

STATE OF SOUTH CAROLINA  
In the Supreme Court

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Certiorari to Greenville County  
The Honorable Edward W. Miller, Circuit Court Judge

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**RECEIVED**

Opinion No. 2012-UP-330 (S.C. Ct. App. filed 5/30/12)  
Appellate Case No. 2012-213226

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MAR 14 2013

**S.C. Supreme Court**

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

DOYLE MARION GARRETT,

PETITIONER.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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**ATTORNEYS FOR RESPONDENT**

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## **ISSUE PRESENTED**

**The issue raised on appeal was not preserved for review; but, in any event, the Court of Appeals properly concluded that Petitioner was not entitled to a jury charge on the lesser-included offense of simple assault and battery since there was no evidence Petitioner was guilty of only the lesser offense.**

## STATEMENT OF THE CASE

Petitioner was indicted in December 2009 in Greenville County for armed robbery, kidnapping, assault and battery of a high and aggravated nature (“ABHAN”), grand larceny, and resisting arrest. He was tried on February 3-4, 2010, before the Honorable Edward W. Miller. The jury found Petitioner not guilty of kidnapping but guilty of the other four charges. Judge Miller sentenced Petitioner to ten years for ABHAN, ten years for grand larceny, one year for resisting arrest, and life without parole for armed robbery pursuant to S.C. Code Ann. § 17-25-45.<sup>1</sup> A notice of appeal was timely served and filed.

On May 30, 2012, the South Carolina Court of Appeals affirmed Petitioner’s conviction in an unpublished opinion. See State v. Garrett, Op. No. 2012-UP-330 (S.C. Ct.App. filed 5/30/12). Petitioner’s request for rehearing was denied on September 25, 2012. A Petition for Writ of Certiorari to the Court of Appeals was submitted on December 27, 2012, and this Return follows.

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<sup>1</sup> Petitioner raised no challenge on appeal regarding his conviction for armed robbery and the corresponding sentence of life without parole.

## ARGUMENT

**The issue raised on appeal was not preserved for review; but, in any event, the Court of Appeals properly concluded that Petitioner was not entitled to a jury charge on the lesser-included offense of simple assault and battery since there was no evidence Petitioner was guilty of only the lesser offense.**

### Relevant Facts

The victim, a sixty-two year old woman, testified that she met Petitioner at a bar and grill where she was singing karaoke with friends. (R. p. 29-31). She stated that she and Petitioner spent some time talking on the night in question and, toward the end of the evening, she offered him a ride home. (R. p. 31-32). After stopping at IHOP to get something to eat, she drove to his home to drop him off. (R. p. 33, lines 14-20). After the victim pulled into Petitioner's driveway and put the car in park, Petitioner thanked her for the ride and the victim thought he was about to give her a hug. (R. p. 33, lines 20-24). However, at that point Petitioner grabbed the victim and put her in a "choke hold." (R. p. 33, line 25). He then stated, "I don't want to have to hurt you, but I'll kill you if I have to." (R. p. 34, lines 1-2). He also stated that he had a gun and would use it. (R. p. 34, lines 11-12). Petitioner kept his hand in his pocket and the victim believed he had a gun. (R. p. 36, lines 7-11). He made the victim leave her purse in her car and took her cell phone and threw it out behind the house. (R. p. 35, lines 19-25). Petitioner then told the victim that she would have to get out and go inside his house. (R. p. 34, lines 15-17). Once inside, Petitioner made the victim give him all her rings and he tied her to a chair with an extension cord. (R. p. 35-36; p. 53). Petitioner then took off in the victim's car. (R. p. 36-41). After she saw that Petitioner was gone, the victim managed to untie herself and she ran to a neighbor's house and called 911. (R. p. 36-37). The victim sustained

some bruises from being tied up but did not receive any medical treatment as a result of the incident. (R. p. 44, lines 2-15).

The police responded quickly and Petitioner was located nearby in possession of the victim's car, purse, and rings. (R. p. 40-41; p. 88-94). Petitioner initially refused to show police his right hand, which he kept in his pocket, and stated that he had a gun and, if the officer didn't leave him alone, he was going to blow his brains out. (R. p. 91, lines 4-14). Because of this safety threat, another deputy came to the scene and deployed a "K-9" dog to take Petitioner down. (R. p. 91-92). Officers discovered a hairbrush rather than a gun in Petitioner's right pocket. (R. p. 92, lines 2-18). Petitioner was charged with armed robbery, kidnapping, assault and battery of a high and aggravated nature ("ABHAN"), grand larceny, and resisting arrest. (See R. p. 289-96).

#### Error Preservation

Petitioner argued on appeal that the trial judge erred in failing to charge simple assault and battery because the only circumstance of aggravation "relied upon" by the State was a difference in the sexes. This argument was not properly preserved for appellate review. Near the end of trial, the judge held a brief charge conference. (See R. p. 242-45). During this conference, Petitioner's counsel requested a charge on simple assault and battery as a lesser-included offense of ABHAN, arguing that "[t]here were no bruises, Your Honor, that was found in the police report. There's no medical evidence or causation proven by a medical doctor that the bruises that came up a week later were traced to -". (R. p. 244, lines 10-17). The judge cut counsel off and indicated that he would charge only ABHAN and not simple assault and battery because there was the aggravating circumstance of a difference in the sexes, and either Petitioner "did it or he

didn't do it.” (R. p. 244, lines 14-25). No further argument was made in support of charging the lesser-included offense. (See R. p. 244-45; p. 271-76).

