THE STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO THE COURT OF APPEALS
Appeal from Charleston County
Honorable J.C. Nicholson, Jr., Circuit Court Judge

Opinion No. 2015-UP-217 (S.C. Ct. App. filed May 8, 2015)

Appellate Case No. 2015-001576

The State of South Carolina,

Respondent-Petitioner,

v.

Venancio Diaz Perez,

Petitioner-Respondent.

BRIEF OF PETITIONER (RESPONDENT-PETITIONER)

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I.

Inasmuch as the Record on Appeal clearly establishes the sentence in this case was not based upon Petitioner-Respondent's exercise of his right to trial by jury, but upon the trial court's proper consideration of the crimes of which Petitioner-Respondent was convicted and the evidence presented, did the Court of Appeals err in setting aside Petitioner-Respondent's sentences and remanding for resentencing, especially since such relief exceeded that requested by Petitioner-Respondent?

STATEMENT OF THE CASE

Petitioner-Respondent was indicted for the offense of lewd act on a minor (Indictment 2010-GS-10-7731) and criminal sexual conduct with a minor in the first degree (Indictment 2010-GS-10-730). He pled not guilty and proceeded to trial by jury on January 14, 2013. At the conclusion of his trial[1], the jury found him guilty of lewd act on a minor and assault and battery of a high and aggravated nature (hereinafter, ABHAN), as a lesser-included offense of criminal sexual conduct with a minor in the first degree (hereinafter "CSC with a minor first degree"). The trial court sentenced Petitioner-Respondent to a 15 year term of incarceration on the lewd act conviction and a consecutive 10 year sentence on the ABHAN conviction. The trial court also ordered

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[1] In order to provide this Court with a context for the argument to follow, the following is a very brief summary of Victim's testimony. Victim in this case was just about to turn nine in 2010 when Victim (referred to as Minor 1 in the appellate record) and her much younger brother began being taken care of by a babysitter, the wife of Petitioner-Respondent, at the babysitter's and Petitioner-Respondent's home after school and in the summer. (JA p. 133, line 25 – p. 135, line 9; p. 135, lines 17-21; p. 136, lines 8-12; p. 137, line 20 – p. 138, line 7; p. 139, lines 6-10; p. 164, line 19 – p. 165, line 3.) Although Petitioner-Respondent had a job, he was sometimes at home when Victim was there. (JA p. 135, lines 10-18.) Victim testified that she stopped going to the babysitter's because Petitioner-Respondent hurt her. (JA p. 139, lines 1-5.)

Victim testified about several different, specific incidents during which: Petitioner-Respondent grabbed her and took her into the bedroom closet where he put his hand under Victim's clothes and stuck his finger inside her (JA p. 136, lines 13-20; p. 139, line 11 – p. 141, line 15); Petitioner-Respondent grabbed her and took her into the closet where he touched her front and her bottom (JA p. 141, line 23 – p. 143, line 6); Petitioner-Respondent was in a closet with her and touched her, under her clothes, on her front and her bottom with his hands (JA p. 152, line 9 – p. 154, line 2); Petitioner-Respondent stuck out his private so only she could see it (JA p. 147, line 21 – p. 149, line 18); Petitioner-Respondent locked Victim in the bathroom with him and then touched her on her breasts with his hands and mouth, pulled her blouse up and bit her on her breast, and used his hands to touch her "front," which is what she uses to go to the bathroom (JA p. 150, line 1 – p. 151, line 25); and Petitioner-Respondent chased her until she went under the bed on which her brother was sleeping where Petitioner-Respondent could not reach her (JA p. 154, line 9 – p. 156, line 4). Victim said that sometimes Petitioner-Respondent would bribe her by offering her money if she would let him keep touching her, but she never asked for money and he never gave her any money. (JA p. 156, lines 5 – 22.)

Petitioner-Respondent to be placed on the Central Registry of Child Abuse and Neglect on the lewd act conviction.

Petitioner-Respondent appealed his convictions and sentences, raising three issues on appeal – two addressing evidentiary rulings and one addressing sentencing. The Court of Appeals affirmed the convictions, but reversed the case for resentencing. *State v. Perez*, Op. No. 2015-UP-217 (S.C. Ct. App. filed May 8, 2015). On June 16, 2016, this Court granted the Respondent-Petitioner's petition seeking a writ of *certiorari* to review that part of the Court of Appeals' decision addressing and reversing the sentences imposed and remanding the case for resentencing.[2]

[2] In the same order, this Court granted Petitioner-Respondent's petition seeking a writ of *certiorari* to review the other portions of the Court of Appeals' decision.

