STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Oconee County
Honorable R. Scott Sprouse, Circuit Court Judge
Appellate Case No. 2017-002282

THE STATE,

Respondent,

vs.

KENNETH STROTHER COLLINS,

Appellant.

RESPONDENT'S PETITION FOR REHEARING
AND
SUGGESTION FOR REHEARING EN BANC

Through an unpublished decision issued on January 15, 2020, this Court erased Appellant's consecutive twenty-year sentence for kidnapping and undid the trial judge's sentencing intention of imposing an unquestionably-permissible fifty-year term of imprisonment upon Appellant after Appellant was convicted of heinously murdering his victim in what appeared to be a methamphetamine-fueled paranoid rage. State v. Collins, Op. No. 2020-UP-012 (S.C. Ct. App. filed Jan. 15, 2020). In doing so, this Court found the presence of a lone "exceptional circumstance"—the State's candid acknowledgement of error—permitted it to vacate Appellant's kidnapping sentence despite the fact Appellant did not raise any objections to that sentence during trial, which wholly denied the trial judge any opportunity to address the error Appellant improperly held back for this Court. Pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, Respondent ("the State") respectfully petitions for rehearing

because this Court overlooked and misconstrued our State's important issue preservation requirements in finding it appropriate to vacate Appellant's kidnapping sentence under the circumstances involved in Collins's case.

Significantly, in South Carolina, issue preservation requirements are a fundamental component of appellate procedure. Gaddy v. Douglass, 359 S.C. 329, 350, 597 S.E.2d 12, 23 (Ct. App. 2004). The key purpose of those requirements is "to give the trial court a fair opportunity to rule on the issues, and thus provide [the appellate court] with a platform for meaningful appellate review." 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). Through their enforcement and application, the trial court is *guaranteed* a fair opportunity "to rule properly after it considered all relevant facts, law, and arguments." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). Moreover, when consistently applied, issue preservation requirements serve to dissuade a party from underhandedly attempting to reserve a vice in order to take a chance at a favorable result from a jury or appellate court without first giving the trial judge a chance to address the matter and potentially immediately correct it in a manner that might not be as favorable to the party. See State v. Penland, 275 S.C. 537, 538, 273 S.E.2d 765, 766 (1981) ("One may not preserve a vice until he learns what the result will be and then, take advantage of the error on appeal."); see also State v. Torrence, 305 S.C. 45, 64, 406 S.E.2d 315, 326 (1991) (Toal, J., concurring in result for the majority) ("The primary danger associated with the doctrine [permitting appellate review of unpreserved errors] is that a defendant will deliberately refrain from objecting to an error which occurs during trial. This is what is referred to by some as 'sandbagging'. Of course, a contemporaneous objection requirement to preserve

legal errors operates to procedurally preclude a defendant from allowing error to occur at trial and then complaining of it on appeal.").

For an issue to be preserved for appellate review pursuant to our issue preservation requirements, the issue must have been: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity. State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912-913 (Ct. App. 2004); see also JEAN HOEFER TOAL ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA 185 (3rd ed. 2016) (identifying the four requirements that must be met in order for an issue to be properly preserved for appellate review). If an issue is not presented to and ruled upon by the trial judge, it cannot be raised for the first time on appeal. State v. Freiburger, 366 S.C. 125, 135, 620 S.E.2d 737, 742 (2005); see State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) ("Appellant is limited to the grounds raised at trial."). Critically, as our appellate courts have repeatedly recognized, plain error review is simply not permitted in South Carolina. See State v. Sheppard, 391 S.C. 415, 421, 706 S.E.2d 16, 19 (2011) ("[T]he plain error rule does not apply in South Carolina state courts."); State v. Burroughs, 328 S.C. 489, 496, 492 S.E.2d 408, 411 (Ct. App. 1997) ("South Carolina has no 'plain error' rule.").

Therefore, based on our issue preservation rules, a criminal defendant is required to contemporaneously object to an alleged sentencing error during trial in order to preserve an issue with a sentence for appellate review. State v. Salisbury, 330 S.C. 250, 276, 498 S.E.2d 655, 669 (Ct. App. 1998). Importantly, a defendant's failure to timely object to or seek modification of a sentence in the trial court precludes him from pursuing the issue on appeal. State v. Winestock, 271 S.C. 473, 475, 248 S.E.2d 307, 308 (1978); see State v. Garner, 304 S.C. 220, 222, 403 S.E.2d 631, 632 (1991) ("No objection to sentencing was raised at trial and this issue is not

properly before the court."); 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. Appellant's contention was not advanced at the probation revocation hearing where the results were most favorable to him. By failing to object to or seek modification of the revocation sentence in the trial court he is now foreclosed from doing so on appeal." (citations omitted)).