Since a different argument was made below to the trial judge, the issue raised on appeal was not preserved for review. See State v. Benton, 338 S.C. 151, 156, 526 S.E.2d 228, 231 (2000) (a party may not argue one ground at trial in support of a requested jury charge and an alternate ground for this jury charge on appeal); see also State v. Dickman, 341 S.C. 293, 295, 534 S.E.2d 268, 269 (2000) (citations omitted) (issue not preserved if defendant argues one ground at trial and a different ground on appeal); State v. McLemore, 310 S.C. 91, 425 S.E.2d 752 (Ct. App. 1992) (a party does not preserve any issue for review where he fails to advance distinct reasons for requesting a particular jury charge), *overruled on other grounds by State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009).

#### The Lesser-Included Charge was not Warranted

Even assuming the issue had been properly preserved for review, the lesser-included charge of simple assault and battery was not warranted under the facts of this case. “No instruction should be given by the trial judge, at the request of the defendant, which tenders an issue not presented or supported by the evidence.” State v. Tyndall, 336 S.C. 8, 518 S.E.2d 278 (Ct. App. 1999). It is not error to refuse to charge a lesser-included offense unless there is evidence tending to show the defendant was guilty *only* of the lesser offense. Id. (citations omitted) (emphasis added). In an ABHAN case, a defendant's contention that the jury could have disbelieved the State's evidence as to the circumstances of aggravation, and, on the remaining evidence, found him guilty of the lesser offense of simple assault and battery, does not entitle him to have the lesser offense

submitted to the jury. State v. Rucker, 319 S.C. 95, 98, 459 S.E.2d 858, 860 (Ct. App. 1995) (*cert. denied* Mar. 21, 1996); see also State v. Geiger, 370 S.C. 600, 608, 635 S.E.2d 669, 674 (Ct. App. 2006); State v. Fields, 356 S.C. 517, 523-24, 589 S.E.2d 792, 795 (Ct. App. 2003).

ABHAN is an unlawful act of violent injury accompanied by circumstances of aggravation. State v. Geiger at 605, 635 S.E.2d at 672. Circumstances of aggravation include the use of a deadly weapon, intent to commit a felony, infliction of serious bodily injury, great disparity in the ages or physical conditions of the parties, difference in gender, taking indecent liberties or familiarities with a female, purposeful infliction of shame and disgrace, and resistance to lawful authority. Id. at 605-606, 635 S.E.2d at 672. Conversely, simple assault and battery is an unlawful act of violent injury “unaccompanied by *any* circumstances of aggravation.” State v. Rucker, 319 S.C. at 98, 459 S.E.2d at 860 (emphasis added).

Here, there was no evidence Petitioner committed an assault and battery *without* circumstances of aggravation. Regardless of the difference in the sexes of the parties, the assault and battery in this case was necessarily aggravated because, as the jury found beyond a reasonable doubt, it took place as a part of the felonies of armed robbery and grand larceny. (See R. p. 33, line 19 – p. 36; p. 281, lines 7-10). See State v. Geiger, 370 S.C. 600, 635 S.E.2d 669 (Ct. App. 2006) (“intent to commit a felony” is an aggravating circumstance). Further, in addition to the aggravating circumstance of intent to commit a felony, there was also a great disparity in the parties’ ages and physical conditions.<sup>2</sup> The fact that the assistant solicitor indicated that she was relying only upon a difference in the

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<sup>2</sup> At the time of the attack, the female victim was 60 years old and Petitioner was 43 years old. (See R. p. 29, lines 3-4; p. 297-300).

sexes – a fact upon which Petitioner now places great emphasis - is immaterial at this juncture, because the evidence must be viewed *as a whole* to determine whether a lesser-included jury charge is appropriate. See State v. White, 361 S.C. 407, 414, 605 S.E.2d 540, 544 (2004) (ultimately concluding that the lesser-included offense of simple assault and battery was not warranted under the facts of the case, even though a difference in genders *alone* would not have justified rejection of the charge). Indeed, the jury was charged regarding *all* possible circumstances of aggravation in a jury instruction that in no way emphasized the aggravating circumstance of a difference in the sexes of the parties. (See R. p. 272, lines 10-20).

In sum, even if the trial judge's analysis was flawed under State v. White because a difference in genders *alone* would not have justified rejection of the lesser-included charge, his refusal to charge simple assault and battery was still proper under the facts of the case since the assault and battery took place as a part of two felonies and because there was a great disparity in the ages and physical conditions of the parties.<sup>3</sup>

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<sup>3</sup> In that vein, since the jury found the "intent to commit a felony" circumstance beyond a reasonable doubt, Petitioner could not have suffered prejudice from the lack of a simple assault and battery charge. See State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 583 (2010) ("To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous *and* prejudicial to the defendant.") (emphasis added) (citation omitted).

CONCLUSION

For the reasons discussed above, Respondent submits that this Court should deny the Petition for Writ of Certiorari. However, if this Court grants certiorari, Respondent asks permission under the rules to fully brief the issues.

Respectfully submitted,

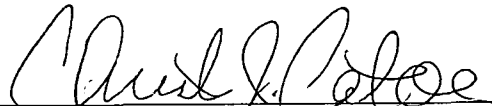
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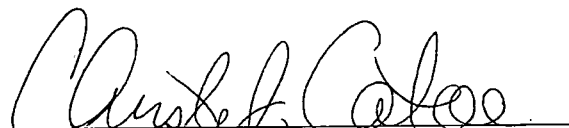
PETITIONER.

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**CERTIFICATE OF SERVICE**

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The undersigned attorney hereby certifies that the **Return to Petition for Writ of Certiorari** in the above-referenced case has been served upon **KATHRINE H. HUDGINS**, Division of Appellate Defense, South Carolina Commission on Indigent Defense, Post Office Box 11589, Columbia, South Carolina 29211-1589, this **14<sup>th</sup> day of March, 2013**.

  
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