

STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

Certiorari to the Court of Appeals
APPEAL FROM BERKELEY COUNTY
COURT OF GENERAL SESSIONS

Honorable Maite Murphy, Circuit Court Judge

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

THE STATE,RESPONDENT,

v.

GABRIELLE OLIVA LASHANE DAVIS-KOCSIS, PETITIONER.

BRIEF OF RESPONDENT

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The Court of Appeals properly upheld the trial court’s admission of the 911 call as the probative value was not substantially outweighed by the risk of unfair prejudice. It rehabilitated the attacked credibility of the witnesses and was relevant to proving criminal intent, corroborating the homeowner’s identity, corroborating witness’s statements, and confirming their identification of Petitioner as a perpetrator13

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PETITIONER'S QUESTIONS PRESENTED

I. Whether the Court of Appeals' opinion, which relied on *State v. Vazsquez*, 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.

RESPONDENT'S QUESTIONS PRESENTED

I. Whether Petitioner's first issue has already been decided by this Court in *State v. Vazsquez*, 613 S.E.2d 359 (2005) (as the Court of Appeals held), because it found S.C. Code §16-3-910 does not prevent a defendant from being convicted and sentenced for murdering one victim and separately kidnapping another.

II. Whether the Court of Appeals rightly affirmed the trial court's admission of a 911 call that rehabilitated the attacked credibility of the eyewitnesses and was relevant to prove criminal intent, corroborate the homeowner's identity, corroborate eyewitness's statements, and confirm their identification of Petitioner as a perpetrator. The call was material to the State in helping prove the elements of the crimes, and, as a result, its probative value was not substantially outweighed by the danger of unfair prejudice.

STATEMENT OF THE CASE

Petitioner was indicted for the murder of Mark Connor, burglary first degree, criminal conspiracy, and two counts of kidnapping by the August 2016 Berkeley County Grand Jury. (2016-GS-08-01951, -01953, 01955, -01957, -01959). She proceeded to trial by jury before the Honorable Maite Murphy from April 8-10, 2019, after which she was found guilty as charged under the State's hand of one, hand of all theory. R. p. 1, R. p. 71, R. pp. 525-526. The State¹ proved that Petitioner led others (armed and masked) to forcefully enter the home of Miss Rose in the middle of the night to exert payback on Mark Connor for stealing Petitioner's belongings. R. pp. 71-72, R. pp. 83-85, R. pp. 91-119, R. pp. 143-145. The home was full of sleeping guests, including the two kidnapping victims Alexis Murray and Whitney Chance. R. pp. 100-101, R. p. 158. Petitioner deployed pepper spray while two co-conspirators held Murray and Chance at gunpoint and a third executed Mark Connor in a bedroom while Petitioner looked on. R. pp. 100-101, R. pp. 126-134, R. pp. 141-146, R. pp. 206-207, R. p. 237, R. p. 275.

Judge Murphy sentenced Petitioner to fifty years' imprisonment for murder and ordered her other sentences of fifty years for burglary, thirty years for each count of kidnapping, and five years for conspiracy to be run concurrently. R. pp. 488-489. After Petitioner timely served her notice of appeal, the South Carolina Court of Appeals ordered briefing and held oral arguments. The court affirmed Petitioner's convictions and sentences in a published opinion on May 4, 2022. *State v. Davis-Kocsis*, 436 S.C. 468, 872 S.E.2d 415 (Ct. App. 2022). The court denied Petitioner's petition for rehearing a few weeks later. This Court, also after briefing, then granted Petitioner's petition for writ of certiorari. This brief of Respondent follows.

¹ Ninth Circuit Assistant Solicitors Bart Stegall, Esq., and Jordan Smith, Esq. prosecuted the case and Petitioner was represented by Grant Smaldone, Esq., and Jason Luck, Esq. R. p. 2.

STATEMENT OF FACTS

For purposes of this brief, Respondent relies on the relevant summary of facts of the crime, investigation, and trial as the South Carolina Court of Appeals set out in their direct appeal opinion:

In 2016, a Berkeley County grand jury indicted Kocsis for the murder of Mark Connor (Victim), first-degree burglary involving Rosemary Hoffberg and her home, criminal conspiracy, and the kidnappings of Alexis Nicole Murray and Whitney Renee Chance.

Pretrial, Kocsis moved to suppress State's Exhibit 1, which is a recording of a 911 call that consisted of Murray requesting emergency services to respond quickly, telling Victim not to die from his gunshot wound, describing that she and others had been pepper sprayed and Victim was shot, identifying Kocsis as a perpetrator, and stating they were asleep when Kocsis and the others came into the home.