Notably though, in State v. Johnston, 333 S.C. 459, 463-464, 510 S.E.2d 423, 425 (1999), our Supreme Court crafted a very specific and limited exception to our issue preservation requirements. In that case, Johnston was convicted of conspiracy to possess marijuana with intent to distribute and was sentenced—without objection—to a term of imprisonment of ten years for that offense despite the fact the maximum sentence statutorily authorized was only five years. Id. at 462, 510 S.E.2d 424. Johnston subsequently appealed her sentence, and, on appeal, this Court affirmed on issue preservation grounds since no objections were raised during trial. Id. at 461, 510 S.E.2d at 424. Thereafter, the Supreme Court granted a petition for a writ of certiorari, reversed, and remanding for resentencing. Id. In doing so, the Supreme Court noted it had "consistently held that a challenge to sentencing must be raised at trial, or the issue will not be preserved for appellate review." Id. at 462, 510 S.E.2d at 425. However, the Supreme Court found Johnston's case involved "exceptional circumstances" because: (1) the State had conceded error in regard to the sentence; *and* (2) a "real threat" existed Johnston would be incarcerated beyond the permissible sentencing range for her conviction if she was forced to pursue relief through a post-conviction relief action. Id. at 463-464, 510 S.E.2d at 425. Based on those *limited* circumstances and those limited circumstances alone, the Supreme Court remanded Johnston's case for resentencing despite the fact the sentencing issue had not been preserved

during trial. Id. at 464, 510 S.E.2d at 425. Importantly though, the Supreme Court expressly cautioned its holding in Johnston's case was based on the "unique" facts involved, which "demand[ed] an expedited result," and was "not intended to disrupt our settled rules on issue preservation and PCR applications." Id. at 464, n. 3, 510 S.E.2d at 425.

Subsequent to the decision in Johnston, this Court expressly—and correctly—recognized the limited nature of that case's holding in State v. Passmore, 363 S.C. 568, 611 S.E.2d 273 (Ct. App. 2005), and declined to apply Johnston's carefully-crafted exception beyond its express limits. See State v. Passmore, 363 S.C. 568, 585-586, 611 S.E.2d 273, 282-283 (Ct. App. 2005) ("We find the exceptional circumstance carefully carved out by the Johnston court is not present here. [Passmore] has already served the duration of her sentence; therefore, she does not face the threat of continuing incarceration beyond the legal sentence. Johnston does not control. . . . Regrettably, [Passmore] has suffered a violation of her right to a jury trial in this case. However, because she failed to raise an objection at trial, we are compelled to let the unconstitutional sentence stand."). However, at other times, this Court has irreconcilably addressed unpreserved sentencing issues that did not squarely fall within the limited exception created in the Johnston decision by expanding it to allow plain error review solely when doing so would purportedly serve the interests of "judicial economy." See State v. Bonner, 400 S.C. 561, 564, 735 S.E.2d 525, 526 (Ct. App. 2012) ("[A]n exception to the general rule of issue preservation exists authorizing the appellate court to consider an unpreserved issue in the interest of judicial economy under appropriate circumstances."); State v. Vick, 384 S.C. 189, 202, 682 S.E.2d 275, 282 (Ct. App. 2009) ("While the case at hand does not present a threat that Vick will remain incarcerated beyond the legal sentence as in Johnston, our courts have, in the past, 'summarily vacated' sentences for kidnapping where such sentences were precluded by § 16-3-910 because

the defendant received a concurrent sentence under the murder statute." (citations omitted)); but see Johnston, 333 S.C. at 462, n. 2, 510 S.E.2d at 425 ("[N]one of these cases addressed error preservation. Thus, they provide no support for Defendant's position here.").

