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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Barnwell County
The Honorable Doyet A. Early, III, Circuit Court Judge

Opinion No. 5846 (S.C. Ct. App. filed August 11, 2021)
2017-GS-06-00066

THE STATE,

PETITIONER,

v.

DEMONTAY MARKEITH PAYNE,

RESPONDENT.

Appellate Case No. 2021-001097

BRIEF OF PETITIONER

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I. **Did the Court of Appeals fail to adhere to the "reasonable inference" standard required for review of the facts of record when evaluating the necessity of a lesser included offense charge?**

II. **Did the Court of Appeals fail to properly apply this Court's precedent in *Knoten* and *Funchess* by reviewing certain facts in isolation of Respondent's direct evidence as to his own state-of-mind, and in using portions of the State's case for malice as evidence supporting a heat of passion killing?**

STATEMENT OF THE CASE

Respondent was indicted for murder by a Barnwell County Grand Jury (2017-GS-06-00066). Assistant Solicitors David Miller and Jackson Cooper represented the State at trial, and defendant Demontay Markeith Payne (hereinafter "Respondent") was represented by attorney Joshua Koger, Esquire (hereinafter "Defense Counsel"). (App., p. 5). Prior to trial, Respondent filed a Motion to Dismiss pursuant to the Protection of Persons and Property Act, for which a hearing was conducted by the Honorable Doyet A. Early, III, on August 22-23, 2017. The trial court heard testimony and concluded that the testimony of witnesses differed considerably, such that he could not find by preponderance of the evidence that Respondent was entitled to protection under the Act. The case was then called to trial before Judge Early and a jury on September 18-19, 2017. (App., p. 5). At the conclusion of trial the jury returned a guilty verdict against Respondent for murder. Judge Early sentenced Respondent to thirty-five (35) years imprisonment with credit for time served. (App., p. 244).

Respondent filed a timely notice of appeal on September 29, 2017. Respondent sought reversal of the conviction on the grounds that the trial court abused its discretion in denying a voluntary manslaughter charge. The parties completed briefing in July 2019 and oral argument was held on September 15, 2020. The Court of Appeals reversed Respondent's conviction by its Opinion filed August 11, 2021. *State v. Payne*, 862 S.E.2d 81 (S.C. Ct. App. 2021), reh'g denied (Aug. 31, 2021). The State filed a Petition for Rehearing on August 26, 2021, and rehearing was denied by the Court of Appeals on August 31, 2021.

On September 29, 2021, the State filed its Petition for Writ of Certiorari to the Court of Appeals. Respondent filed his Return to the Petition on November 1, 2021. On March 30, 2023, this Court granted certiorari. This Brief of Petitioner now follows.

STANDARD OF REVIEW

"An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion." *State v. Mattison*, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010). An abuse of discretion "means nothing more or less than that the ruling of the trial court was without reasonable factual support, resulted in prejudice to the rights of appellant, and therefore, in the circumstances, amounted to error of law." *Bridges v. Wyandotte Worsted Co.*, 239 S.C. 37, 40, 121 S.E.2d 300, 302 (1961). A jury charge which is substantially correct and covers the law does not require reversal. *State v. Otts*, 424 S.C. 150, 155, 817 S.E.2d 540, 543 (Ct. App. 2018), reh'g denied (Aug. 16, 2018), cert. granted (Dec. 13, 2018), cert. dismissed as improvidently granted, No. 2018-001671, 2019 WL 1783684 (S.C. Apr. 24, 2019). "In reviewing jury charges for error, [the appellate court] must consider the court's jury charge as a whole in light of the evidence and issues presented at trial." *State v. Brandt*, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011). The denial of a requested jury charge is subject to harmless error analysis, and both error and prejudice must be demonstrated in order to warrant reversal. *State v. Commander*, 396 S.C. 254, 270-71, 721 S.E.2d 413, 422 (2011).

