STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Writ of Certiorari to the Court of Appeals
Appeal from Oconee County
Honorable R. Scott Sprouse, Circuit Court Judge

THE STATE,

Petitioner,

vs.

KENNETH STROTHER COLLINS,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUE ON CERTIORARI

Did the Court of Appeals commit a fundamental error of law by ignoring South Carolina's well-established issue preservation requirements and vacating a twenty-year portion of the aggregate fifty-year sentence Collins received for his "terrible" crimes based on a sentencing error that was neither raised to nor ruled upon by the trial judge and, thus, was not properly preserved for appellate review?

STATEMENT OF THE CASE

Procedural History

In January of 2015, Respondent Kenneth Strother Collins was arrested after a body was discovered hidden inside his home located in Walhalla, South Carolina. In April of 2015, the Oconee County Grand Jury indicted Collins for murder, kidnapping, and possession of a weapon during the commission of a violent crime. On October 17, 2017, a jury trial was commenced in the Oconee County Court of General Sessions with the Honorable R. Scott Sprouse, circuit court judge, presiding. At the conclusion of the two-day trial, the jury convicted Collins as indicted. Following the verdict, the trial judge—*without objection*—sentenced Collins to a thirty-year term of imprisonment for murder, a consecutive twenty-year term of imprisonment for kidnapping, and a concurrent five-year term of imprisonment for possession of a weapon during the commission of a violent crime. Collins then timely filed and perfected an appeal.

On appeal, the Court of Appeals unanimously vacated Collins's consecutive twenty-year kidnapping sentence in an unpublished opinion issued without oral argument. State v. Collins, Op. No. 2020-UP-012 (S.C. Ct. App. filed Jan. 15, 2020). Thereafter, the State timely filed a petition for rehearing along with a suggestion for rehearing en banc. Subsequently, on March 9, 2020, the Court of Appeals denied the State's petition and rejected the State's suggestion for rehearing en banc.

Factual History

In the early morning hours of January 13, 2015, Collins—after reportedly smoking methamphetamine for a period of several days—stabbed his victim, Jeremy Little, in the back with a dagger-like knife that had a seven-inch blade as Little tried to escape from Collins's residence. (App'x p. 42; p. 45; p. 50; p. 54; p. 66; pp. 71-75; p. 79; p. 82; pp. 142-143; p. 165; p.

184; p. 213; p. 221). After Little was stabbed, he fell to the floor near the residence's front door and cried out that he was paralyzed. (App'x pp. 45-46; p. 124; pp. 184-185; p. 213; pp. 220-221). Collins was alleged to have then kicked and stomped on his defenseless victim as he begged for his life before violently stabbing Little yet again. (App'x p. 46; pp. 48-49; pp. 75-76; pp. 202-203; pp. 220-221). The second stab wound was inflicted with such significant force the knife's blade cut one of Little's rib bones, and one of Little's lungs suffered a puncture wound that resulted in Little bleeding to death within a matter of minutes. (App'x p. 168; p. 171).

Once the fatal stab wound had been inflicted, Collins—by his own later-repudiated admission—tied Little up and put a gag in Little's mouth to quiet his anguished moans.[1] (App'x p. 47; p. 103; p. 111; p. 189; p. 195; p. 205). Collins and his confederates, Megan Crowe and Andy Cobb, then wrapped Little in duct tape, removed some of his clothing, pulled his underwear down to his ankles, covered his body with a sleeping bag, wrapped it with a rug, and dragged it to a back room.[2] (App'x p. 38; pp. 46-47; p. 76; pp. 80-81; pp. 160-161; p. 190). However, before they could finish concealing the body, law enforcement officers responding to a report of the stabbing arrived at the residence, and the three quickly scurried into the attic to hide while leaving Little's body behind. (App'x p. 47; pp. 51-52; p. 78; pp. 83-84; p. 190).