Respectfully, just as this Court recognized in Passmore, the limits of the decision in Johnston are clear, and our state's fundamental issue preservation requirements remain applicable outside of the limited circumstances of that case, which involved a "real threat" Johnston would be incarcerated beyond the permissible sentencing range for her conviction if she was immediately granted relief. Johnston, 333 S.C. at 463-464, 510 S.E.2d at 425; see also Hutto v. S. Farm Bureau Life Ins. Co., 259 S.C. 170, 173, 191 S.E.2d 7, 8-9 (1972) ("It is, of course, settled law that a case cannot be considered as a binding precedent on a legal point that was not argued in the case and not mentioned in the opinion." (citation and internal quotations omitted)). Collins does not face that threat, and the circumstances of his case do not demand an expedited result. Instead, he received a thirty-year sentence for murder, which undeniably will *not* have run its course such that he will begin serving his kidnapping sentence before he has a legitimate opportunity to seek relief through the readily-available avenue of post-conviction relief.[1] See S.C. Code Ann. § 17-27-20(A)(3) (recognizing one of the express grounds upon which a person may seek and obtain post-conviction relief is when "the sentence exceeds the maximum authorized by law"); see Passmore, 363 S.C. at 586, 611 S.E.2d at 283 ("Appellant will be forced to seek redress through the avenue of post-conviction relief."); see also Torrence, 305 S.C. at 61, 406 S.E.2d at 324 (Toal, J., concurring in result for the majority) (abolishing the doctrine of in favorem vitae based, in part, on the fact "[o]ther mechanisms of protection and of

[1] Notably, in his appellate brief, Collins fully acknowledged he "could raise [his] issue in an application for post-conviction relief as a claim of ineffective assistance of trial counsel for failing to object to an improper sentence." (App. Br. p. 5).

relief have now been created for the criminal defendant which safeguard the defendant and render the protections afforded by in favorem vitae surplusage"). Therefore, the "exceptional circumstances" present in Johnston's case are simply not present in Collins's, and the lone fact the trial judge improperly structured Collins's sentence—without objection—in a manner not permitted by the language of the kidnapping statute did not permit this Court to ignore our State's plain and well-articulated issue preservation requirements. Johnston, 333 S.C. at 463-464, 510 S.E.2d at 425; see State v. Walker, 252 S.C. 325, 327-328, 166 S.E.2d 209, 210 (1969) (declining to address Walker's appellate contention the sentence he received could not have properly been imposed "on the elementary ground that the question was not raised below"); State v. Head, 330 S.C. 79, 87, 498 S.E.2d 389, 393 (Ct. App. 1997) (instructing an appellate court "cannot address unpreserved errors").

In conclusion, Collins unquestionably had a full and fair opportunity to contemporaneously object to his sentence below, which would have obviously been the most expeditious and economical matter of obtaining correction of any issue he had with the sentence, and simply failed to do so. See State v. Williams, 303 S.C. 410, 411, 401 S.E.2d 168, 169 (1991) ("A defendant must object at his first opportunity to preserve an issue for appellate review."); see also State v. Ballew, 83 S.C. 82, __, 63 S.E. 688, 690 (1909) ("The general principle that a party can not take his chances of a successful issue, reserving vices in the trial, of which he has notice, for use in case of disappointment, is universally recognized and obviously just."); cf. State v. Lopez, 82 S.C. 368, __, 64 S.E. 144, 144 (1909) ("The Circuit Court was in no way called upon to make a ruling and made no ruling upon the subject. There was nothing to prevent counsel raising the question in the Circuit Court. Hence there is nothing to review."). Based on that failure, Collins denied the trial judge an opportunity to address any issue he may

have with his sentence, and, pursuant to the mandates of South Carolina's issue preservation requirements, this Court could not properly address a sentencing issue for the first time on appeal as a result. See State v. Hoffman, 312 S.C. 386, 393, 440 S.E.2d 869, 873 (1994) ("A contemporaneous objection is required to properly preserve an error for appellate review."); see also State v. Berry, 418 S.C. 500, 503-504, 795 S.E.2d 26, 28 (2016) (vacating the analysis of the Court of Appeals because it addressed an issue that was not properly preserved for appellate review); cf. State v. Hale, 284 S.C. 348, 355, 326 S.E.2d 418, 423 (Ct. App. 1985) ("Hale concedes that no exception was taken to the 'Allen' charge in the trial court. Having denied the trial judge an opportunity to cure any alleged error by failing to object to the charge, Hale cannot properly raise the issue for the first time on appeal.").