ARGUMENT

Inasmuch as the Record on Appeal clearly establishes the sentence in this case was not based upon Petitioner-Respondent's exercise of his right to trial by jury, but upon the trial court's proper consideration of the crimes of which Petitioner-Respondent was convicted and the evidence presented, the Court of Appeals erred in setting aside Petitioner-Respondent's sentences and remanding the case for resentencing.

Prior to the trial of this case (and prior to hearing the witnesses testify), the parties discussed a guilty plea with the trial court. During that discussion, the trial court told counsel that if he were to try Petitioner-Respondent without a jury, he would find him guilty of lewd act and ABHAN. The trial court also indicated to counsel that if Petitioner-Respondent were to plead guilty on the indictment for lewd act (with the other charge being dismissed), the trial court would impose a sentence in the 10-15 year range. (JA p. 554, line 16 – p. 555, line 22.)

At the conclusion of his jury trial at which the victim and others testified, Petitioner-Respondent was found guilty of lewd act on a minor and ABHAN, as a lesser-included offense on the indictment for CSC with a minor first degree. (JA p. 535, line 2 – p. 536, line 12; p. 537, lines 11-19.) These offenses of conviction carried, respectfully, sentences of up to 15 years and up to 10 years, meaning that Petitioner-Respondent faced a possible maximum of 25 years if sentenced consecutively. The trial court sentenced Petitioner-Respondent to a 15-year term of incarceration on the lewd act conviction and a consecutive 10-year sentence on the ABHAN conviction for a total, cumulative sentence of 25 years. The trial court also ordered that Petitioner-Respondent be placed on the

Central Registry of Child Abuse and Neglect for the lewd act conviction. (JA p. 553, line 6 – p. 554, line 5.)

Thereafter, Petitioner-Respondent argued for a sentence of time served (918 days) and presented the following grounds as supporting such a sentence:

- Petitioner-Respondent's lack of a prior criminal record;
- the fact that the conduct at issue was "so" contrary to Petitioner-Respondents past conduct;
- the fact that Petitioner-Respondent was a hard worker and has worked hard to provide for his family;
- the fact that Petitioner-Respondent and his children love and will miss each other;
- the fact that Petitioner-Respondent was a family man who put his concern for his friends and family above his own;
- the fact that Petitioner-Respondent has carried himself well and showed a great deal of restraint, self-control and kindness since his arrest;
- Petitioner-Respondent's imminent deportation back home to Mexico as a result of the convictions and how that may be considered punishment in and of itself;
- the fact that Petitioner-Respondent, as a convicted child molester, will have a "rough time" in prison; and
- the fact that Petitioner-Respondent's beautiful family would be wrecked by his conviction and sentence.

(JA p. 540, line 21 – p. 546, line 9; p. 550, lines 6-24.) Defense counsel also argued that, because there were no specific findings by the jury, the trial court should, under *Apprendi*

v. New Jersey, 530 U.S. 466 (2000), assume the jury only found the least serious possible acts necessary to convict Petitioner-Respondent of lewd act upon a minor to have been proved. (JA p. 546, lines 10-24.)

The trial court then heard fromVictim's mother, who spoke about the impact of Petitioner-Respondent's assaults upon her daughter and her. She talked about Victim's nightmares and counseling, as well as about her guilt over not only placing Victim in Petitioner-Respondent's home where she was assaulted and her failure to see what was going on, but also her guilt about recommending the daycare services of Petitioner-Respondent's wife and another little girl being assaulted as a result of that. (JA p. 551, line 5 – p. 552, line 2.)

The Assistant Solicitor then addressed the trial court. She said that, while the defense had spoken about the possibility that Petitioner-Respondent might be harmed if sent to prison, Petitioner-Respondent took advantage of very vulnerable, young children and showed them no mercy. She stated that, in terms of lewd acts, this case involved very serious acts – acts that were repetitive and involved a lot more in terms of the ABHAN and indecent liberties. While she expressed her sorrow for Petitioner-Respondent's family, the Assistant Solicitor pointed out that their suffering was the result of Petitioner-Respondent's behavior. (JA p. 552, line 14 – p. 553, line 5.) The Assistant Solicitor ended her argument on sentencing by asking the trial court to impose consecutive sentences to reflect the repetitive and long-term nature of the crimes. (JA p. 552, line 25 – p. 553, line 3.)

