

**RECEIVED**  
**Jan 30 2023**  
SC Court of Appeals

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal from Charleston County

Kristi L. Harrington, Circuit Court Judge

\_\_\_\_\_  
Opinion No. 5960  
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THE STATE,

RESPONDENT,

V.

KENNETH LAMONT ROBINSON, JR.,

APPELLANT

APPELLATE CASE NO. 2018-001269

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RETURN TO PETITION FOR REHEARING  
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On January 11, 2023, this Court issued a published opinion reversing Appellant Kenneth Robinson's convictions for murder and four counts of assault and battery in the first degree. *State v. Robinson*, Op. No. 5960 (S.C. Ct. App. filed Jan. 11, 2023) (Howard Adv. Sh. 2 at 202). On January 19, 2023, the state petitioned this Court for rehearing. The following day, this Court requested a response to the petition for rehearing. Pursuant to Rule 221(a), SCACR, and this Court's request, Appellant now files this return. Appellant respectfully requests this Court deny the state's petition for rehearing because no matter was overlooked or misapprehended by this Court in arriving at its well-reasoned decision.

This Court reversed Kenneth's convictions, holding the trial court erred in admitting evidence related to Kenneth's alleged gang affiliation. *State v. Robinson*, Op. No. 5960 (S.C. Ct. App. filed Jan. 11, 2023) (Howard Adv. Sh. 2 at 202). This Court held, and the state does not dispute, the testimony regarding Kenneth's alleged gang affiliation constituted prior bad act evidence. *Id.* Analyzing the gang evidence in accordance with Rule 404(b), SCRE, this Court held "the gang-related evidence was *not logically* relevant to any material fact at issue." *Id.* (emphasis added). Specifically, this Court recounted that "[t]he witnesses that testified to participating in the car chase admitted the two prior shootings in front of [Kenneth]'s home provoked their actions," "Simmons testified that he was upset someone had vandalized his car and wanted retaliation for being shot at twice," and Simmons "ultimately admitted on the stand to shooting [the deceased]." *Id.*

Notably, the state has *not* requested rehearing on this Court's holding that the gang-related evidence was *not logically* relevant to Robinson's involvement in the crimes for which he was charged. According to numerous decisions of this Court and the Supreme Court, it is axiomatic that appellate counsel must appeal all grounds upon which the ruling was based. *See, e.g., Atlantic Coast Builders and Contractors, LLC v. Lewis*, 398 S.C. 323, 328, 730 S.E.2d 282, 284 (2012) (finding arguments on appeal barred by the two-issue rule where the master found in favor of the opposing party on three causes of action, but the appealing party appealed only the findings two); *Anderson v. Short*, 323 S.C. 522, 525, 476 S.E.2d 475, 477 (1996) (refusing to consider an issue on appeal where the judge ruled against the party on two grounds, but only one ground was challenged on appeal); *Biales v. Young*, 315 S.C. 166, 168, 432 S.E.2d 482, 484 (1993) (explaining that "[f]ailure to argue is an abandonment of the issue and precludes consideration on appeal" where the appellant failed to appeal the findings of waiver, ratification, or estoppel, which were alternative rulings for the

trial judge). “It is a fundamental rule of law that an appellate court will affirm a ruling by a lower court if the offended party does not challenge that ruling.” Toal, *Appellate Practice in South Carolina*, at 80. “Failure to challenge the ruling is an abandonment of the issue and precludes consideration on appeal.” *Id.*; see also *Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010) (discussing the two issue rule).

Recently, the Supreme Court provided the bench and bar with the framework for analyzing evidence pursuant to Rule 404, SCRE. *State v. Perry*, 430 S.C. 24, 842 S.E.2d 654 (2020). “[T]o justify a finding that evidence of other crimes, wrongs, or acts is offered for a legitimate purpose, and thus should not be excluded pursuant to Rule 404(b), South Carolina courts have required a logical relevancy or connection between the other crime and some disputed fact or element of the crime charged.” *Id.* at 31, 842 S.E.2d at 658. Here, this Court held “the gang-related evidence was *not logically* relevant to any material fact at issue.” *State v. Robinson*, Op. No. 5960 (S.C. Ct. App. filed Jan. 11, 2023) (Howard Adv. Sh. 2 at 202) (emphasis added). The state has not challenged this holding; thus, it is the law of the case and rehearing should be denied because this Court’s judgment reversing Kenneth’s convictions Kenneth’s convictions would not be disturbed even if this Court were to grant the petition for rehearing on the other ground argued in the petition, discussed *infra*.

Similarly, the state’s petition for rehearing failed to challenge this Court’s holding that “the risk of unfair prejudice ... raised by [the gang] evidence ... substantially outweighed the scant probative value such evidence brought to the table.” *State v. Robinson*, Op. No. 5960 (S.C. Ct. App. filed Jan. 11, 2023) (Howard Adv. Sh. 2 at 202). Instead, the state made only conclusory remarks. See Rhg. at 5 (“Evidence raised by the state does prejudice the Appellant, and what the Court must look for is if the evidence unduly prejudices the Appellant, and if its probative value overrides any prejudicial effect.”). The state put forward *no* argument that this Court erred in

holding the danger of unfair prejudice from the introduction of the gang evidence substantially outweighed its probative value; thus, this Court’s judgment would remain intact even if this Court grants the petition for rehearing. *See Glasscock, Inc. v. U.S. Fidelity and Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001) (“South Carolina law clearly states that short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review.”).