Upon investigating the scene, the officers spotted a large amount of blood on the floor of the residence through one of its windows and forced entry based on the plainly emergent circumstances. (App'x pp. 31-33; pp. 35-38; p. 78; pp. 138-139). During the ensuing search of the house, one of the officers discovered Little's hastily-wrapped body after accidentally

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[1] Although the stab wound proved to be fatal, Little's life could have potentially been saved with prompt medical treatment. (App'x p. 172). Unfortunately though, that is not what happened. (App'x pp. 157-158; p. 171; p. 174).

[2] Regarding their connections to Collins, Crowe was Collins's girlfriend and Cobb was a close friend of Crowe's. (App'x pp. 41-42; p. 71).

stepping on it. (App'x p. 38; p. 139). Subsequent to that, Crowe inadvertently fell through the ceiling and was swiftly taken into custody. (App'x pp. 52-53; p. 61; p. 65; p. 143). Cobb then exited the attic and was apprehended as well. (App'x p. 78; p. 86). Bizarrely, after that, Collins came down from the attic while holding a revolver to his mouth, and he, too, was arrested once he surrendered. (App'x p. 130).

Following his arrest, Collins, who was caught with Little's blood still on his hands, voluntarily agreed to speak with officers and provided a statement about what had allegedly occurred. (App'x pp. 98-102; pp. 108-111; pp. 129-130). Through his statement, Collins claimed he bought some "dope" from a "snitch," the "snitch" later came to his residence to use some "dope," the "snitch" pulled a gun on Crowe, and he stabbed the "snitch" in the back in response. (App'x pp. 102-103; p. 111). Collins further admitted to tying up and gagging his victim, and he acknowledged he removed his victim's clothing while searching for a hidden wire. (App'x p. 103; p. 111). However, after presenting that version of events, Collins quickly offered another one and claimed the "snitch" actually pulled a gun on him instead of Crowe. (App'x p. 103; pp. 111-112). The interviewing officer then questioned Collins's about the obvious inconsistencies between his accounts, and Collins responded by swiftly terminating the interview. (App'x p. 103; p. 112).

Subsequently, Collins was indicted for murder, kidnapping, and possession of a weapon during the commission of a violent crime, and he proceeded forward to trial. (App'x p. 12; pp. 278-281). During the course of trial, evidence and testimony was presented detailing the discoveries made through the investigation into the incident, and Collins's inconsistent statements following his arrest were introduced. (App'x pp. 28-40; pp. 98-135; pp. 137-147; pp. 154-174). Likewise, Crowe and Cobb offered accounts of the events surrounding Little's death,

and both identified Collins as the person who stabbed and assaulted Little as he tried to leave the residence while confirming Little never threatened anyone in the home prior to his death. (App'x pp. 41-66; pp. 70-88).

Conversely, Collins testified in his own defense, acknowledged he stabbed Little once during the incident, claimed he did so while Little was engaged in "a little altercation" with his brother, and denied inflicting—or knowing who inflicted—the fatal stab wound. (App'x pp. 181-211). Somewhat similarly, Collins's brother, Christopher Burrell, also testified on Collins's behalf and claimed Collins saved him and the others in the house after Little pointed a gun at him and Collins "over $20 worth of crank." (App'x pp. 212-216). However, almost immediately after offering that testimony, Burrell altered his account and asserted Little actually only pointed a gun at Collins. (App'x p. 216). Beyond that, Burrell further acknowledged he provided a starkly different account of the events leading to Little's death in the immediate aftermath of the killing. (App'x pp. 220-221). Specifically, Burrell admitted he had earlier reported Collins invited Little into the residence, stabbed him in the back after he came inside, and repeatedly kicked him in the face while Little was on the floor exclaiming he was paralyzed. (App'x pp. 220-221).

