STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Lexington County
Honorable Eugene C. Griffith, Jr., Circuit Court Judge

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THE STATE,

Respondent,

vs.

CHRISTOPHER JAMEL BRISBON,

Appellant.

Appellate Case No. 2022-000478

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# INITIAL BRIEF OF RESPONDENT

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## APPELLANT'S STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in sentencing Appellant to consecutive terms of imprisonment based upon his mistaken belief that his discretion was restricted in such a way that he was required to order consecutive sentences where neither statute nor case law restricted the judge's discretion in sentencing?

(Appellant's Brief, p. 1).

## STATEMENT OF THE CASE

On February 22-28, 2022, Appellant, Christopher Brisbon, stood trial on the charges of murder, burglary second degree, criminal conspiracy, and possession of a weapon during the commission of a violent crime. The Honorable Eugene Griffith, Jr., presided. David Mauldin, Esq., and Robert Madsen, Esq., represented Petitioner on the charges. Deputy Solicitor Suzanne Mayes and Senior Assistant Solicitor Rhonda Patterson represented the State. At the conclusion of the State's case, Judge Griffith directed a verdict on the criminal conspiracy charge. (Tr. p. 793-95).[1] The jury convicted Appellant of murder, burglary second, and the weapon charge. (Tr. pp. 859-60). Judge Griffith sentenced him to 40 years imprisonment for murder; 5, consecutive, on the weapon charge; and 15, concurrent for burglary second. (Tr. 877). Judge Griffith denied the defense's motion for a new trial by order dated April 8, 2022. (R. p. *).

This appeal follows.

[1] The judge did, however, instruct the jury on "hand of one is the hand of all," (Tr. p. 848), given the testimony presented at trial that two individuals participated.

## STATEMENT OF FACTS

The charges stemmed from the December 17, 2017 murder of Rodney T. Leak at his nightclub in Lexington County. According to witnesses, two masked men entered the office area of the nightclub and viciously gunned down Mr. Leak. (Tr. pp. 254-57; 392-94; 496-99). One of the men described generally matched Appellant's physical appearance and particularly his hairstyle. (Tr. pp. 402-404; 497; 781). Critically, a .40 caliber Smith & Wesson clip/magazine was recovered from the murder scene with Appellant's fingerprint, and the major portion of a DNA sample from the magazine was given a "likelihood ratio for the probability of the DNA being that of Christopher Brisbon" as "240 million times more likely" to be his with "two unidentified, unrelated individuals … than if three unidentified, unrelated individuals" contributed. (Tr. pp. 188-89; 471-72; 526; 703). Cellphone data recovered from Appellant's phone identified the phone near the crime scene near the time of the murder. (Tr. p. 767-70).

Further, Appellant was in jail with an individual, Larry Myers, who had been friends with Appellant's sister, and had met Appellant before. Myers was facing federal charges and was being housed in the Lexington County Detention Center. Appellant told Myers that he was charged with murder and explained that he and a guy named "T" had gone to a nightclub to "rob a guy." Appellant admitted he had a .40 caliber weapon, and told his friend: "They got to shooting in the club. The guy in the club had a gun. They shot from the side door. He ran back out, him and the guy T guy. As he was running back to the car, he told me that the clip in the gun he had, the .40 caliber fell out." (Tr. pp. 656-62).

## STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Wilson,* 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). " 'A sentence will not be overturned absent an abuse of discretion when the ruling is based on an error of law....' " *State v. Jacobs*, 393 S.C. 584, 586, 713 S.E.2d 621, 622 (2011) (quoting *In re M.B.H,* 387 S.C. 323, 326, 692 S.E.2d 541, 541 (2010)). "An abuse of discretion occurs when the trial court's ruling is based upon an error of law, such as application of the wrong legal principle; or, when based upon factual conclusions, the ruling is without evidentiary support; or, when the trial court is vested with discretion, but the ruling reveals no discretion was exercised; or when the ruling does not fall within the range of permissible decisions applicable in a particular case, such that it may be deemed arbitrary and capricious." *State v. Allen*, 370 S.C. 88, 94, 634 S.E.2d 653, 656 (2006)

## ARGUMENT

**Any issue with Appellant's five-year consecutive sentence for possession of a firearm during the commission of a violent crime was not properly preserved for appellate review because defense counsel did not object to the sentence.**

Appellant contends the "judge erred in determining that he was required to sentence Appellant to a term of years to be served *consecutively* to the sentence for the principal crime." (Appellant's Brief, p. 4). Appellant, however, concedes "there was no explicit objection to the sentence at the time of imposition." (Appellant's Brief, p. 6). Further, Appellant concedes that the trial judge had discretion to run the 5-year sentence either consecutively or concurrently. (Appellant's Brief, pp. 4-6). Together, these concessions show that no objection was made to preserve an issue on appeal and the sentence was not illegal so an exception to the preservation rules is not prompted or supported. Thus, the issue presented is procedurally barred from review.