Chance can also be heard on the recording. Relying on Rule 403, SCRE, Kocsis argued the 911 call would “stir up the passions and prejudices of the jury via using emotion rather than facts.” The State asserted all 911 calls are emotional, this call was not substantially prejudicial, and the 911 call provided a “real time” account immediately after the shooting. The trial court found State's Exhibit 1 admissible for “corroborative purposes and establishing the elements of the offense[s]” and stated “although [State's Exhibit 1] may be prejudicial, the probative value outweigh[ed] the prejudicial effects.”

In her opening statement, Kocsis asserted many of the witnesses, including herself, used methamphetamine, and she urged the jury to consider the credibility of the witnesses, their motives in testifying she was responsible for organizing how Victim was killed, and if she were “some drug leader.”

During the first witness's testimony, the trial court admitted State's Exhibit 1 over Kocsis's renewed Rule 403 objection. Thereafter, the State presented evidence that Kocsis was a drug dealer, Victim stole over a thousand dollars and a motorcycle from her, and Kocsis “put a hit on” Victim.

On the day of Victim's death, Victim was staying at “Ms. Rose's” home, and there were several other people there, including Murray, Chance, Richard Curtis, Nick Varner, and Ms. Rose

According to the State's witnesses, Kocsis, Matt Grainger, Grayson Griffin, and others broke into Ms. Rose's home in the early morning hours by breaking a window and kicking a door in while they were looking for Victim. These witnesses detailed Kocsis sprayed bear mace, or pepper spray, inside the home and indicated to

Grainger to shoot Victim. Thereafter, a gun went off, and Kocsis and the other intruders fled Ms. Rose's home.

According to Varner, he told Chance to call 911—although Murray was the one who actually called 911 on State's Exhibit 1. Varner testified he told Chance to tell law enforcement that they were at Ms. Rose's home and stated law enforcement would know the location. Deputy Kimberly Vandiver, of the Berkeley County Sherriff's Office, testified she was one of the first responders and she spoke with “[t]he owner of the residence.”

Murray testified that during the break-in, she was in a bedroom and did not feel free to leave because one of the men Kocsis was with was pointing a gun at her face. Chance, who was in the living room, also testified she did not feel free to leave during the incident; Chance emphasized the mace caused her pain and she had difficulty breathing because of it.

Melissa Freeman, who was with the intruders, testified Kocsis “orchestrated” the incident, and Freeman believed Kocsis and the others were only going to scare Victim. Griffin testified he sold drugs to Kocsis and did not know that someone was going to be killed when they went to Ms. Rose's home. However, Curtis testified he overheard a phone call between Griffin and Kocsis in which Griffin told Kocsis that “they [could not] let stuff like this happen and [let] people get away with it.”

During cross-examination of many of the State's witnesses, Kocsis questioned the witnesses about their credibility, focusing on their drug usage, criminal records, possible benefits from testifying, and their recollections of what occurred

Kocsis testified in her own defense and confirmed Victim took her money and motorcycle. According to Kocsis, the money that Victim stole actually belonged to Griffin because Griffin sold her drugs on credit. Kocsis asserted Griffin threatened that if she could not obtain the money from Victim, he “was going to take it out on [her].” Kocsis testified Griffin took out the hit on Victim, but Kocsis later acknowledged she shared information about the hit.

According to Kocsis, she received a text message that Victim was at Ms. Rose's home, and Griffin wanted her to tell him where the home was located. She stated Griffin gave her a pistol to give to Grainger, which she later gave to Grainger, and Griffin tried to give her a gun to use personally, but she declined to take it. Kocsis testified that upon arriving to Ms. Rose's home, Griffin told her that he planned to smash a window to cause everyone to run out.

Kocsis stated Griffin broke a window and Grainger attempted to kick the door in. Kocsis explained the door started coming open, and Ms. “Rose Hoffberg” was “standing behind the door.” . . . Kocsis stated she entered the home and looked for Victim, and upon seeing Victim in the backroom, she sprayed him with the mace. .

. . Kocsis acknowledged the purpose of going to Ms. Rose's home was to obtain the stolen money. Kocsis denied the intention was to kill Victim and asserted the incident was not planned In her closing argument, Kocsis emphasized many of the State's witnesses were drug addicts, asserted they were liars, attacked their credibility, and contended their memories were faulty. Kocsis specifically went witness by witness in her closing argument and highlighted aspects about the individuals

During its deliberations, the jury requested to listen to State's Exhibit 1 again, which the trial court permitted. The jury found Kocsis guilty as indicted, and the trial court sentenced Kocsis to an aggregate sentence of fifty years' imprisonment, including for the murder of Victim and the kidnappings of Murray and Chance.