The trial court sentenced Petitioner-Respondent to a 15-year term of incarceration on the lewd act conviction and a consecutive 10-year sentence on the ABHAN conviction

for a total, cumulative sentence of 25 years. The trial court also ordered that Petitioner-Respondent be placed on the Central Registry of Child Abuse and Neglect for the lewd act conviction. (JA p. 553, line 6 – p. 554, line 5.) The following colloquy then occurred.

> [DEFENSE COUNSEL]: Your Honor, one more matter. I normally don't bring this up but given the sentence we would object to it as being vindictive.
>
> THE COURT: I'm sorry, what now?
>
> [DEFENSE COUNSEL]: *We object to the sentences being run consecutively as being vindictive and punishing [Petitioner-Respondent] for going to trial.* I think there were – and this is where I'm a little reluctant to go into detail but we did have – I think I have to, to preserve [Petitioner-Respondent]'s rights to make the record clear. We did have an in-chambers conference where we talked about potential pleas –
>
> THE COURT: I didn't have an in-camera conference. I was talking to the two of you unofficially, off the record trying to work out a plea. Now, if you want to put that on the record I'll put that on the record.
>
> I very clearly told you that if I was trying this case nonjury I would find him guilty of lewd act and high and aggravated. If you wanted to enter a plea I would do away with the high and aggravated and let him plead to the lewd act and give you a range of 10 to 15.
>
> [DEFENSE COUNSEL]: Yes, sir.
>
> THE COURT: That's what I told you.
>
> [DEFENSE COUNSEL]: Yes, sir.
>
> THE COURT: Now, if you want to take exception to that, that's fine. That was an informal conference where I was trying to assist you and the solicitor in dismissing the case. Is that what you were doing?
>
> [DEFENSE COUNSEL]: Yes, sir.
>
> THE COURT: Because if it is it's the last time I will speak with you without a court reporter present.
>
> [DEFENSE COUNSEL]: I apologize. But, yes, sir. I think I have to.

THE COURT: Pardon? It was not an in-camera hearing. I was trying facilitate [sic] the disposition of this case.

[DEFENSE COUNSEL]: I apologize if I mischaracterized a hearing. You are correct. It was unofficial. It was off the record, but that was what was said.

THE COURT: Pardon?

[DEFENSE COUNSEL]: That's an accurate summary of what was said.

THE COURT: Okay. Now, do you want to make a motion on that, what I put on the record?

[DEFENSE COUNSEL]: Yes, sir.

THE COURT: What's your motion?

[DEFENSE COUNSEL]: That running these sentences consecutively is punishing [Petitioner-Respondent] for his right to go to trial.

THE COURT: Motion is denied. This Court is of the opinion that the little girl was abused. This Court is also of the opinion that there was penetration, digital penetration based upon her sworn testimony. The jury has found her not guilty.

The Court's of the opinion he's guilty of all the charges from the testimony I've heard. So it's not any abuse in giving him the consecutive. You understand?

[DEFENSE COUNSEL]: Yes, sir.

THE COURT: All right. Motion denied....

(Emphasis added.) (JA p. 554, line 7 – p. 556, line 14).

Before the Court of Appeals, Petitioner-Respondent argued the trial court's sentence was due to vindictiveness arising from Petitioner-Respondent's exercise of his right to a jury trial, and the Court of Appeals summarily agreed.

> Perez argues the trial court issued a sentence that was vindictive and violated Perez's due process rights. We agree and remand for resentencing.
>
> "A [trial court] or other sentencing authority is to be accorded very wide discretion in determining an

> appropriate sentence, and must be permitted to consider any and all information that reasonably might bear on the proper sentence for the particular defendant, given the crime committed." *State v. Hicks,* 377 S.C. 322, 325, 659 S.E.2d 499, 500 (Ct. App. 2008). "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). A trial court abuses its discretion in sentencing when it considers the fact that the defendant exercised his right to a jury trial. *State v. Hazel,* 317 S.C. 368, 370, 453 S.E.2d 879, 880 (1995).
>
> We find there is a reasonable likelihood the trial court sentenced Perez on the improper basis of Perez exercising his right to go to trial. Further, the record suggests a basis for the sentence was the fact that the trial court thought Perez was guilty of the first-degree criminal sexual conduct offense for which he was not convicted. The trial court's comments justifying the increased sentence do not convince us that the sentence was imposed free of an underlying punishment for Perez going to trial. Accordingly, we remand for resentencing. *See State v. Brouwer,* 346 S.C. 375, 388, 550 S.E.2d 915, 922 (Ct. App. 2001) ("[W]e believe the mere disavowal of wrongful intent cannot remove the taint inherent in the court's commentary, especially since the record fails to reflect an otherwise appropriate basis for Brouwer's disparate sentence.").