Relevant Facts:

At sentencing, Judge Griffith inquired as to defense counsel's understanding whether "the weapons charge requires a consecutive five years…" (Tr. p. 876, lines 21-23). Defense counsel responded, "I never thought it would be let's just make –" at which time the judge added that he "thought that was a requirement." (Tr. 876, line 25- 877, line 2). Defense counsel offered that the sentence was "day-for-day," and the solicitor agreed. (Tr. p. 877, lines 3-5). The court reporter then notes in the transcript that there was a "Pause" in the sentencing proceedings. (Tr. p. 877, line 6). The transcript next reflects:

> THE COURT: All right. I've signed the sentencing sheets and orders. Obviously the lead indictment, the most severe charge is the murder charge. Burglary is secondary to that. And then the weapon's charge is secondary to that as well.
>
> On indictment 1604, which is the murder charge, the sentence of the Court is that Mr. Brisbon be confined to the Department of Corrections for a determinate term of 40 years.

> On the weapon's charge, five years. And that's consecutive to the 40. He gets credit on both of those for 1531 days.
>
> On the burglary it's 15 years. That's concurrent.

(Tr. p. 877, lines 7-20).

The sentencing sheet reflects that Judge Griffith struck through "concurrent" and indicated consecutive for the 5-year sentence. (R. * [sentencing sheet]).

On March 4, 2022, defense counsel filed a post-trial motion. (R. *). Defense counsel first noted the convictions and the sentences – including the "5 year consecutive" sentence "on the weapon charge." (R. p. *). Defense counsel then moved for a new trial based on "all prior motions and objections made during trial" and an "assertion that a reasonable trier of fact would not find the defendant guilty beyond a reasonable doubt…." (R. p. *). There was no mention of a potential error regarding the consecutive 5-year sentence, nor did the defense seek reconsideration of the sentence.

Discussion:

"In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge." *State v. Dunbar,* 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003). *See also State v. Passmore,* 363 S.C. 568, 583, 611 S.E.2d 273, 281 (Ct. App. 2005) ("Our courts have 'consistently refused to apply the plain error rule.'") (quoting *Jackson v. Speed,* 326 S.C. 289, 306, 486 S.E.2d 750, 759 (1997)). Consequently, in most circumstances, "a challenge to sentencing must be raised at trial, or the issue will not be preserved for appellate review." *State v. Johnston,* 333 S.C. 459, 462, 510 S.E.2d 423, 425 (1999).

An exception to the general preservation rule exists to allow swift address of a sentencing issue where "there is the real threat that Defendant will remain incarcerated beyond the legal

sentence due to the additional time it will take to pursue" post-conviction relief. *Johnston,* 333 S.C. at 464, 510 S.E.2d at 425. Further, if an illegal sentence is imposed, and the state concedes the sentence in question is actually illegal, then an "appellate court may correct that sentence on direct appeal or remand the issue to the trial court even if the defendant did not object to the sentence at trial and even if there is no real threat of incarceration beyond the limits of a legal sentence." *State v. Plumer*, 439 S.C. 346, 351, 887 S.E.2d 134, 137 (2023). An illegal sentence, in such context, is "a sentence in excess of that permitted by law, even if there is no real threat of incarceration beyond the legal sentence." *Id.*, at 350, 887 S.E.2d at 137 n. 1.

Here, Appellant did not object to a perceived misunderstanding on whether the 5-year sentence had to be consecutive, but the sentence was not illegal – the statute would allow for the sentence to be imposed.

a. *The Statutory Provision*

S.C. Code Ann. § 16-23-490 provides for a 5-year sentence "in addition to the punishment provided for the principal [violent] crime," when "a person" has been convicted of being "in possession of a firearm … during the commission of [that] violent crime…." Section (A) prohibits imposition of the sentence "where the death penalty or a life sentence without parole is imposed for the violent crime." Section (B) provides, where that is not the case, that "[s]ervice of the five-year sentence is mandatory unless a longer mandatory minimum term of imprisonment is provided by law for the violent crime," and that "[t]he court may impose this mandatory five-year sentence to run consecutively or concurrently."

b. *The Sentence Imposed is Not Illegal and No Exception is Available to Excuse the Failure to Object.*

Petitioner was not sentenced to death or life without parole; thus, Section (A) does not prohibit a sentence. As such, the sentence imposed is not illegal because it is not "in excess of

law." *See Plumer,* at 350, 887 S.E.2d at 137 n. 1. Therefore, based on our issue preservation rules, Appellant was required to object, and failing to do so bars review on appeal. *State v. Shumate*, 276 S.C. 46, 47, 275 S.E.2d 288, 288 (1981) ("A defendant's failure to timely object to or seek modification of his sentence in the trial court precludes him from presenting his objection for the first time on appeal.").