STATEMENT OF FACTS

The Crime

Respondent and Devante Odom (hereinafter "Victim") encountered each other on the porch of the home belonging to Stacey Hartzog. Stacey Hartzog, Yvette Walker, Alicia Youmans, and Tyeisha Youmans were present at the time. (App., p. 18). During the encounter Respondent and Victim "ha[d] words" with each other over the course of a couple of minutes. The encounter ended and Victim walked up the street toward the intersection of Emerald Road and Wingo Estates. (App., p. 21-23; p. 110). According to Respondent, he got in his car to go home, which was in the

same direction that Victim had walked. Respondent arrived home, exited his car in the vicinity of Victim, and moments later Victim was shot and killed by Respondent. (App., p. 23). Respondent then fled the scene. (App., p. 28-29; p. 158). Forensics recovered six .380 caliber casings in the yard and street where Respondent had fired. (App., p. 60-61; p. 172). A single .40 caliber shell casing was found in the vicinity of Victim's body in the location where Victim fell after fleeing from Respondent's gunfire. (App., p. 62). No firearms were recovered from the scene. Respondent turned himself in approximately one week later. (App., p. 100). The precise testimonies of three witnesses are pertinent to the voluntary manslaughter issue:

Alicia Youmans

Alicia Youmans testified on behalf of the State. In pertinent part, she testified that when Victim arrived at the porch he asked to buy two cigarettes from her. She did not abide the request because Victim and Respondent began to argue. (App., p. 20, lines 1-23). Her cross-examination revealed that she believed Respondent was responsible for starting the argument because Respondent lifted his shirt to Victim to show the presence of his gun. (App., p. 33, lines 15-18; p. 37, lines 1-10). She could not testify as to the topic of their argument, but noted that the argument ended when Victim walked away and Respondent got in his car. Victim walked up Wingo Estates toward Emerald Road. (App., p. 21, lines 2-25). Respondent drove his car on to Wingo Estates and drove up towards Emerald Road. (App., p. 23, lines 1-5).

Victim had reached the intersection by the time Respondent arrived, wherein another verbal dispute arose and Respondent exited his vehicle.[1] She then testified, "they was still arguing or whatever, and he turned to go back to his car. I'm not sure if something was said or what happened,

[1] Alicia's statement to police indicated that Respondent "got out of his car swinging his arms. After that they got real close to each other, and that's when Montay Payne pulled out his gun and shot Devante Odom." (App., p. 39, lines 19-24).

but he – when he turned back around to face Mr. Odom, he began shooting at him." (App., p. 23, line 1 through p. 24, line 25). Alicia testified that Victim attempted to run away once Respondent began shooting. (App., p. 26, lines 2-21). Alicia did not see Victim with a gun, nor did she see a gun in his vicinity when she reached the location where he fell. (App., p. 30, line 1-14).

Of critical import to the totality of the evidence is that the forensics supports Alicia's version of events. Six .380 caliber casings were recovered in the yard and street where Respondent had fired. (App., p. 60-61; p. 172). A fired .380 caliber bullet was recovered from Victim's body. (App., p. 88-91; p. 184). Victim's body was struck four times and exhibited both soot and stippling indicative of a close-range attack estimated to be between 18 inches and two feet. (App., p. 186-188). No shell casings were recovered from where Victim was at the time the shooting began. Though no guns were recovered from the scene, only a single .40 caliber shell casing was found in the vicinity of Victim's body *in the location where Victim fell after fleeing from Respondent's gunfire*. (App., p. 62; p. 100). Additionally, Alicia was the individual who called 911, identified Respondent as the shooter, informed police of Respondent's vehicle and the direction he fled, and testified that Tyeisha had gone inside of the house and was not outside to witness the shooting take place. (App. p. 24, lines 11-15; p. 28-29).

Tyeisha Youmans

Tyeisha testified that she was in her car changing the music and did not initially notice Victim's arrival. However, she heard what she thought to be arguing and approached the porch. (App., p. 113, line 5 through p. 114, line 2). She then testified that Respondent and Victim were not "necessarily arguing, arguing, but they was just having words back and forth" and that it only lasted a few minutes. (App., p. 114, lines 6-19). She testified that Victim walked up the road to the intersection, and thereafter Respondent got in his car to leave and go home. (App., p. 114, line

20 through p. 115, line 21). Tyeisha testified that Respondent made no mention of the back-and-forth with Victim to her or the other individuals before he left in his car. (App., p. 116, lines 1-9).

