 168, 175 (2003). Where 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*, 354 S.C. at 111, 580 S.E.2d at 105.

Therefore, in 1991, when the Legislature amended the statute to decrease the maximum penalty for kidnapping, the Legislature was well aware of this Court's interpretation of the clause excluding punishment for kidnapping when the person was also sentenced for murder – regardless of whether the murder victim and kidnapping victim were one in the same. Aware of this interpretation, the Legislature took no action to change the statutory provision. Thus, the rules of statutory construction require this Court interpret the Legislature's decision to leave that particular clause of the statute alone, while altering the words immediately preceding that clause, to mean that the Legislature intended the statute to have the force and effect given by this Court in *Livingston*.

Similarly, the Legislature has changed the sentencing ranges for kidnapping and murder several times. Currently, and at the time of the alleged offenses at issue here, the punishment for murder is death or thirty years to life. S.C. Code § 16-3-20(A). The punishment for kidnapping is a sentence not to exceed thirty years. S.C. Code § 16-3-910. Importantly, the Legislature made changes to the sentencing provisions for murder and kidnapping, but the Legislature left alone the prohibition on sentencing a person for kidnapping when the person has already been sentenced for murder. Just as the Legislature's determination to leave this provision alone

following the *Livingston* decision manifests the Legislature's intent that anytime someone is sentenced for murder the person shall not be sentenced for kidnapping as well, the Legislature's resolution to leave this prohibition alone while altering other aspects of the statutory scheme shows the Legislative desire to forbid the sentencing of someone for convictions of murder and kidnapping regardless of the identity of the alleged victims of those offenses.

The Court of Appeals erred in affirming the trial court's sentence, and Kocsis is entitled to, at a minimum, vacatur of her kidnapping sentences.

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

The State's first witness at trial was Peggy Brown, records custodian for Berkeley County 911. (R 37-38). The sole purpose of this witness was to introduce into evidence a September 27, 2015, recording of a 911 call made by witnesses Alexis Murray and Whitney Chance. (R 39). The call consisted primarily of Murray and Chance pleading with the operator for a quick response and begging Connor to not die. The State argued the recording was admissible because it provided "in real time what is taking place in that moment in trying to give law enforcement the address, the description of the cars, trying to get the description of the assailants in real time." (R 13). This recording, which is part of the Court of Appeals' record, was raw and emotional, and it poisoned the jury, leaving such an impression that they asked to hear it again during deliberations. (R 483).

Kocsis sought to exclude this recording first in a pretrial motion in limine. (R 12-14). Despite having not listened to the recording in question (R 12; Opinion p. 4 n.

1), the trial court denied Kocsis's motion to exclude the recording under Rule 403, SCRE, on the basis "[the 911 recording is] intended for corroborative purposes and establishing the elements of the offense." (R 14). The trial court issued the same ruling when Kocsis's counsel contemporaneously objected to the introduction of the recording at trial. (R 39). The Court of Appeals held the trial court did not abuse its discretion in refusing to exclude the 911 recording it never listened to. (Opinion p. 17).

The trial court's failure to review the evidence it admitted represents an abuse of discretion. *Fontaine v. Peitz*, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987) ("When the trial judge is vested with discretion, but his ruling reveals no discretion was, in fact, exercised, an error of law has occurred."). The trial court's decision was also controlled by an erroneous interpretation of corroboration evidence. In order to present corroboration evidence, one must first present evidence to corroborate:

> Corroborative testimony is testimony which tends to strengthen, conform, or make more certain the testimony of **another witness**. Evidence is admissible to corroborate the testimony of a **previous witness**, and whether it in fact corroborates the witness' testimony is a question for the jury.

*Stroman*, 281 S.C. at 510, 316 S.E.2d at 397 (quotations and citations removed) (emphasis added). Peggy Brown was the first witness of trial; by the time the State introduced the 911 recording, no party had presented evidence to the jury. The parties had presented opening statements, but the arguments of counsel are not evidence. *See, e.g., State v. Hughes*, 328 S.C. 146, 493 S.E.2d 821 (1997); *see also* R 24 ("What the attorneys tell you during their opening statements is not evidence in this case.").

With no evidence in the record to corroborate, admission of evidence on the basis it was corroborative is both an error of law and without any evidentiary support. *See State v. Bratschi*, 413 S.C. 97, 114, 775 S.E.2d 39, 49 (Ct. App. 2015).

The trial court also found (affirmed by the Court of Appeals) the 911 recording was admissible for "establishing the elements of the offense" (R 14), *i.e.*, it was relevant. *See* Rule 401, SCRE (definition of relevant evidence). However, even relevant evidence may be excluded when its probative value is substantially outweighed by the danger of unfair prejudice. *See* Rule 403, SCRE. "Evidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis, such as an emotional one." *State v. Cheeseboro*, 346 S.C. 526, 547, 552 S.E.2d 300, 311 (2001).

Here, the 911 recording's probative value was substantially outweighed by the danger of unfair prejudice. As previously discussed, the recording was raw and emotional, exceeding the typical scope of a 911 call. *See Davis v. Washington*, 547 U.S. 813, 827 (2006) (explaining that a 911 call ordinarily involves a brief description of current circumstances that require emergency assistance).

In addition to the danger of unfair prejudice posed by the raw emotion of the call itself, the cumulative effect of the call coupled with the witnesses' testimony and the jury's request to hear the recording again heightened the danger of unfair prejudice presented by the call. This Court has recognized improper corroboration evidence has a "cumulative effect" which has a "devastating impact". *See State v. Barrett*, 299 S.C. 485, 487, 386 S.E.2d 242, 243 (1989). The jury's request to hear the

911 recording a second time during deliberations provides additional evidence of the danger of unfair prejudice presented by the 911 recording. (R 483). This request shows the jury gave "critical attention" to this unfairly prejudicial piece of evidence. *See Martin v. State*, 427 S.C. 450, 457, 832 S.E.2d 277 (2019) (citing *State v. Blassingame*, 271 S.C. 44, 46-47, 244 S.E.2d 528, 529-30 (1978)); *Rutland v. State*, 415 S.C. 570, 579, 785 S.E.2d 350, 354 (2016) (granting post-conviction relief where trial counsel failed to cross examine a witness on a prior inconsistent statement and explaining that a jury's question regarding fingerprints on a handgun showed the jury was focusing critical attention on the sequence of events surrounding the shooting, about which the witness had testified). The outsize weight the jury gave the 911 recording substantially outweighs the probative value of the 911 recording; Alexis Murray and Whitney Chance were available to testify at trial, and did in fact testify at trial as to all of the information communicated in the 911 recording. The 911 call represented needless cumulative evidence that only resulted in inflaming the passions of the jury; the Circuit Court erred in admitting it, and Kocsis is entitled to a new trial.

## CONCLUSION

The Court of Appeals should be reversed.

Dated: 01/09/2023

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