Thereafter, Kocsis moved for a new trial, asserting **(1)** “there was not [the] requisite evidence to prove any sort of legal possession necessary to prove a burglary charge”; **(2)** “there was [not] sufficient evidence to support a mens rea aspect of the kidnapping charge[s]”; **(3)** *State v. East* implied for a jury to “convict a defendant of kidnapping that is incident to another crime, ... there need[ed] to be a specific charge telling them that there must be requisite intent to commit two separate offenses”; and **(4)** she “would like ... like to reincorporate” her prior objection to the jury charge.

The trial court denied her motion, finding there was sufficient evidence for the jury to return the verdicts it did, the jury was charged to consider each element of each offense separately, and it charged all of Kocsis's requested charges except for the burglary charge. This appeal followed.

State v. Davis-Kocsis, 436 S.C. 468, 872 S.E.2d 415, 418-420 (Ct. App. 2022) (emphasis added).

STANDARD OF REVIEW

Sentences for Kidnapping and Murder

A sentence will not be overturned absent an abuse of discretion, which is when a ruling is based on an error of law, or a factual conclusion is without evidentiary support. *State v. Fuller*, 425 S.C. 468, 480, 822 S.E.2d 910, 916 (Ct. App. 2019) (citations omitted).

911 Call Admissibility

The admission or exclusion of evidence is in the sound discretion of the trial court and its ruling will not be disturbed without a manifest abuse of discretion accompanied by probable prejudice. *State v. Collins*, 409 S.C. 524, 529-530, 763 S.E.2d 22, 25 (2014). “An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law.” *State v. Bratschi*, 413 S.C. 97, 114, 775 S.E.2d 39, 48 (Ct. App. 2015) (cleaned up.) “A trial judge’s decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances.” *State v. McLeod*, 362 S.C. 73, 81-82, 606 S.E.2d 215, 220 (Ct. App. 2004). “If judicial self-restraint is ever desirable, it is when a Rule 403 [SCRE] analysis . . . is reviewed by an appellate tribunal.” *State v. Lyles*, 379 S.C. 328, 339, 665 S.E.2d 201, 207 (Ct. App. 2008).

ARGUMENT

I. This Court already decided this issue in *State v. Vazsquez*, 613 S.E.2d 359 (2005), when it held a defendant may be separately sentenced for murder and kidnapping when the respective victims are different. Therefore, the Court of Appeals rightly applied this Court's precedent when it upheld the trial court's murder and kidnapping sentences here.

Petitioner argues that even though she was convicted of the murder of Mark Connor, the separate kidnapping of Alexis Murray, and the separate kidnapping of Whitney Chance, she still should have received the benefit of S.C. Code § 16-3-910's provision that trial judges may not sentence a defendant for both murder and kidnapping when the same person was the victim of both crimes.² This issue has already been decided by this Court in *State v. Vazsquez*, 364 S.C. 293, 613 S.E.2d 359 (2005) (abrogated on other grounds by *State v. Evans*, 371 S.C. 27, 637 S.E.2d 313 (2006)), and therefore this Court should affirm the Court of Appeals. Petitioner is not entitled to commit two free kidnappings just because she also murdered a third individual.

Petitioner was convicted of all three crimes at issue in this section under hand of one, hand of all. The record shows she "put a hit out" on Mark Connor for stealing cash and a motorcycle from her. It also shows she then organized a group to exact revenge in the middle of the night, ensuring the group was armed and masked before forcibly breaking into Miss Rose's

² **S.C. Code § 16-3-910 (1991):** "Whoever 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 his 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."

This section has become an issue in recent cases where an individual has been convicted of both murder and kidnapping but only the murder sentence is overturned on appeal. *See, e.g. Williams v. Stirling*, 914 F.3d 302 (4th Cir. 2019) (vacating petitioner's death sentence (where the jury had previously found both the aggravating circumstance of kidnapping and found him guilty of the offense of kidnapping) but no sentence was issued *for* the kidnapping.) There is no legal authority to hold an offender in prison pending re-trial or further proceedings even though the violent and most serious offense of kidnapping stands if a murder sentence is vacated.

house where Mark Connor and many others slept. While inside, one co-conspirator held Alexis Murray at gunpoint, who testified at trial that she did not feel free to leave. Another co-conspirator held Whitney Chance at gunpoint, who also testified she did not feel free to leave, especially when the pepper spray immobilized her. A third co-conspirator joined Petitioner in the bedroom where Connor and multiple others slept, and Petitioner loudly exhorted that man to “shoot him” right before he did, in fact, shoot Connor. The record shows that criminal intent existed for the three crimes at issue here, and as there were three separate victims, three separate indictments, convictions, and sentences were properly issued.