Further, the record is not clear that Judge Griffith's initial belief that the term was required to be consecutive – which was stated on the record – was not corrected. Indeed, defense counsel expressed he did not believe that to be the case (*i.e.,* a required consecutive term); there is a noted pause in the proceedings; there is no objection at sentencing even after the judge's question; the sentencing sheet shows a strike through in concurrent; and, notably, there was not a motion to reconsider the sentence. At best, it is unclear what happened after the comment, if anything, but it is clear that the specter of an incorrect understanding was known, and some objection could have been made if counsel believed that it was not corrected.

Relying upon and applying a procedural bar in these circumstances actually underscores and preserves two primary goals for the court's preservation requirements – to allow the trial judge the fair opportunity to consider the matter in the first instance, and to better develop the record for an appellate court's review. *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) ("Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review.") (quoting *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.,* 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct.App.2006)). The bar should be applied.

Even while acknowledging the lack of objection, Appellant nonetheless suggests "judicial economy" should allow the appellate court to reach the matter rather than waiting for further development in post-conviction relief, (*see* Appellant's Brief, p. 6), that misapprehends the actual purported error at hand, and the need for factual development.

As noted above, the sentence is not illegal. Therefore, unlike *Plumer*, there is not a "fix it now, or fix it later" concept at issue. Of note on this point is the observation in *Plumer* that "it is inefficient and a waste of judicial resources ***to delay the inevitable*** by requiring the appellant to file a post-conviction relief action or petition for a writ of habeas corpus." 439 S.C. at 351, 887 S.E.2d at 137 (emphasis added). Here, upon additional information, it could be determined that there is no abuse of discretion at all, and the sentence could be affirmed as imposed because the judge did, in fact, exercise his discretion. Moreover, vastly different from *Plumer*, if vacated and remanded, the same sentence could still be imposed as nothing prevents the imposition of either a concurrent or consecutive sentence. The "inevitable" result referenced in *Plumer* does not exist here.

Appellant relies upon *State v. Vick,* 384 S.C. 189, 682 S.E.2d 275 (Ct. App. 2009), and *State v. Bonner*, 400 S.C. 561 735 S.E.2d 525 (Ct.App. 2012) to support its argument for dispensing with the preservation rules. (Appellant's Brief, pp. 6-7). However, those cases, like *Plumer* refer to circumstances where the imposition of a sentence is not possible. *Vick*, 384 S.C. at 202, 682 S.E.2d at 282 (kidnapping sentence not possible under "§ 16–3–910 because the defendant received a concurrent sentence under the murder statute"); *Bonner*, 400 S.C. at 565, 735 S.E.2d at 527 (juvenile sentencing issue, LWOP sentence for non-homicide conviction). Notably, in support of judicial economy, the *Vick* panel cited two cases: *S. Bell Tel. & Tel. Co. v. Hamm,* 306 S.C. 70, 75, 409 S.E.2d 775, 778 (1991) and *Jeter v. S.C. Dep't of Transp.,* 369

S.C. 433, 441 n. 6, 633 S.E.2d 143, 147 n. 6 (2006). Both of those cases are civil cases, and do not contemplate an option for post-conviction relief. Here, in a criminal appeal context where post-conviction relief is available for issues not preserved for direct appeal review, appellant should not be excused from adherence to the general preservation rules. Should appellate courts routinely cite judicial economy to address unpreserved errors, the exception becomes the rule, and that would undermine the scope and purpose of the Post-Conviction Relief Act, see S.C. Code §§ 17-27-10 et.seq., and our state supreme court's rejection of the clear error rule. Appellant's argument should be rejected.

But if not rejected for the reasons argued above, the Court should consider what type of remand would best serve the concept of judicial economy. Appellant asserts that the sentence should be vacated, and the matter remanded for resentencing. (Appellant's Brief, p. 7). But to reach that conclusion, Appellant must assume error because whether "the judge based his sentencing structure on a mistake of law" is not clear. (*See* Appellant's Brief, p. 7). A more prudent course would be a limited remand to Judge Griffith to clarify whether there was a mistake of law or an intentional exercise of known discretion. Anything else would relieve Appellant of the duty of showing an actual error of law.

## CONCLUSION

For all the foregoing reasons, it is respectfully submitted that this Court should find the issue raised is procedurally barred and affirm on appeal. Alternatively, should a remand be ordered, this Court should limit such remand and direct the remand be for the limited purpose of determining whether discretion was actually exercised.

Respectfully submitted,

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July 6, 2023

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**PROOF OF SERVICE**

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The undersigned hereby certifies that, on July 6, 2023, she served Appellant's counsel, Assistant Appellate Defender Breen R. Stevens, with a scanned copy of the Initial Brief of Respondent sending the same to the email address listed below pursuant to Rule 262(c)(3), SCACR and Section (d)(1) of the South Carolina Supreme Court's August 25, 2021 order (Order No. 2021-08-25-02):

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