She testified that after leaving to go home, Respondent and Victim "I guess . . . started having words again because you could tell that they was, like, had to be talking back and forth" down the street. (App., p. 117, lines 2-6). She clarified that Respondent had exited his car and walked into Emerald Road for this to occur. She testified that she saw Respondent swing at Victim, and Victim responded by pulling a gun out. (App., p. 117, line 7 through p. 118, line 13). After Victim pulled out his gun, Tyeisha testified that "Mr. Payne, like I said, he had, like, his hands like that, like I guess you don't want to fight or something like that." (App., p. 118, lines 21-23). *She testified that at this point Respondent turned around and headed back toward his house.* She testified that Victim followed Respondent and that they still appeared to be having words back and forth as he did so. (App., p. 118, line 23 through p. 121, line 25; p. 120, lines 2-4; p. 132, lines 8-21). After walking some distance back to his home, Respondent turned and faced Victim. (App., p. 120, lines 3-25). Tyeisha testified that when Respondent turned around Victim started firing at Respondent. She testified that Respondent then started firing back, and that amidst the shooting, Victim turned to run back toward the trailers on Emerald Road. (App., p. 121, line 4 through p. 122, line 5). Tyeisha confirmed that she witnessed these events from approximately 100 yards away. (App., p. 130, lines 11-24).

Respondent Demontay Payne

Respondent testified that once Victim arrived at Stacey Hartzog's home "he said something to me that I can't quite remember. But we engaged in a verbal argument or exchanged words, and that was it." (App., p. 156, lines 10-12). Respondent testified that though he could not recall the topic of the argument, he recalled telling Victim "I ain't worrying about it." (App., p. 156, lines

18-19). Respondent further testified that he was calm during the exchange, but that Victim was less so. (App., p. 156, line 20 through p. 157, line 1). Respondent testified the girls told Victim to leave. Victim left and walked up the road to the intersection of Emerald Road and Wingo Estates, which was in the vicinity of Respondent's grandmother's home. (App., p. 157, lines 4-18). Respondent further testified that the girls told him not to follow Victim. Respondent responded by informing the girls that he was not going to follow. Respondent testified on cross-examination that the girls telling him not to follow was due to Victim's choice to stay up at the top of the intersection, not as a result of Respondent's demeanor. (App., p. 158, lines 9-14; p. 165, line 19 through p. 166, line 4). Respondent then told Tyeisha he was going home (his grandmother's home) and left in his car. (App., 160, lines 9-24).

Respondent next described how the violent altercation took place. He testified that, "After [driving home], as I was getting out of the car, he was coming towards, he fired, and I fired back." (App., p. 159, lines 10-11). Respondent clarified that when he pulled up to the edge of his trailer, he saw Victim coming. Respondent testified that they exchanged words, and Victim fired at him, and he "fired back in self-defense." (App., p. 159, lines 12-24). Respondent further testified as to the manner in which he fired his gun, describing that he was backing up shooting and not paying attention to where he was shooting. He testified that *the reason he was backing up* was, "because he was afraid for his life." (App., p. 160, lines 3-12). Respondent could not recall how many shots he fired and only knows how many times he shot Victim because of the police report. (App., p. 160, lines 13-21). Respondent testified that he did not see where Victim ran, as he was "looking back running." (App., p. 161, lines 2-4). He then explained that, "after everything – after all the fire exchange[d], [he] was scared" and made the decision to jump in his car and leave. (App., p. 161, lines 2-8). Respondent was then asked: "when he fired at you, what went through your mind?"

He responded by saying: "That the bullet was going to kill me or either I was going to lose something that I would never be able to get back." (App., p. 163, lines 6-12). He agreed with counsel's questioning that he could not "have taken another course" and "had no other choice" but to respond as he did. (App., p. 163, lines 13-18).

Respondent's cross-examination added further testimony. Respondent reiterated that he could not recall the topic of the argument. (App., p. 164, line 21 through p. 165, line 6; p. 171, lines 16-21). He agreed that he was calm in comparison to Victim, whom he agreed was out of control. (App., p. 165, lines 16-18). He testified that Victim started shooting at him before he could even close the door to his car. (App., p. 168, lines 1-4). He testified: "When you're backing up not looking, you can't see who you're shooting at or what you're shooting, you just know you're shooting to get someone away from you or anything that's firing at you away." (App., p. 168, lines 16-20). Respondent could not remember whether or not he had a subsequent verbal confrontation with Victim in the middle of Emerald Lane prior to the shooting taking place. (App., p. 171, lines 7-12; p. 171, line 22-24). Respondent testified that he does not remember swinging at Victim. (App., p. 171, lines 13-15). Respondent denied having any knowledge of a preexisting dispute between him and Victim. (App., p. 172, lines 20-22). When asked if there was a problem between them after their argument on the porch, Respondent thought only that Victim "probably had a hostile – hostile feeling about me." (App., p. 172, line 23 through p. 173, line 3).