The Court of Appeals reached the correct conclusion in their 2022 opinion that affirmed the Judge Murphy’s sentences. *State v. Davis-Kocsis*, 436 S.C. 468, 872 S.E.2d 415 (Ct. App. 2022). The court, first noting the issue was unpreserved,³ reached the merits in light of *State v. Vick* and discussed the cases Petitioner relies on including *Vick*, 384 S.C. 189, 682 S.E.2d 275 (Ct. App. 2009) (vacating the kidnapping sentence of a defendant sentenced for the murder and kidnapping of the same victim); *State v. East*, 353 S.C. 634, 638-639, 578 S.E.2d 748, 751 (Ct. App. 2003) (upholding the trial court’s denial of a directed verdict on a kidnapping charge

³ This issue was not properly preserved because no contemporaneous objection was made at sentencing. *State v. Johnston* mandates that a challenge to a sentence cannot be raised for the first time on appeal. Only in exceptional circumstances may an appellate court hear the issue, and the two circumstances that qualify as exception as set forth in *Johnston* do not apply here. *State v. Johnston*, 333 S.C. 459, 463-464, 510 S.E.2d 423, 425 (1999) (finding an appellate court may only hear a sentencing issue raised for the first time on appeal if the State made a concession regarding sentencing or there was a threat a defendant would remain incarcerated beyond his legal sentence).

As during a trial, grave procedural issues arise when objections are not made at sentencing. Objections are necessary to give both the bench and the bar an opportunity to address an issue right then. *See, e.g., State v. Bonner*, 400 S.C. 561, 735 S.E.2d 525 (Ct. App. 2012). Therefore, this Court should find the Court of Appeals improperly reached the merits, but nevertheless reached the proper result.

because the jury was properly instructed they must find a separate intent to commit kidnapping in order to convict); *State v. Livingston*, 282 S.C. 1, 317 S.E.2d 129 (1984) (upholding the four life sentences for four counts of murder but vacating the five life sentences given for five counts of kidnapping); and *State v. Stroman*, 281 S.C. 508, 316 S.E.2d 395 (1984) (vacating the life sentence for kidnapping when the judge also gave a life sentence for murder). It then logically explained why the cases Petitioner argues should have been applied to her did not.

The court cited *Vazsquez*, 364 S.C. 293, 613 S.E.2d 359, and concluded that in light of it, § 16-3-910 did not apply to the separate kidnappings of Murray and Chance. *Davis-Kocsis*, 436 S.C. at 426; *Vazsquez*, 364 S.C. at 302, 613 S.E.2d at 363. The “kidnapping sentences related to victims who were not murdered were proper.” *Davis-Kocsis*, 436 S.C. at 426; *Vazsquez*, 364 S.C. at 302, 613 S.E.2d at 363. The court then stated “[w]e acknowledge Kocsis cites two opinions from our Supreme Court from 1984 to support her position” (noting *Livingston* and *Stroman*) but then highlights that it relies on the most current and correct precedent in making its decision. *See State v. Phillips*, 416 S.C. 184, 194, 785 S.E.2d 448, 453 (2016) (“[I]t is incumbent upon the court of appeals to apply [the South Carolina Supreme Court’s] precedent.”)⁴

The court is correct. The Court of Appeals is always required to apply this Court’s most recent precedent. S.C. Const. Art. V, § 9. This Court’s most recent precedent is *Vazsquez*: “[T]he judge erred in sentencing Appellant for the kidnapping of the murder victims. However, the sentences related to the kidnapping of Atkins and Robertson (who were not murdered) are proper

⁴ Respondent notes for this Court that all other cases that discuss § 16-3-910 (with the exception of *Vick*) were all decided before *Vazsquez*: e.g., *Owens v. State*, 331 S.C. 582, 503 S.E.2d 462 (1998); *State v. McCall*, 304 S.C. 465, 405 S.E.2d 414 (Ct. App. 1991) (overruled by *Brightman v. State*, 336 S.C. 348, 520 S.E.2d 614 (1999) on other grounds); *State v. Adams*, 277 S.C. 115, 283 S.E.2d 582 (1981) (overruled by *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991) on other grounds); *State v. Perry*, 278 S.C. 490, 299 S.E.2d 324 (1983); *State v. Copeland*, 278 S.C. 572, 300 S.E.2d 63 (1982); etc.