At the conclusion of trial, the jury convicted Collins as indicted after roughly an hour of deliberations. (App'x pp. 268-269). Following the verdict, the solicitor recounted the substantial criminal record Collins had accrued by the age of just twenty-six, which included convictions for second-degree burglary, third-degree assault and battery, grand larceny, malicious injury to personal property, receiving stolen goods, breach of peace, providing false information, failure to stop for a blue light, and resisting arrest. (App'x pp. 270-271; p. 274). The solicitor further noted Collins had assaulted correctional officers multiple times while

awaiting trial on the charges stemming from Victim's death. (App'x p. 271). Ultimately, at the conclusion of the sentencing proceedings, the trial judge sentenced Collins to an aggregate fifty-year term of imprisonment for his "terrible" crimes by imposing a thirty-year term of imprisonment for murder and a consecutive twenty-year term of imprisonment for kidnapping. (App'x p. 277). Significantly, no objections were raised to Collins's sentence or the manner in which it was structured after it was imposed. (App'x p. 277).

Despite raising no objections to his sentence during trial, Collins subsequently appealed the propriety of the portion of his aggregate sentence related to the kidnapping conviction. (App'x p. 277; pp. 287-297). In challenging his kidnapping sentence on appeal, Collins appeared to acknowledge no sentencing challenge was raised to the trial judge while further directly acknowledging the matter was capable of being addressed through an application for post-conviction relief. (App'x p. 294). Nonetheless, Collins argued the Court of Appeals should vacate his consecutive twenty-year sentence for kidnapping in the interest of judicial economy since it was plainly improper. (App'x p. 294). In rebuttal, the State readily conceded the manner in which the trial judge structured Collins's sentence was legally improper in light of the manner in which Section 16-3-910 of the South Carolina Code of Laws has been interpreted. (App'x pp. 307-308). However, the State contended Collins's sentencing issue was procedurally barred because it had not been raised to the trial judge. (App'x pp. 309-310). Furthermore, in the event the Court of Appeals addressed the issue despite the clear procedural bar, the State argued the appropriate relief would be to vacate the entirety of Collins's sentence and remand for resentencing so the trial judge would be given an opportunity to effectuate his sentencing intention in an appropriate manner. (App'x p. 309; p. 313).

Upon considering the matter, the Court of Appeals concluded the trial judge committed an error of law by sentencing Collins for kidnapping and, as a result, solely vacated Collins's consecutive twenty-year sentence for that offense. (App'x pp. 318-320). In doing so, the Court of Appeals recognized the issue was not properly preserved for appellate review but—relying on the decisions in State v. Johnston, 333 S.C. 459, 510 S.E.2d 423 (1999); 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)—found an "exceptional circumstance" existed that allowed for the issue to be addressed for the first time on appeal. (App'x p. 319). Specifically, the Court of Appeals found the issue could be addressed even without being preserved solely because the State conceded Collins's kidnapping sentence was improper. (App'x p. 319). However, somewhat inconsistently, the Court of Appeals declined to vacate the entirety of Collins's aggregate sentence and remand for a full resentencing hearing due to the fact no issues or challenges had been properly raised to Collins's sentences for murder and possession of a weapon during the commission of a violent crime. (App'x pp. 319-320).

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review *preserved* errors of law only. State v. Palmer, 415 S.C. 502, 511, 783 S.E.2d 823, 827 (Ct. App. 2016); see State v. Wise, 359 S.C. 14, 21, 596 S.E.2d 475, 478 (2004) ("In criminal cases, the appellate court sits only to review errors of law which have been properly preserved, i.e., the issue has been raised to and ruled on by the trial court."); see also State v. Head, 330 S.C. 79, 87, 498 S.E.2d 389, 393 (Ct. App. 1997) (recognizing appellate courts "cannot address unpreserved errors"). When reviewing a sentencing issue on appeal, an appellate court will only interfere with a trial judge's sentencing decisions in rare and unusual circumstances in light of the broad discretion afforded to trial judges on such matters. State v. Ferguson, 221 S.C. 300, 307, 70 S.E.2d 355, 358 (1952); see State v. Sidell, 262 S.C. 397, 398, 205 S.E.2d 2, 3 (1974) ("A broad discretion is allowed the trial judge in imposing sentence within the legal limits."). As a result, the appellate court is generally limited to determining on appeal whether the trial judge abused his or her broad discretion, which typically occurs when the trial judge's decision is unsupported by the evidence or controlled by an error of law. Palmer, 415 S.C. at 511, 783 S.E.2d at 827; see State v. Barton, 325 S.C. 522, 531, 481 S.E.2d 439, 444 (Ct. App. 1997) ("Absent partiality, prejudice, oppression, or corrupt motive, [the appellate court] lacks jurisdiction to disturb a sentence that is within the limits prescribed by statute."); see also State v. Kimbrough, 212 S.C. 348, 353, 46 S.E.2d 273, 275 (1948) ("The power of an appellate court to review a sentence for the purpose of determining whether it offends the constitutional provision against cruel and unusual punishment may be sustained under the grant of power to correct errors of law in the judgment appealed from.").