ARGUMENT

I. The Court of Appeals failed to adhere to the "reasonable inference" standard required for review of the facts of record when evaluating the necessity of a lesser included offense charge.

The Court of Appeals failed to correctly apply the legal standard that a jury charge for a lesser included offense is only proper upon any evidence supporting a *reasonable inference* of

guilt for only the lesser included offense. Instead, the Court of Appeals relied upon a superficial application of the "any evidence" standard by citing random, disjointed, and unsupportive facts to conclude there existed circumstantial evidence of both heat of passion and legal provocation. The Court of Appeals failed to consider these facts in context, failed to consider the causal connection required between the two, and was dismissive of Respondent's own explicit testimony[2] as to his own state-of-mind at the time of the crime. In doing so, the Court of Appeals' ruling is legally incorrect and is based upon unreasonable factual inferences that disregard the totality of the evidence presented. Its decision to reverse Respondent's conviction was therefore reached in error and should be reversed.

a) The Court of Appeals did not abide the reasonable inference standard of review and the record is absent evidence establishing the heat of passion element.

Jury charges are generally subject to an "any evidence" standard, but jury charges on lesser included offenses are only proper where the totality of the evidence is considered and is found to support a *reasonable inference* that the jury could find the defendant guilty of *only* the lesser included offense. Numerous cases speak to this legal principle. *State v. Moore*, 245 S.C. 416, 421, 140 S.E.2d 779, 781 (1965) (noting that the degree of the offense committed and the propriety of the jury charges warranted at trial is subject to the "**reasonable inferences**" to be drawn from the testimony.)(emphasis added); *State v. Lambright*, 279 S.C. 535, 537, 309 S.E.2d 7, 8

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[2] Such evidence may not always be dispositive, in light of differences in circumstances and testimony that can exist between cases. However, when the matter of Respondent's supposed mental state is at issue, his own direct testimony that his mental state lacked any passion or anger is monumental evidence against a heat of passion killing for which a reasonable contradictory inference would be nearly impossible to reach when the State is <u>*likewise*</u> not submitting evidence of voluntary manslaughter. (*State v. Niles*, 412 S.C. 515, 772 S.E.2d 877 (2015), *infra*); *Cf. State v. Moore*, 245 S.C. 416, 420, 140 S.E.2d 779, 781 (1965)("In determining the issues to be submitted to the jury . . . all of the testimony, both for the State and the defense, must be considered.").

(1983)("When the evidence is **susceptible of the inference** that an accused person is guilty of only a lesser included offense, it is the duty of the trial judge to charge the lesser offense so the jury may choose.")(emphasis added); *State v. Gilmore*, 396 S.C. 72, 82, 719 S.E.2d 688, 693 (Ct. App. 2011) (Noting that in judging the trial court's refusal to charge ABHAN, "[w]e must examine the record to determine whether **sufficient circumstantial evidence exists to support a reasonable inference**" of the lesser included offense.)(emphasis added); *State v. Geiger*, 370 S.C. 600, 607, 635 S.E.2d 669, 673 (Ct. App. 2006) ("To justify charging the lesser crime, the evidence presented must allow **a rational inference** the defendant was guilty only of the lesser offense. The court looks to the **totality of the evidence** in evaluating whether such an inference has been created.")(internal citations omitted)(emphasis added); *State v. Small*, 307 S.C. 92, 94, 413 S.E.2d 870, 871 (Ct. App. 1992) ("Due process requires that a lesser included offense be charged when the evidence warrants it but only if the evidence would permit a jury **rationally** to find the defendant guilty of the lesser offense."); See also *State v. Sims*, 426 S.C. 115, 130, 825 S.E.2d 731, 738 (Ct. App. 2019), reh'g denied (Apr. 19, 2019), cert. denied (Aug. 16, 2019); *State v. Morris*, 307 S.C. 480, 483, 415 S.E.2d 819, 821 (Ct. App. 1991); *State v. Tyndall*, 336 S.C. 8, 21, 518 S.E.2d 278, 285 (Ct. App. 1999).