under S.C. Code Ann. §16-3-910 (2003).” 364 S.C. at 302, 613 S.E.2d at 363 (parentheses added). The *Vazsquez* determination comports with both common sense and history. Until 1976, kidnapping and murder were always separate crimes and offenders always received separate sentences.⁵ The present murder statute, “Murder is the killing of any person with malice aforethought, either express or implied,” has been in place since the mid-1800s.⁶ The language of our modern-day kidnapping statute, though, began to take shape in 1942:

Whoever shall unlawfully seize, confine, inveigle, decoy, kidnap, abduct, or carry away any person by any means whatsoever, and hold such person for ransom or reward . . . shall suffer the punishment of death: provided however . . . the jury may find a special verdict recommending him or her to the mercy of the court, whereupon the punishment shall be reduced to . . . hard labor during the whole lifetime

[P]rovided further, that notwithstanding the foregoing provisions of this subsection with respect to punishment of death, if the kidnapped person be released and returned alive prior to the opening of the trial, the death penalty shall not be imposed, and the convicted person shall be punished by imprisonment in the same manner as though the jury had recommended him or her to the mercy of the court.

Jacobs Press, *Code of Laws of South Carolina 1942 in Five Vols.*, Vol. I, § 1122, p. 771 (1942).

⁵ See, e.g., A.S. Johnston, *The Statutes at Large of South Carolina 1682-1716 Acts* p. 42 (1837). The first kidnapping law (that affected South Carolina law) was established in 1486 in Great Britain and was adopted by this state in the early 1700s. It was illegal to “carry a woman away against her will that hath lands or goods” and the penalty was death. *Id.* See also David J. McCord, *The Statutes at Large of South Carolina 1814-1838*, Vol. VI, p. 574 (1839), where it was rendered illegal to abduct and sell a free person of color, with the penalty being at least twelve months in prison, a fine of not less than one thousand dollars, and “thirty-nine lashes on the bare back.” Other various laws across time prohibited the kidnapping of sailors, pirates, maidens, minors, and more with each enjoying an accompanying sentence.

Conversely, murder of slave or free (or “murder” as it was in 1685) was always punished by “the paines of death” up until 1912 when juries were first permitted to recommend mercy to the court. Michie Company, *Code of Laws of South Carolina 1912*, Vol. II, p. 254 (1912). By comparison, Sections 164 and 165 of the 1912 Code provided a separate punishment for kidnapping: life imprisonment. *Id.* pp. 264, 319.

⁶ Republican Printing Company, *Revised Statutes of the State of South Carolina* p. 709 (1873).

By 1962, the punishment for murder was still death with the possibility of a jury mercy recommendation of hard labor for life in prison, and the separate punishment for kidnapping was also still death, with the possibility of a jury mercy recommendation of hard labor for life in prison. Michie Company, *Code of Laws of South Carolina 1962*, Vol. IV, § 16-52 p. 448, § 16-91 p. 464 (1962). Then, in 1976, the Legislature amended the kidnapping statute to:

Whoever shall unlawfully seize, confine, inveigle, decoy, kidnap, abduct or carry away any other person by any means whatsoever without authority of law . . . 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.

Lawyers Co-Operative Publishing Co., *Code of Laws of South Carolina 1976 Annotated*, Vol. VIII, § 16-3-910, p. 73 (1976).

This Court interpreted the statute for the first time in 1981 in *State v. Adams*, holding that a trial court erred by sentencing a defendant to life for his kidnapping conviction because he had already been sentenced to death on his murder conviction, and no statutory provision was made for concurrent punishments. *State v. Adams*, 277 S.C. 115, 283 S.E.2d 582 (1981).

Fast forwarding to 2009, the Court of Appeals noted, “[o]ur courts have long held, where an appellant has been sentenced for a murder of a victim, this code section precludes a sentence for kidnapping *of that victim*, and any such sentence should be vacated.” *Vick*, 384 S.C. at 201, 682 S.E.2d at 281. The reason for the 1976 additional half-sentence is largely unknown, but it was enacted at a time where an offender who committed both offenses would likely be put to death, potentially rendering a life imprisonment sentence moot or redundant. The exact reasoning is not recorded in the annals of South Carolina history.