ARGUMENT

The Court of Appeals committed a fundamental error of law by ignoring South Carolina's well-established issue preservation requirements and vacating a twenty-year portion of the aggregate fifty-year sentence Collins received for his "terrible" crimes based on a sentencing error that was neither raised to nor ruled upon by the trial judge and, thus, was not properly preserved for appellate review.

Through its decision in Collins's case, the Court of Appeals erased Collins'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 Collins after Collins was convicted of heinously murdering his victim in what appeared to be a methamphetamine-fueled paranoid rage. In doing so, the Court of Appeals found the presence of a lone "exceptional circumstance"—the State's candid acknowledgement of a sentencing impropriety—permitted it to vacate the portion of Collins's aggregate sentence related to his kidnapping conviction despite the fact Collins did not raise any objections to his kidnapping sentence during trial. By addressing Collins's unpreserved sentencing issue in the manner it did, the Court of Appeals wholly denied the trial judge any opportunity to address the error Collins improperly held back for appeal and rewarded Collins's decision to hold the matter back with a windfall reduction in his aggregate sentence by twenty years less than the trial judge believed was warranted for Collins's crimes. What occurred on appeal in Collins's case strongly demonstrates why South Carolina's issue preservation requirements have traditionally been recognized as being fundamental to the appellate process in our state. Pursuant to those requirements, Collins could not properly obtain appellate relief in regard to his sentence because he did not raise any issues to his sentence during trial, but the Court of Appeals granted relief anyway. Because the Court of Appeals ignored our state's issue preservation requirements and addressed an error it correctly recognized had not been raised to the trial judge, the decision of the Court of Appeals was

manifestly erroneous and should be reversed in order to ensure the underlying purposes of South Carolina's issue preservation requirements are served in Collins's case. The State's petition for a writ of certiorari should be granted, the decision of the Court of Appeals should be reversed, and Collins's unobjected-to sentence should be affirmed.

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 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, in State v. Johnston, 333 S.C. 459, 463-464, 510 S.E.2d 423, 425 (1999), this 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, the Court of Appeals affirmed on issue preservation grounds since no objections were raised during trial. Id. at 461, 510 S.E.2d at 424. Thereafter, this Court granted a petition for a writ of certiorari, reversed, and remanded for resentencing. Id. In doing so, this 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, this 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, this 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, this 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, the Court of Appeals 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, the Court of Appeals 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.").

In the case sub judice, the trial judge undeniably had the discretion to sentence Collins to the fifty-year term of imprisonment he believed was warranted based on the circumstances of Collins's "terrible" crimes. Collins was convicted of the offense of murder, which authorized the trial judge to impose a sentence of no less than thirty years up to life without parole. See S.C. Code Ann. § 16-3-20 (authorizing the imposition of death or "a mandatory minimum term of imprisonment for thirty years to life" for murder). Thus, the issue in Collins's case does not hinge on the length of Collins's aggregate sentence but on the manner in which the trial judge effectuated his sentencing intention. See generally Pepper v. United States, 562 U.S. 476, 507 (2011) ("A criminal sentence is a package of sanctions that the [sentencing] court utilizes to effectuate its sentencing intent." (citation and internal quotations omitted)). The problem is simply that the trial judge structured Collins's fifty-year sentence by imposing a thirty-year term of imprisonment for murder along with a consecutive twenty-year term of imprisonment for kidnapping instead of simply imposing the fifty years he believed was warranted for the murder conviction alone while refraining from imposing any sentence for the kidnapping conviction. See S.C. Code Ann. § 16-3-910 (stating a person convicted of kidnapping must be sentenced to a term of imprisonment not in excess of thirty years *unless* sentenced for murder); see also State v. Perry, 278 S.C. 490, 496, 299 S.E.2d 324, 327 (1983) (interpreting an earlier version of the kidnapping statute to provide "that either the life imprisonment sentence or the death penalty sentence required in a murder conviction shall be sufficient punishment"). Since the issue involved in Collins's case merely revolves around the manner in which the sentence was structured, the trial judge could have easily corrected Collins's aggregate sentence had the error