State v. Perez, Op. No. 2015-UP-217 at 4-5.

The Honorable John Few, Chief Judge, disagreeing with the majority's analysis of and conclusion on the sentencing issue, filed a concurring opinion in which he essentially dissented from the majority's analysis and holding on the sentencing issue.

> I agree with the majority's decision to affirm the first two issues raised by Perez. As for the sentencing issue, however, I would remand for the trial court to clarify the basis on which it sentenced Perez. When the circumstances of a sentencing proceeding raise the question of whether the sentencing judge imposed a sentence on an improper basis — such as facts not proven by the State or charges for which the defendant was not convicted—but this court cannot determine from the record whether the sentence was

> improper, I believe the appropriate remedy is to remand to the sentencing judge to clarify the basis upon which the sentence was imposed. Here, one portion of the sentencing judge's comments raises the question of whether the sentence was imposed on an improper basis:
>
> > This court is... of the opinion that there was penetration, digital penetration based on her sworn testimony. The jury has found [him] not guilty. The court [is] of the opinion he's guilty of all the charges.
>
> Comparing these comments with others that indicate a proper basis for sentencing, it is unclear whether the judge imposed the sentence on an improper basis. Thus, I would remand the case to the sentencing judge for clarification as to whether the sentence was imposed on the basis of facts not proven by the State or charges for which the defendant was not convicted.

Id., at 6-7.

I. The Court of Appeals Exceeded its Jurisdiction in Disturbing Petitioner-Respondent's Sentences, which were within the Limits Prescribed by Law and Not the Result of Partiality, Prejudice, Oppression, or Corrupt Motive.

The trial courts of this state have wide discretion in determining the sentence to be imposed upon a conviction. *State v. Franklin,* 267 S.C. 240, 226 S.E.2d 896 (1976). Likewise, whether multiple sentences should run consecutively or concurrently is a matter left to the sound discretion of the trial court, subject to any statutory restriction. *State v. De La Cruz*, 302 S.C. 13, 393 S.E.2d 184 (1990); *State v. Barton*, 325 S.C. 522, 531, 481 S.E.2d 439, 444 (Ct. App. 1997).

Our state appellate courts have no jurisdiction to disturb, because of alleged excessiveness, a sentence which is within the limits prescribed by statute, unless: (a) the statute itself violates the constitutional prohibition against cruel and unusual punishment, or (b) the sentence is the result of partiality, prejudice, oppression, or corrupt motive.

Garrett v. State, 320 S.C. 353, 356, 465 S.E.2d 349, 350 (1995); *Stockton v. Leeke,* 269 S.C. 459, 461-462, 237 S.E.2d 896, 897 (1977).

A. The conclusion of the Court of Appeals that the sentences imposed by the trial court were based upon Petitioner-Respondent's exercise of his right to a trial is not supported by the appellate record.

The Court of Appeals concluded there was a reasonable likelihood the trial court sentenced Petitioner-Respondent on the improper basis of Petitioner-Respondent exercising his right to go to trial. The Court failed to set forth a factual basis for this conclusion and, as a review of the record before that Court establishes, it could not have done so. The record is absolutely devoid of any evidence that the trial court based any part of its sentence on Petitioner-Respondent exercising his right to go to trial.

Rather than supporting a finding that the trial court acted with partiality, prejudice, oppression, or corrupt motive in imposing the consecutive sentences, the record supports a finding that the trial court sentenced Petitioner-Respondent based upon what actually happened at his trial:

- guilty verdicts for both lewd act and ABHAN, *and*
- trial testimony from the victim as to what Petitioner-Respondent had done to her, *and*
- the oral victim impact statement of the victim's mother, *and*
- the defense's proffered mitigation and justification for lower sentences, *and*
- the State's proffered justification and request for high and consecutive sentences.

The record before the Court of Appeals also established the 15-year sentence imposed upon Petitioner-Respondent for his lewd act conviction *was within the 10-15 year range mentioned during plea discussions for that same offense*. Therefore, the fact the trial court imposed a 15-year sentence on the lewd act conviction – which not only was within the range mentioned during plea discussions, but less than the statutory maximum for the offense – clearly does not establish vindictiveness for Petitioner-Respondent's exercise of his right to trial on the lewd act charge, and Petitioner-Respondent presented no evidence to the Court of Appeals to the contrary.