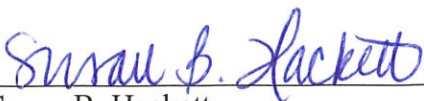
Turning now to the argument on the merits, the state faulted this Court for considering the evidence “only on one critical point, motive, ignoring the fact that the gang evidence is also necessary to prove that this was not a murder in the sudden heat of passion.” Rhg. at 2. This Court analyzed whether the gang evidence “proved motive or intent to commit such a crime.” *State v. Robinson*, Op. No. 5960 (S.C. Ct. App. filed Jan. 11, 2023) (Howard Adv. Sh. 2 at 202). This Court examined the exceptions of motive *and* intent to the general prohibition on propensity evidence. *Id.* This Court did so despite the state’s insistence that the evidence applied *only* to the exception of motive. FBOR at 21 (“The Respondent argues the evidence admitted reveals motive; and therefore, is admissible.”). To the extent the state sought rehearing on this Court’s determination that the gang evidence failed to show a motive, this Court should deny the petition for rehearing because the state has offered no legitimate reason to alter this Court’s reasoning. Every argument presented in the state’s petition for rehearing that the gang-related evidence demonstrated motive was presented in the state’s brief and soundly rejected by this Court in its well-reasoned opinion.

For the first time, the state argues that the gang evidence was admissible “to prove that this was not a murder in the sudden heat of passion.” Rhg. at 2. To support this argument, the state argues the gang-related evidence showed “[t]his shooting was due to a retaliation for an attempted gang hit committed by a rival gang,” and that Kenneth’s alleged “association with a street gang had to be

revealed” “[t]o present proof that [Kenneth] was not entitled to a voluntary manslaughter instruction.” Rhg. at 2-3. The state presented nothing other than conclusory statements for its proposition that the gang evidence demonstrated the death was not an unlawful killing in the sudden heat of passion upon sufficient legal provocation. Contrary to the state’s assertion, gang evidence, in general or as specifically presented here, does not mean that a homicide cannot be voluntary manslaughter. Even individuals who are gang members can act in the sudden of heat of passion upon sufficient legal provocation.

Furthermore, the state defeated its own argument that gang evidence was necessary to show the shooting did not occur during the sudden heat of passion by asserting that the “decision to continue [pursuing the car when others backed off the chase] prove[d] this was not sudden heat of passion but premeditation.” Rhg. at 3. If the driver’s decision to continue pursuing the person he believed shot at him earlier was all that was necessary to defeat the element of sudden heat of passion needed for voluntary manslaughter, then gang evidence, by definition, was unnecessary. Putting to one side the state’s internally inconsistent argument, the facts are clear that the driver (and shooter) continued to pursue the car that the driver believed held the person who shot at the driver earlier in the evening which is evidence that he was acting under sudden heat of passion. Any argument by the state otherwise is refuted by the state’s offer to allow the driver, who was the shooter, to enter a guilty plea to voluntary manslaughter, which was accepted and entered before a judge, and the state’s failure to argue that the gang evidence defeated the voluntary manslaughter jury instruction request in its brief. FBOR at 28.

Appellant respectfully requests this Court deny the state’s petition for rehearing as this Court neither overlooked nor misapprehended anything in reaching its well-reasoned and thoroughly researched opinion that follows binding appellate court precedent.



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This 30<sup>th</sup> day of January, 2023.

STATE OF SOUTH CAROLINA  
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THE STATE,

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KENNETH LAMONT ROBINSON, JR.,

APPELLANT

APPELLATE CASE NO. 2018-001269

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the return to petition for rehearing in the above-referenced case has been served upon Tommy Evans, Jr., Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), which is [tommyevansjr@scag.gov](mailto:tommyevansjr@scag.gov); and on Kenneth Lamont Robinson, Jr., #376714, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 30<sup>th</sup> day of January, 2023.

  
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ATTORNEY FOR APPELLANT

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**Cc:** [Hackett, Susan](#); [John H. Blume](#); [mehrlich@charlestoncounty.org](mailto:mehrlich@charlestoncounty.org)  
**Subject:** Robinson, K. - Return to Petition for Rehearing - 2018-001269  
**Date:** Monday, January 30, 2023 11:51:00 AM  
**Attachments:** [Robinson, K. - Return to Petition for Rehearing - 2018-001269 - AG Cover Letter.pdf](#)  
[Robinson, K. - Return to Petition for Rehearing - 2018-001269.pdf](#)

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Mr. Evans,

Please find attached for service the Return to Petition for Rehearing for Kenneth Robinson's appeal which will be filed today with the Court of Appeals.

Thank you.

Chris

**Chris Stock**  
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