with it been called to his attention after it occurred. But Collins did not do so and, instead, held back the error for appeal in the apparent hope of receiving the windfall sentencing reduction he did, in fact, receive from the Court of Appeals. The problem with a grant of appellate relief under such circumstances is fundamental and obvious.

By failing to avail himself of his full and fair opportunity to contemporaneously object to his sentence below, Collins wholly denied the trial judge an opportunity to address any issue with the sentence. 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."); 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."). Therefore, pursuant to South Carolina's well-settled issue preservation requirements, Collins failed to properly preserve any issue he may have had with his aggregate sentence for appellate review, and no issue involving his sentence could properly be raised or addressed for the first time on appeal. 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.").

Despite Collins's obvious failure to preserve his sentencing issue for appellate review, the Court of Appeals nonetheless addressed that unpreserved issue and rewarded the lack of preservation by solely vacating the twenty-year portion of Collins's aggregate sentence that was related to his kidnapping conviction while declining to remand for a full resentencing hearing on all the charges, which effectively reduced the sentence the trial judge believed was appropriate—and could properly have imposed—by *two decades* without the trial judge ever being afforded an opportunity to address the error in the aggregate sentence's structure.[3] See Pepper, 562 U.S. at 507 (explaining an appellate court may vacate an entire sentence whenever reversing only a portion of a criminal defendant's sentence because such a limited partial reversal may fundamentally alter the original sentencing judge's sentencing intent); Greenlaw v. United States, 554 U.S. 237, 254, 128 S. Ct. 2559, 2570, 171 L. Ed. 2d 399 (2008) (recognizing the practice of vacating an entire sentence and remanding for resentencing following a successful challenge by a criminal defendant to a portion of an aggregate sentence ensures the defendant's sentence will fit the offender as opposed to merely the individual offense while further guaranteeing "the assessment will be made by the sentencing judge exercising discretion, not by an appellate panel ruling on an issue of law no party tendered to the court"); see also United States v. Johnson, 934 F.3d 498, 502 (6th Cir. 2019) ("Reasoned judgments about the appropriate length of a sentence are largely for trial courts, not appellate courts."). To support its decision to do so, the Court of Appeals interpreted this Court's decision in Johnston to permit it

[3] Oddly, despite not applying South Carolina's issue preservation requirements to Collins's sentencing challenge as it was required to do, the Court of Appeals inconsistently elected to apply those requirements to the State's proposal for a remand and declined to send the matter back for a full resentencing hearing because *no issues were properly raised* related to Collins's sentences for murder and possession of a weapon during the commission of a violent crime. 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)).

to conduct plain error review based on the existence of a single "exceptional circumstance." Specifically, the Court of Appeals found plain error review was permitted because the State admitted—as it must—Collins's sentence could not properly be structured in the manner the trial judge structured it.

Respectfully though, just as the Court of Appeals had earlier 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 not immediately granted relief.[4] 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 did not and does not face such a threat, and the circumstances of his case did not and 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. 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,

[4] Interestingly, the Court of Appeals did *not* cite to the decision in Passmore in its decision in Collins's case. (App'x pp. 318-320).

in part, on the fact "[o]ther mechanisms of protection and of 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 the Court of Appeals 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 (emphasis added); 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"); Head, 330 S.C. at 87, 498 S.E.2d at 393 ("[The Court of Appeals] cannot address unpreserved errors.").