Accordingly, for all the foregoing reasons coupled with the reasons raised in the State's appellate brief, the State respectfully urges this Court to reconsider this matter pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, vacate its prior opinion, and issue a new opinion correctly finding Collins's issue with his sentence was not properly preserved for appellate review since he did not raise any objections to his sentence in the trial court.[2] See Johnston, 333 S.C. at 462, 510 S.E.2d at 425 ("[A] challenge to sentencing must be raised at trial, or the issue will not be preserved for appellate review."). By doing so, this Court will ensure the goals of our issue preservation requirements are promoted and will prevent the trial

[2] Moreover, even if this Court stands by its decision not to apply South Carolina's issue preservation requirements to Appellant's sentencing challenge as the State believes it is required to do, the State urges this Court to apply that decision equally and fairly to all parties and reconsider its decision to reject the State's request for a remand for a full resentencing hearing, which will ensure the trial judge has an opportunity to effectuate his sentencing intention within the confines of the law, purely on issue preservation grounds. See Payne v. Tennessee, 501 U.S. 808, 827 (1991) ("Justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true." (citation, brackets, and internal quotations omitted)).

judge's sentencing intention from being unjustly subverted on appeal—without oral argument—solely based on an unpreserved error that might have intentionally been withheld from the trial judge on strategic grounds so as to deny him an opportunity to impose the fifty-year sentence he believed was appropriate through means indisputably available to him under the law. See S.C. Code Ann. § 16-3-20(a) (authorizing a trial judge to sentence a defendant convicted of murder to a sentence of at least thirty years up to life without parole); cf. Torrence, 305 S.C. at 65-66, 406 S.E.2d at 326 (Toal, J., concurring in result for the majority) ("[S]ome attorneys may allow errors to occur as a matter of trial strategy [when issue preservation rules are not applied]. A defense attorney may, for example, desire that certain improper arguments by the State be heard by the jury, or that the jury be charged a certain erroneous charge. The defense attorney will thus allow the 'error' to occur, based on the thinking that the introduction of the argument or charge into the case would *benefit* the client due to the nature of the case or the circumstances involved. Also, defense counsel may decide as a strategic matter not to object because his objection would highlight the erroneous evidence, argument, or charge."). Furthermore, pursuant to Rule 219(b) of the South Carolina Appellate Court Rules, the State respectfully suggesting this Court rehear the matter en banc in order to resolve the lack of uniformity that exists between its decision in Passmore and the irreconcilable decisions that have followed it. See Rule 219(a), SCACR (explaining "rehearing en banc is not favored and ordinarily will not be ordered *except* (1) when consideration by the full court *is necessary to secure or maintain uniformity of its decisions*, or (2) when the proceeding involves a question of exceptional importance").

Respectfully submitted,

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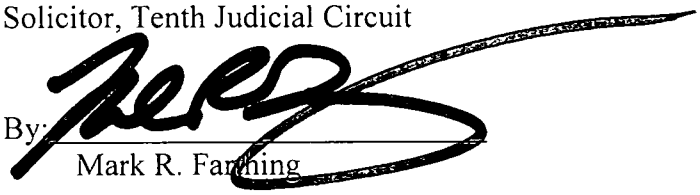

By: _____
Mark R. Farthing

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January 30, 2020

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Oconee County
Honorable R. Scott Sprouse, Circuit Court Judge
Appellate Case No. 2017-002282

THE STATE,

Respondent,

vs.

KENNETH STROTHER COLLINS,

Appellant.

PROOF OF SERVICE

I, Shana Montgomery, certify I have served the within Respondent's Petition for Rehearing and Suggestion for Rehearing En Banc on Appellant by sending two copies of the same to:

David Alexander, Esq.
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify all parties required by Rule to be served have been served.
This 30th day of January, 2020.

Shana Montgomery

SHANA MONTGOMERY
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ALAN WILSON
ATTORNEY GENERAL

January 30, 2020

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: State v. Kenneth Strothers Collins – Appellate Case No. 2017-002282

Dear Ms. Kitchings:

With the court's permission, please add me as counsel of record in the above-referenced criminal appeal as I will be representing the State in this appeal going forward. If that is acceptable to the court, please forward all future correspondence regarding this matter directly to me, and do not hesitate to contact me if you have any questions or need any additional information from this office.

Sincerely,

Mark R. Farthing
Senior Assistant Attorney General
S.C. Bar No. 76901

MRF/

cc: David Alexander, Esquire
Victim Advocacy Division

ALAN WILSON
ATTORNEY GENERAL

RECEIVED
JAN 30 2020
SC Court of Appeals

January 30, 2020

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: State v. Kenneth Strothers Collins – Appellate Case No. 2017-002282

Dear Ms. Kitchings:

Enclosed please find the original and six copies of Respondent's Petition for Rehearing and Suggestion for Rehearing En Banc, along with proof of service, for filing in the above-referenced appeal.

Sincerely,

Mark R. Farthing
Senior Assistant Attorney General
Bar Number 76901

MRF/
Enclosures

cc: David Alexander, Esquire
Victim Advocacy Division