Petitioner argues that if the Legislature meant the portion of the statute in question to apply *only* when the victim of the kidnapping is *also* the victim of the murder then it should and could have said so. Respondent asserts the opposite. One cannot conclude the Legislature

intended a defendant to escape accountability for a separate kidnapping of a victim he or she did not murder just because he or she happened to murder another victim for which he is on trial. This has been particularly true since 1991 (post *Stroman* and *Livingston*) when the Legislature amended the kidnapping statute yet again to decrease the penalty from life to thirty years. S.C. Code § 16-3-910 (1991); Session 109 (1991-1992) S.C. Legislature H*3350, Act # 0117. Murder also no longer carries a mandatory death, or even life, sentence, so kidnapping necessarily should be a distinct crime that is punished separately. History demonstrates that both crimes have always been taken very seriously by this state. Ruling that the last half sentence of § 16-3-910 mandates that an offender can never be punished for kidnapping separate victims than the one(s) he or she murdered does not comport with either history or common sense.

In 1998, Article I of the South Carolina Constitution was amended to include Section 24, The Victims' Bill of Rights. In Section (C)(2), "Victim" is defined as "a person who suffers direct or threatened physical, psychological, or financial harm as a result of the commission or attempted commission of a crime against him." S.C. Const. art I § 24. Section (A) underscores that victims of crimes have a right to justice and due process. Section (A)(11) establishes they have the right to a reasonable disposition of and to their case. A victim has a right to see their lawfully convicted offender receive a just and separate punishment for each criminal offense he or she committed against him or her under South Carolina law. This Court and the Court of Appeals have both wisely affirmed that sentiment in recent years. To not also do so here would be unjust. Where else in South Carolina history, case law, or statute is a free crime allowed, especially one of the magnitude of kidnapping, a violent and most serious offense?⁷

⁷ An offender may receive life in prison if he or she is convicted of two or more most serious offenses under S.C. Code § 17-25-45 (1982).

II. The Court of Appeals properly upheld the trial court’s admission of the 911 call because it rehabilitated the attacked credibility of the eyewitnesses, gave a real-time account of what occurred post-shooting, was material to proving criminal intent and the elements of the crimes, and it corroborated statements regarding the identity of the shooter and homeowner. Its probative value was not therefore substantially outweighed by any prejudicial effect.

Petitioner argues the Court of Appeals erred in upholding Judge Murphy’s admission of the 911 tape as it was unfairly prejudicial for being “raw and emotional” and the record did not support admission for the stated purposes.⁸ Respondent maintains this argument is without merit. The Court of Appeals rightly held no manifest abuse of discretion accompanied by probable prejudice occurred by the call’s admission. *Davis-Kocsis*, 872 S.E.2d at 426. Judge Murphy stated the 911 call’s probative value was not substantially outweighed by the danger of undue prejudice under Rule 403, SCRE, was admissible to corroborative purposes, and was admissible to establish the elements of the offense. *Davis-Kocsis*, 872 S.E.2d at 427; R. p. 14. The Court of Appeals also rightly found the call was admissible to counteract the Petitioner’s attempt to discredit witnesses in her opening statement. “If judicial self-restraint is ever desirable, it is when Rule 403 analysis of a trial court is reviewed by an appellate tribunal.” *Id.*; *Lyles*, 379 S.C. at 339, 665 S.E.2d at 207. This Court should affirm.

In its analysis of why the trial court was correct, the Court of Appeals compared Petitioner’s case to *State v. Stephens*, 398 S.C. 314, 78 S.E.2d 68 (Ct. App. 2012). In *Stephens*, the Court of Appeals upheld the trial court’s admission of a second photographic lineup under Rule 403 because the main defense strategy was to discredit a witness’s identification of the defendant in the lineup. 398 S.C. at 319-322, 728 S.E.2d at 71-73. The court here compared the facts of the cases and held

⁸ As to Petitioner’s argument that the trial court erred by admitting the 911 call without listening to it first, this argument is not preserved for appellate review. Petitioner did not raise this issue to the Court of Appeals in its initial, final, or reply brief, at oral argument, or in its petition for rehearing. Therefore, Petitioner has waived this issue. This Court should affirm.

the trial court in Petitioner's case did not abuse its discretion because the defense's main strategy at trial was to discredit the witnesses as unreliable drug addicts. *Davis-Kocsis*, 872 S.E.2d at 427.