Our Fourth Circuit Court of Appeals has also weighed in favorably on the matter. *Ford v. Stevenson*, 523 F. App'x 206, 212 (4th Cir. 2013) (quoting *State v. Geiger*, 370 S.C. 600, 635 S.E.2d 669, 673 (S.C.Ct.App.2006)) ("In addition, the 'any evidence' standard Ford cites does not require a charge on a lesser-included offense unless the 'evidence presented' would 'allow a rational inference the defendant was guilty only of the lesser offense.'"). Even United States Supreme Court precedent (cited to favorably in *State v. Smalls,* 307 S.C. 92, 94, 413 S.E.2d 870, 871 (Ct. App. 1992)), bears out that "a lesser included offense instruction should be given 'if the

evidence would permit a jury **rationally** to find a [a defendant] guilty of the lesser offense and acquit him of the greater.'" *Hopper v. Evans*, 456 U.S. 605, 612, 102 S. Ct. 2049, 2053, 72 L. Ed. 2d 367 (1982) (quoting *Brandt v. United States*, 412 U.S. 205, 208, 93 S.Ct. 1993, 1995, 36 L.Ed.2d 844 (1973))(emphasis added).

Of the numerous cases articulating this standard for jury charges, *State v. Gilmore* provides the most thoughtful discussion and it warrants additional attention. The Court of Appeals in *Gilmore* held that the record must show "any direct evidence or any substantial circumstantial evidence" in order to demonstrate that the denial of a lesser included offense was in error. *State v. Gilmore*, 396 S.C. 72, 80, 719 S.E.2d 688, 692 (Ct. App. 2011). "When the evidence supporting a request for a charge on a lesser-included offense is purely circumstantial, we examine the record to determine if there is *sufficient circumstantial evidence* to permit a reasonable inference that the defendant is guilty only of the lesser crime." *Gilmore*, 396 S.C. at 80, 719 S.E.2d at 692. (emphasis added).

This articulation of the reasonable inference rule makes sense, as it constitutes analogous treatment of the evidence when considering a motion for directed verdict. Therein, if there is not substantial circumstantial evidence tending to prove guilt of the charged crime, the charged crime is not presented to the jury for consideration. The same should hold true for the request of lesser included offenses; the jury should not be presented an opportunity to consider the charge in the absence of substantial circumstantial evidence creating a reasonable inference supporting the charge. The analogous comparisons continue in consideration of the fact that like summary judgment consideration, facts for purposes of jury charges must be viewed in the light most favorable – *but only to the extent that reasonable inferences may be drawn therefrom.* Crucially, the light most favorable standard does not permit willful ignorance or disregard of evidence

contrary to the desired inference. Not only is the reasonable inference standard clearly set forth across multiple cases for decades of South Carolina jurisprudence, the standards fits firmly into place alongside other maxims of review. The Court of Appeals' holding in *Gilmore* presents sound analogous logic for consideration of charging lesser included offenses, but such logic was abandoned in this case.

In addition to the plethora of cases articulating the appropriate rule of law, there is also case law bearing striking similarity to the pertinent facts of this case, and how the law is to be applied to such facts. In *State v. Niles*, this Court undertook the examination of a murder conviction reversed by the Court of Appeals, claiming the trial court erred in denying a voluntary manslaughter charge due to the presence of evidence supporting the charge. *State v. Niles*, 412 S.C. 515, 521, 772 S.E.2d 877, 880 (2015).

In *Niles*, the testimony of two individuals was in dispute. Ervine Moore testified that Niles approached victim's car and conversed with victim regarding the purchase of marijuana. Soon after he heard two gun shots and saw Niles leap back into the seat of their vehicle, and he then heard victim fire a weapon in response. The exchange of gunfire then continued between them and Moore saw that Niles had stolen the drugs in question. Niles, on the other hand, testified that Moore was the one attempting to purchase the drugs, which resulted in a fight between them, and Moore attempting to rob victim of the drugs. According to Niles, Moore leaped into the car with the drugs and victim began shooting at their car. Niles responded by grabbing his own gun and returning fire. Most importantly, *Niles testified at trial and explicitly stated that he was firing with his eyes closed, was not trying to kill anybody, was just trying to get victim to stop shooting, and was concerned for the safety of his fiancé in the car. Id.*, at 518-521, 772 S.E.2d 877, 880 (2015)(emphasis added). Despite those facts, the Court of Appeals found evidence of sufficient