Accordingly, because the Court of Appeals fundamentally erred by declining to follow South Carolina's well-established issue preservation requirements and improperly granted relief on an unpreserved issue, its decision must be reversed. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) ("An issue that was not preserved for review should not be addressed by the Court of Appeals, and the court's opinion should be vacated to the extent it addressed an issue that was not preserved."); Powers v. City of Aiken, 255 S.C. 115, 117, 177 S.E.2d 370, 371 (1970) ("We have searched the record and agree that the trial judge was not given an opportunity to rule upon this issue, and accordingly, the question is not properly before us. This is a court of review."); cf. 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). By reversing, this Court will ensure the goals of our

issue preservation requirements are promoted and will prevent the trial 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.[5] 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, by doing so, this Court will be able to reaffirm the limits of its decision in Johnston while also resolving the lack of uniformity that exists between the decision in Passmore and the irreconcilable decisions that have followed it. Compare Passmore, 363 S.C. at 585-586, 611 S.E.2d at 282-283 (holding Passmore's unpreserved sentencing issue could not properly be addressed on appeal because "she does not

[5] Significantly, a reversal will also not in any way prevent Collins from pursuing relief through the proper avenue of the post-conviction relief process, which could potentially yield an answer as to why no objection was raised to the sentence during trial. See Johnston, 333 S.C. at 464, n. 3, 510 S.E.2d at 425 ("Our holding today is not intended to disrupt our settled rules on issue preservation and *PCR applications*." (emphasis added)); Passmore, 363 S.C. at 586, 611 S.E.2d at 283 (recognizing Passmore would still be able to seek relief "through the avenue of post-conviction relief").

face the threat of continuing incarceration beyond the legal sentence"); with Vick, 384 S.C. at 202, 682 S.E.2d at 282 (addressing an unpreserved sentencing issue related to an improper *concurrent* sentence despite the fact "the case at hand does not present a threat that Vick will remain incarcerated beyond the legal sentence as in Johnston"). The State's petition for a writ of certiorari should be granted, the decision of the Court of Appeals should be reversed, and Collins's unobjected-to sentence should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted the petition for a writ of certiorari should be granted. In requesting this relief, counsel for Petitioner certifies a petition for rehearing was made and finally ruled upon by the Court of Appeals.

Respectfully submitted,

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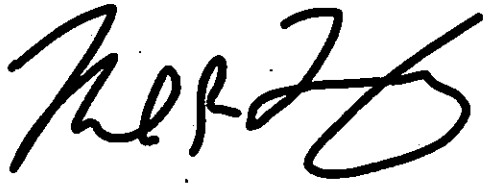

BY:_____
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ATTORNEYS FOR PETITIONER

March 26, 2020

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Writ of Certiorari to the Court of Appeals
Appeal from Oconee County
Honorable R. Scott Sprouse, Circuit Court Judge

THE STATE,

Petitioner,

vs.

KENNETH STROTHER COLLINS,

Respondent.

PROOF OF SERVICE

I, Sally Ellison, certify I have served the within Petition for Writ of Certiorari and accompanying Appendix on Respondent by sending two copies of the same to:

David Alexander, Esquire
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 26th day of March, 2020.

Sally Ellison

SALLY ELLISON
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ALAN WILSON
ATTORNEY GENERAL

March 26, 2020

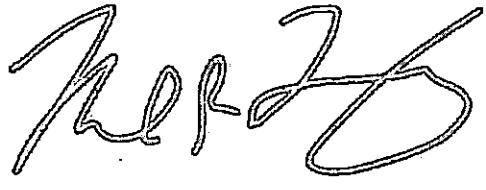
David Alexander, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

RE: State v. Kenneth Strother Collins

Dear Mr. Alexander:

I am enclosing two copies of the Petition for Writ of Certiorari and the accompanying Appendix, along with proof of service, in the above-referenced case.