It found that the call, admitted as State's Exhibit 1:

[S]upported the State's version of events by providing an account of what happened in "real time," and the recording identified Kocsis as being part of the group that broke into Ms. Rose's home and killed Victim. Additionally, during cross-examination of many of the State's witnesses, Kocsis questioned the witnesses about their credibility, their drug usage, criminal records, possible benefits from testifying, and the quality of their recollections of what occurred.

In her closing argument, Kocsis emphasized the State's witnesses were drug addicts, asserted they were liars, attacked their credibility, and contended their memories were faulty. Kocsis's case is similar to *Stephens* because in light of the whole trial, Kocsis attempted to discredit the State's witnesses like the defendant attempted to discredit the witness's identification in *Stephens*.

Davis-Kocsis, 872 S.E.2d at 427.

This ruling is correct. A trial judge has considerable latitude in its decision to admit or exclude evidence, *Bratschi*, 413 S.C. at 113, 775 S.E.2d at 47-48, and Judge Murphy did not abuse her discretion here. Before the trial began, the parties met in chambers and discussed the 911 call, then Judge Murphy heard arguments from both the solicitor and the defense on the record regarding the level of emotion on the tape. The defense said:

Your Honor, it's two of the people that I believe will be called as witnesses by the State, two females crying for 911, asking them to hurry up, crying. Saying, please don't die, to the alleged victim in this case. So that's the nature of the call, and as I have addressed in chambers, my issue is under Rule 403. It is more prejudicial than probative. It would stir up the passions and prejudices of the jury via using emotion rather than facts.

R. pp. 12-13.

The solicitor countered by arguing:

[Y]ou know, most, if not all, 911 calls are emotional in nature. It not only has to be prejudicial, it has to be substantially prejudicial to the client. And it's our position that it is not substantially prejudicial. It actually gives real time [to] 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.

They're crying because a friend had just gotten shot 20 minutes prior, so they are emotional, but we don't believe that emotion rises to the level of a 403 motion.⁹

R. pp. 13-14.

Judge Murphy then ruled: "Based on what was presented at this juncture, it does sound like it's intended for corroborative purposes and establishing the elements of the offense. And although it may be prejudicial, the probative value outweighs the prejudicial effects, and your motion is respectfully denied." R. 12-14. This complies with case law and the Rule of Evidence. The defense only objected under Rule 403 and Judge Murphy conducted the balancing test as she is required to and gave her reasons why she was denying the motion on the record.

On the 911 call, Alexis Murray (one of the kidnapping victims) can be heard stating, "we just got pepper sprayed and my friend got shot." She requested EMS respond quickly, told the victim not to die from his wound, described how her and her friends were pepper sprayed, how the victim was shot, identified Petitioner as a perpetrator, and stated everyone in the house was asleep when Petitioner and her co-conspirators forcibly broke down the door. She also confirms that Miss Rose's house was at 512 McCrystal (important to the elements of "without consent" and "dwelling" of Petitioner's burglary first degree indictment), and describes the two vehicles the perpetrators arrived in. Whitney Chance, the other kidnapping victim, can be also be heard on the call. By admitting it, the trial judge ensured the jury was provided with a real-time account of the events that occurred after the shooting and helped them assess the credibility of the witnesses.

⁹ **Rule 403, SCRE:** Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time. "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."

Evidence that contains raw emotion or that may be unsettling or disturbing is not automatically excluded from trials in this state. For example, in *State v. Sledge*, a ten-year-old boy called 911 right after his stepfather (the defendant) shot his mother in the back of the head in front of him, and the Court of Appeals still ruled it admissible. *State v. Sledge*, 428 S.C. 40, 832 S.E.2d 633 (Ct. App. 2019). “The young boy can be heard crying often and expressing shock, disbelief, and fear during the twenty-two-minute call.” *Id.* at 44-45, 832 S.E.2d at 636. The court found the call was admissible because it was first relevant, as it had “any tendency to make the existence of any fact that is of consequence to the determination more probable or less probable than it would be without the evidence,” Rule 401, SCRE, and that, second, the probative value was not substantially outweighed by the danger of unfair prejudice because it did not have an “undue tendency to suggest a decision on an improper basis.” *State v. Wiles*, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009); *State v. King*, 424 S.C. 188, 200 n.6, 818 S.E.2d 204, 210 n.6 (2018). Gruesome autopsy photographs are also oftentimes admissible as are other unseemly and unsettling pieces of evidence.¹⁰ The main question is whether the court conducted the proper balancing test on the record and stayed within its reasonable discretion.