Petitioner-Respondent's whole argument is premised on the fact that – after he refused a plea offer that would have resulted in his conviction of only one charge, lewd act, with a 15-year sentence and dismissal of the CSC charge – he was convicted at trial of both lewd act and ABHAN as a lesser-included offense of the CSC charge, and received a cumulative sentence of 25 years. He claimed, without citation to any authority, that his alone established vindictiveness on the part of the trial court: "This scenario on its face smacks of punishment for [Respondent] exercising his right to trial by jury." (JA p. 584.)

What Petitioner-Respondent in his brief filed with the Court of Appeals recognized, but ignored, and what the Court of Appeals failed to even acknowledge, is that the only "increase" in sentencing from what was mentioned during plea discussions was due to Petitioner-Respondent's conviction of *an additional offense not considered as part of the plea discussions*. For the second conviction – of ABHAN – the trial court imposed a 10-year consecutive sentence. Therefore, it is only with this second conviction

and the impact of the resulting consecutive sentence on it that Petitioner-Respondent has truly taken issue.

The imposition of the consecutive 10 years on the second conviction does not, by itself, indicate any vindictiveness due to Petitioner-Respondent's exercise of his right to trial, there is nothing in the record upon which to base such a motive, and there is not and should not be a presumption of vindictiveness. *See Alabama v. Smith*, 490 U.S 794 (1989) (because of greater amount of sentencing information that trial generally affords as compared to guilty plea, there is no basis for presumption of vindictiveness where second sentence imposed after trial is heavier than first sentence imposed after guilty plea). Instead, in addition to the fact that Petitioner-Respondent was convicted of two charges and the trial court was able to hear the evidence presented throughout the trial, the record reflects that counsel for the State and the defense presented evidence and argument in both mitigation and aggravation at sentencing. (JA p. 540, line 21 – p. 553, line 3 summarized at pp. 6-7.)

The Court of Appeals' assumption of vindictiveness in sentencing is without evidentiary or legal support. *See United States v. Goodwin,* 457 U.S. 368 (1982) (no presumption of prosecutorial vindictiveness when a prosecutor files additional charges after a defendant refuses a plea bargain).

B. The conclusion of the Court of Appeals that the sentence imposed by the trial court on the conviction for the lesser-included offense of ABHAN conviction was based upon the trial court's consideration of evidence that the victim was digitally penetrated by Respondent, even though the jury found him guilty of the lesser-included on the CSC with a minor first degree indictment, and that such was improper, is not supported by the record on appeal.

The Court of Appeals also concluded there was a second improper basis for the trial court's sentence on the ABHAN conviction, *i.e.*, the trial court's belief that the victim was digitally penetrated by Petitioner-Respondent even though the jury convicted him of the lesser-included offense on the CSC with a minor first degree indictment. In reaching this conclusion, that Court, overlooking the context in which the statement was made, focused on a *single comment* made by the trial court. That comment was made during the following colloquy.

> This Court is of the opinion that the little girl was abused. *This Court is also of the opinion that there was penetration, digital penetration based upon her sworn testimony.* The jury has found her not guilty.
>
> The Court's of the opinion he's guilty of all the charges from the testimony I've heard. So it's not any abuse in giving him the consecutive. You understand?

(Emphasis added.) (JA p. 556, lines 5-12). The Court of Appeals, apparently thinking it of no import, ignored the fact that this comment was made after Petitioner-Respondent had been sentenced and when the trial court was ruling on Petitioner-Respondent's objection to the consecutive sentencing based on alleged vindictiveness. This was error. The Court of Appeals should have considered the context in which the statements were made to determine their meaning and impact. *See Vasquez v. State*, 388 S.C. 447, 698 S.E.2d 561 (2010) (appellate court, in reviewing challenge to prosecution's closing argument, must look at challenged statements in context of entire argument); *State v. Taylor,* 333 S.C. 159, 177, 508 S.E.2d 870, 879 (1998) (in determining materiality of nondisclosed evidence for *Brady* purposes, appellate court must consider evidence in context of entire record).

When analyzed in context of the colloquy that had occurred, it is much more reasonable to interpret or understand this comment as no more than an attempt by the trial court to explain why the sentences on the charges of conviction were reasonable: (1) the court believed the victim was truthful in testifying that Petitioner-Respondent had digitally penetrated her, but that the jury had chosen to find him not guilty of the greater offense and guilty of the lesser, and (2) the evidence, which included digital penetration, supported the jury's guilty verdicts. In context, the trial court's comments do not reflect any improper motive or prejudice in the sentence imposed and were within the range allowed by law.[3] The sentences were proper and the Court of Appeals erred in not so concluding.

C. Even if the Court of Appeals was correct in concluding the sentence imposed by the trial court was based upon the trial court's belief that the victim was digitally penetrated by Respondent, when the jury found him guilty of the lesser-included offense of ABHAN on the CSC with a minor first degree indictment, such would not render the sentence improper.