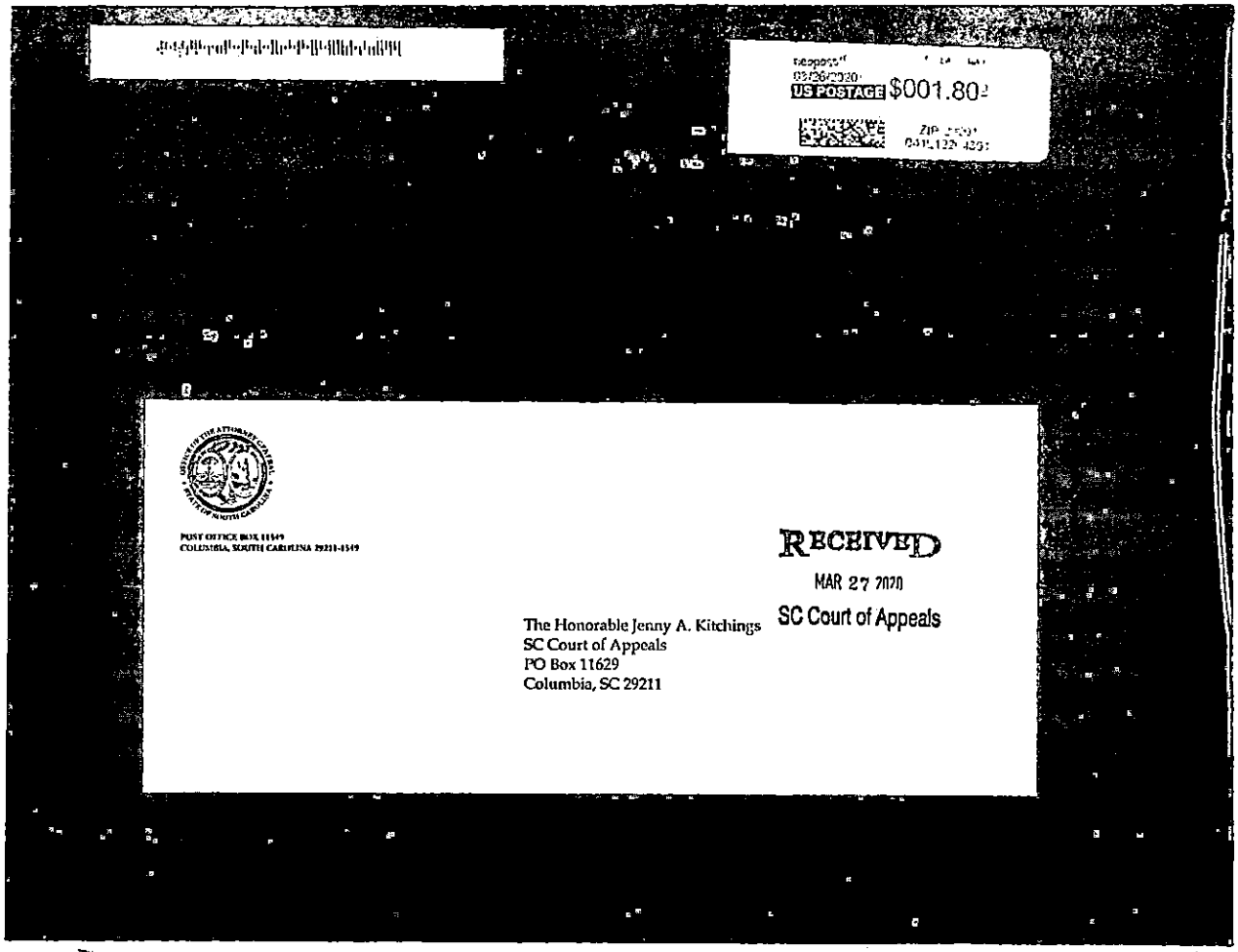
Sincerely,



Mark R. Farthing
Senior Assistant Attorney General
Bar Number 76901

MRF/
Enclosures

cc: Honorable Daniel E. Shearouse (original petition enclosed and appendix previously filed)
Honorable Jenny A. Kitchings
Victim Advocacy Division



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The Honorable Jenny A. Kitchings
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