The burden is on the opponent of the evidence to establish inadmissibility. *Sledge*, 428 S.C. at 55, 832 S.E.2d at 641-642. Petitioner did not and has not shown how the danger of unfair prejudice by the jury hearing the 911 call substantially outweighed its probative effect. Great deference must be given to the trial court’s decision regarding the admissibility of evidence and the decision should only be reversed in exceptional circumstances. *State v. Adams*, 354 S.C. 361,

¹⁰ See *State v. Hawes*, 423 S.C. 118, 813 S.E.2d 513 (Ct. App. 2018) (affirming the admission of crime scene photographs in a murder prosecution of the victim who had been stabbed to death); *State v. Collins*, 409 S.C. 524, 763 S.E.2d 22 (2014) (affirming the admission of pre-autopsy photographs of the young victim, who had been mauled by dogs.)

378, 580 S.E.2d 785, 794 (Ct. App. 2003). Exceptional circumstances have not been demonstrated here. Therefore, this Court should affirm.

It is jury's job to assess the credibility of the witnesses. Under Rule 607, SCRE, "[t]he credibility of a witness may be attacked by any party, including the party calling the witness." Character evidence, specific instances of conduct, and evidence of bias, prejudice, or any motive to misrepresent may also be used to impeach a witness to help the jury make their credibility assessments (subject to the parameters in Rule 608, SCRE). However, while solicitors (or any attorney for that matter) cannot improperly vouch for the credibility of a witness after they have been attacked via personal assurances, they *are* permitted to rehabilitate that witness with relevant evidence. *State v. Shuler*, 344 S.C. 604, 630, 545 S.E.2d 805, 818 (2002). Under Rule 801(d)(1)(B), SCRE, a prior consistent statement of a witness is admissible (subject of course to Rules 401 to 403), to "rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive."

Judge Murphy therefore properly admitted the call after the Petitioner attacked the credibility of the witnesses in her opening statement. R. 14, R. 31-36. Petitioner argued:

[Y]ou will hear from a lot of witnesses in this case, and the one thing that ties almost all of them together is drugs. It's not just marijuana or pills or anything like that. It's meth, ice. It's a terrible drug. And you will hear about people staying up for days, weeks at a time. Call them tweakers. People that just live a sad life

You might hear some people that [Petitioner] set it up. Ask yourself, who is saying that? What is their motive to say that? The truth will come out

R. 32, R. 35.

Judge Murphy had already heard arguments and had placed her 403 balancing test ruling on the record before opening statements. Therefore, the stage was set for the 911 call to come in right after the openings ended. Petitioner did not object to hearsay, authentication, or any other

potential issue 911 calls could provoke; she only objected to Rule 403. Therefore, that is the only issue that should be examined here.

This Court upheld the admission of a 911 call in a death penalty trial's penalty phase (even though caller was audibly distressed) and found the call's probative value outweighed its prejudicial nature under Rule 403 in *State v. Shuler*, 353 S.C. at 184-185, 577 S.E.2d at 442-443. The caller described the crime scene immediately after her and her family were shot, and the call was relevant because it established the aggravating circumstance of physical torture. *Id.* As the relevance, materiality, and admissibility of evidence were matters within the sound discretion of the trial judge, this Court affirmed, finding no abuse of discretion occurred. *Id.*, *State v. Rosemond*, 335 S.C. 593, 518 S.E.2d 588 (1999). Similarly, here, the callers were relatively but not hysterically emotional,¹¹ and they described the crime scene immediately after the victim was shot and they were pepper sprayed. The call was therefore relevant because it corroborated witness testimony and established the circumstances (or elements) of the offenses Petitioner would later be indicted for. The relevance, materiality, and admissibility of the call was within Judge Murphy's sound discretion and she properly exercised it.

The record thus supports the trial court's ruling that the tape was admissible to rehabilitate the witnesses' credibility the Petitioner attacked. The trial court properly analyzed Rule 403 in making its determination that the danger of undue prejudice did not substantially outweigh the probative value of the 911 call – State's Exhibit 1 – and rightly admitted it. The Court of Appeals then rightly upheld the trial court's ruling. This Court should do the same and affirm.

¹¹ State's Exhibit 1, the 911 call, is on file with this Court.

CONCLUSION

For all the foregoing reasons and for any others the Court may find in the record under Rule 220(c), SCACR, the State respectfully requests that the Court affirm the Court of Appeals. If this Court finds any error, it is harmless beyond a reasonable doubt. *State v. Vick*, 384 S.C. 189, 199, 682 S.E.2d 275, 280 (Ct. App. 2009) (“Error is harmless when it could not reasonably have affected the result of the trial.”)

Respectfully submitted,

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