The Court of Appeals concluded, for purposes of its holding, that not only did the trial court believe Petitioner-Respondent was guilty of the higher crime despite the jury's determination of guilty on the lesser, but that it was error for the trial court to consider the victim's testimony of penetration.

> Further, the record suggests a basis for the sentence was the fact that the trial court thought Perez was guilty of the first-degree criminal sexual conduct offense for which he was not convicted.

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[3] In *Apprendi v. New Jersey,* 530 U.S. 466, 490 (2000), the Supreme Court of the United State held that a defendant's sentence may not be increased beyond the prescribed statutory maximum for any fact, other than a prior conviction, that is not submitted to a jury, and proved beyond a reasonable doubt. Because the sentences imposed by the trial court were within the statutory maximum, *Apprendi* is inapplicable to this case.

State v. Perez, at 5. Yet, there is no legal authority to warrant such a conclusion.

As recognized by the Supreme Court of the United States, "[i]t is now well established that a judge or other sentencing authority is to be accorded very wide discretion in determining an appropriate sentence. The sentencing court or jury must be permitted to consider any and all information that reasonably might bear on the proper sentence for the particular defendant, given the crime committed." *Wasman v. United States*, 468 U.S. 559, 563 (1984). That Court has explained the need for such wide discretion in sentencing, as compared to the more stringent evidentiary considerations in guilt determinations, as follows.

> Tribunals passing on the guilt of a defendant always have been hedged in by strict evidentiary procedural limitations. But both before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law.[5] Out-of-court affidavits have been used frequently, and of course in the smaller communities sentencing judges naturally have in mind their knowledge of the personalities and backgrounds of convicted offenders....
>
> In addition to the historical basis for different evidentiary rules governing trial and sentencing procedures there are sound practical reasons for the distinction. In a trial before verdict the issue is whether a defendant is guilty of having engaged in certain criminal conduct of which he has been specifically accused. Rules of evidence have been fashioned for criminal trials which narrowly confine the trial contest to evidence that is strictly relevant to the particular offense charged. These rules rest in part on a necessity to prevent a time consuming and confusing trial of collateral issues. They were also designed to prevent tribunals concerned solely with the issue of guilt of a particular offense from being influenced to convict for that offense by evidence that the defendant had habitually engaged in other misconduct. A sentencing judge, however,

> is not confined to the narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined. Highly relevant – if not essential – to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics. And modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial.

(Footnotes omitted.) *Williams v. New York*, 337 U.S. 241, 246-247 (1949).

The South Carolina appellate courts have also clearly recognized that trial court musts be allowed to consider any and all information that reasonably might bear on the proper sentence to be given to a particular defendant.

> ...[B]efore making [a sentencing] determination, a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider or the source from which it may come.

(Emphasis added.) *State v. Franklin,* 267 S.C. at 246, 226 S.E.2d at 898 (1976). See also *In re M.B.H.*, 387 S.C. 323, 326, 692 S.E.2d 541, 542 (2010);State v. Gulledge, 326 S.C. 220487 S.E.2d 590 (1997); *State v. Hicks*, 377 S.C. 322, 325, 659 S.E.2d 499, 500 (Ct. App. 2008) ("A judge or other sentencing authority is to be accorded very wide discretion in determining an appropriate sentence, and must be permitted to consider any and all information that reasonably might bear on the proper sentence for the particular defendant, given the crime committed.").

Clearly, these cases not only allow for a court to consider all evidence properly admitted during the course of a trial, but require consideration of evidence offered at trial that reasonably bears on the proper sentence for a defendant. Therefore, it was clearly not

improper for the trial court here, in determining what sentence to impose, to consider all of the evidence presented at trial – and, in this case, that included the victim's testimony of penetration – as well as the sentencing arguments made by the parties. The Court of Appeals erred in concluding otherwise and its holding is in conflict with this Court's prior decisions – including those in *State v. Gulledge*, *supra*; *State v. Franklin*, *supra*, and *In re M.B.H.*, *supra* -- and the opinions of the Supreme Court of the United States in *Wasman v. United States*, *supra*, and *Williams v. New York*, *supra*.

Moreover, the Court of Appeals was incorrect in assuming that the evidence of penetration was irrelevant to the jury's finding of guilt on the less-included offense of ABHAN. The common law offense of ABHAN requires the State to prove beyond a reasonable doubt that a defendant committed an assault and battery accompanied by circumstances of aggravation. As the appellate record reveals, the jury was instructed by the trial court that the taking of indecent liberties or familiarities with a female is a circumstance of aggravation. (JA p. 525, lines 2-4). South Carolina does not require the use of special verdict forms in criminal cases (requiring a jury to make special written findings upon each element of the charged crime), and none was used in this case. Without such, it is impossible to know whether the jury concluded the State had not proven an act of penetration occurred or whether they concluded an act of penetration did occur, but used that evidence to conclude Petitioner-Respondent committed ABHAN rather than the greater offense.[4]

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[4] And, as at least one court has recognized, a jury's finding of guilt on a lesser-included offense does not necessarily mean the jury did not find the prosecution failed to prove the elements of the greater offense beyond a reasonable doubt.

> Juries in criminal cases often find defendants not guilty or find persons who have committed the charged

However, even if the trial court's consideration of the victim's testimony of penetration was improper, it was immaterial and nonprejudicial since the record here – unlike in *State v. Brouwer*, 346 S.C. 375, 550 S.E.2d 915 (Ct. App. 2001), relied upon the Court of Appeals – reflects an otherwise appropriate basis for the trial court's exercise of discretion to impose the sentence it did. See *State v. Follin*, 352 S.C. 235, 573 S.E.2d 812 (Ct. App. 2002). The Court of Appeals overlooked the fact that – *in addition to Petitioner-Respondent having been convicted of two crimes when the plea negotiations only involved the possibility of one conviction* – the trial court here had the benefit of having heard the complete and full presentation of evidence during the trial. The Record establishes that Petitioner-Respondent not only repeatedly abused the young and

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> greater offense guilty of only a lesser offense in the face of the evidence for reasons satisfactory to them. 'The very essence of the jury's function is its role as spokesman for the community conscience in determining whether or not blame can be imposed.' *United States v. Dougherty*, 154 U.S. App. D.C. 76, 105, 473 F.2d 1113, 1142 (1972) (Bazelon, C.J., dissenting). The observation was made by the United States Supreme Court in *Duncan v. Louisiana*, 391 U.S. 145, 157, 88 S. Ct. 1444, 1451, 20 L. Ed. 2d 491 (1968) that:
>
> > 'the most recent and exhaustive study of the jury (Kalven and Zeisel, The American Jury (1966)) in criminal cases concluded that juries do understand the evidence and come to sound conclusions in most of the cases presented to them and that when juries differ with the result at which the judge would have arrived, it is usually because they are serving some of the very purposes for which they were created and for which they are now employed.'

People v. Chamblis, 395 Mich. 408, 426, 236 N.W.2d 473, 482 (1975), *overruled on other grounds, People v. Cornell*, 466 Mich. 335, 646 N.W.2d 127 (2002), and *People v. Stephens*, 416 Mich. 252, 330 N.W.2d 675 (1982).

vulnerable[5] victim in this case, but also, as the spouse of the victim's babysitter, took advantage of a position of trust. Such was a clearly appropriate basis for the sentences imposed in this case. *Cf. State v. Brouwer, supra.* The Court of Appeals erred in setting aside Petitioner-Respondent's sentences.

D. Even if the Court of Appeals was correct in concluding the sentence imposed by the trial court on the ABHAN conviction was improper, it erred in setting aside both sentences and remanding the case for resentencing on both convictions.

As discussed earlier, the record before the Court of Appeals establishes the 15-year sentence imposed upon Petitioner-Respondent for his lewd act conviction was within the 10-15 year range mentioned during plea discussions for that same offense and the only "increase" in sentencing, from what was mentioned during plea discussions, was due to Petitioner-Respondent's conviction of an additional offense – of ABHAN – not considered as part of the plea discussions, for which the trial court imposed a 10-year consecutive sentence. The attack upon Petitioner-Respondent's sentence for vindictiveness thus is focused solely on the sentence imposed upon the ABHAN conviction such that even if the Court of Appeals correctly found error with or had concerns about that sentence, only that sentence should be impacted. The sentence on the lewd act conviction should stand as it was within the range contemplated by the plea negotiations.

If the Court of Appeals determination that the sentence on the ABHAN conviction was based on vindictiveness is upheld by this Court as correct, then only the sentence for ABHAN should be set aside and the case remanded for sentencing on only that

[5] Victim was vulnerable not only because of her age, but also because the abuse occurred while she was at her babysitter's residence (a place where she should have been safe).

conviction. *State v. Hill*, 254 S.C. 321, 331, 175 S.E.2d 227, 232 (1970) (imposition of illegal sentence requires remand for resentencing). If, on the other hand, this Court concludes that the sentence was not the result of vindictiveness, but that the comments made by the trial court in ruling on the vindictiveness objection make it unclear whether the trial court considered evidence or acts it should not have, then – as Chief Judge Few stated in his concurring opinion, in which he dissented from the majority – the case should be remanded for the limited purpose of having the trial court set forth the basis for its sentencing. *See Brayboy v. Clark Heating Co.*, 306 S.C. 56, 409 S.E.2d 767 (1991) (impossible for Court to determine basis for Commission's finding requiring remand to Commission for purpose of making specific factual findings); *Pack v. S.C. Dept. of Transportation*, 381 S.C. 526, 673 S.E.2d 461 (Ct. App. 2009) (same).

II. The scope of the relief granted by the Court of Appeals exceeded that both requested by Petitioner-Respondent and properly before that Court pursuant to the well-established rules of issue preservation and appellate review.

Petitioner-Respondent's *only* objection at trial to the sentences imposed by the trial court was to the fact that they were ordered to run consecutively. The objection was based upon the claim that the consecutive sentences were "vindictive and punishing [Respondent] for going to trial." In making the objection, defense counsel referred to the plea negotiations that occurred prior to the trial. (JA p. 554, lines 7 – p. 556, line 4.)

The Court of Appeals, in setting aside the sentences on both of Petitioner-Respondent's convictions and remanding the case for resentencing, clearly overlooked precedent that limits appellate review to issues preserved for appeal. See, *e.g.*, *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691 (2003). Therefore, even if the Court of Appeals was correct in its conclusions that the trial court acted inappropriately in

sentencing Petitioner-Respondent, the prison sentence on each conviction should not be disturbed. *See Hendrix v. Eastern Distribution, Inc.,* 320 S.C. 218, 464 S.E.2d 112 (1995) (appellate court should not address an issue that was not preserved for appeal and, to the extent that it does, that portion of an opinion should be vacated). Rather, the Court of Appeals should only have remanded to the trial court for the limited purpose of reconsidering whether the sentences should run concurrently or consecutively and providing a basis for whichever decision is made.[6]

[6] Such again is in line with the disposition suggested by Chief Judge Few in his concurring opinion.

CONCLUSION

For the reasons stated, the State asks this Court to (1) reverse that portion of the opinion of the Court of Appeals that set aside Petitioner-Respondent's sentences and remanded this case for resentencing and reinstate Petitioner-Respondent's sentences; or (2) either (a), if this Court determines there was no vindictiveness by the trial court in sentencing Petitioner-Respondent, but cannot otherwise determine from the record if the sentence was proper, remand this case for the limited purpose of having the trial court set forth the basis for its sentencing, and review and act upon that basis once provided; (b), if the sentence on the ABHAN conviction is determined to be the result of vindictiveness, modify the opinion of the Court of Appeals to only remand that conviction for resentencing as to whether it is to run consecutively or concurrently to the sentence imposed upon the lewd act conviction; and (3) grant any other and further relief as this Court deems appropriate.

Respectfully submitted,

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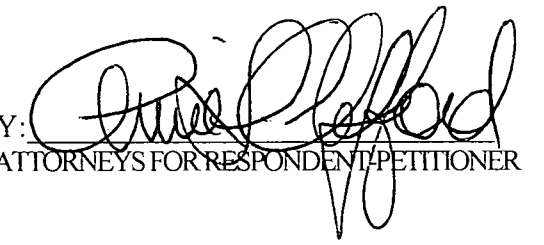
BY: 
ATTORNEYS FOR RESPONDENT-PETITIONER

August 8, 2016

Columbia, South Carolina

THE STATE OF SOUTH CAROLINA

In The Supreme Court

CERTIORARI TO THE COURT OF APPEALS

Appeal from Charleston County

Honorable J.C. Nicholson, Jr., Circuit Court Judge

Opinion No. 2015-UP-217 (S.C. Ct. App. filed May 8, 2015)

Appellate Case No. 2015-001576

The State of South Carolina,

Respondent-Petitioner,

v.

Venancio Diaz Perez,

Petitioner-Respondent.

PROOF OF SERVICE

I, Angela Bennett, certify that I have served the by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney Robert M. Dudek, Esquire, S.C. Commission on Indigent Defense, Division of Appellate Defense, P.O. Box 11589, Columbia, South Carolina, 29211 and Jason Scott Luck, Esquire, 38 Broad Street, Suite 200, Charleston, South Carolina 29401

I further certify that all parties required by Rule to be served have been served.

This 8th day of August, 2016.

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