legal provocation on the basis that Niles only fired his weapon after being shot at by victim, and it found evidence supporting a sudden heat of passion "based on Niles's testimony that he took Moore to meet the victim to buy marijuana; that Moore, without warning, decided to rob the victim; and that Niles did not fire his gun until after Moore perpetrated the robbery and the victim shot first." *Id.* at 521.

This Court reversed, noting that Niles's own testimony failed to establish "that he was overtaken by a sudden heat of passion such that he had an *uncontrollable impulse to do violence*." Instead, this Court gave great consideration to Nile's testimony of his own mental state, which, if believed, established that Niles 1) did not want to hurt the victim; 2) shot with his eyes closed; 3) was merely attempting to stop the victim from shooting; and 4) was thinking of his fiancé safety rather than of perpetrating violence upon the victim when he chose to shoot. In light of such, this Court noted that Niles's testimony demonstrated no criminal intent whatsoever and appeared designed to support a charge of self-defense, not a heat of passion killing. *Id.*, 772 S.E.2d at 881.

The case at hand bears a striking resemblance to *Niles*, and deserves similar analysis and treatment. Three versions of events were presented to the jury during Respondent's case. Looking at these versions of events for purposes of establishing a reasonable inference of heat of passion leaves one completely empty handed.

In summary, Alicia Youmans testimony demonstrates that an argument took place on the porch, it appeared to continue up the road, and Respondent was the first to initiate violence of any form by shooting Victim[3]. Notwithstanding the facts of her testimony and forensic evidence which strongly supports a shooting committed with malice, Alicia's testimony does not provide any direct

[3] Though this portion of the brief is designed to address specifically the issue of "heat of passion" it is undeniable that Alicia's testimony does not support a voluntary manslaughter charge, as there is no basis for legal provocation.

evidence of Respondent's state of mind and she explicitly says she does not know why Respondent turned away only to then turn back and start shooting.

Tyeisha Youman's testimony, if believed, can be summarized to suggest to the jury that Victim and Respondent were "having words" over just a few minutes time, after which Victim left to the top of the road. She testified that Respondent made no mention of the argument and got in his car to go home, thereby indicating no heat of passion. When Victim and Respondent encountered each other again, Respondent got out of the car and swung at Victim. Crucially, Victim pulled out a gun in response, but Respondent's reaction was to put up his hands in a gesture demonstrating that Victim was unwilling to fight him – Respondent then disengaged from the confrontation by turning his back to Victim and walking toward his nearby home. Thereby again demonstrating no basis for heat of passion. According to Tyeisha, Victim followed behind Respondent and when Respondent turned back around to face Victim, Victim started shooting. Only then did Respondent shoot back, and amidst the shooting Victim retreated toward the trailers on Emerald Road. Her testimony *does not* show that Respondent pursued Victim so as to continue shooting him. Moreover, her general articulation of events are not supported by the forensic evidence. Gunshot wound number 1, which entered Victim's upper chest and exited his left back, exhibited soot and stippling. (App., p. 186; p. 188). Those are facts counter to the premise that Victim shot at Respondent, missed Respondent entirely, but was then struck himself from a distance of approximately 18 inches to two feet.

While according to Tyeisha, Victim fired first, which *could* establish sufficient legal provocation, *nothing* about the encounter demonstrates that Respondent was overcome by a heat of passion. To the contrary, her testimony repeatedly demonstrated ***a lack of*** uncontrollable impulse to do violence by Respondent. He may have swung a fist, but his reaction to Victim

pulling a gun was to put his hands up to insinuate Victim was not willing to fight him and then to disengage entirely from the confrontation. *This demonstrates a choice against committing violence, not an impulse to do violence.* His next action, according to Tyeisha was to return fire once Victim started shooting at him. The simple act of returning fire once shot at does not establish the element of heat of passion. Tyeisha's testimony does not provide any direct evidence as to Respondent's state of mind, *and the only reasonable inference to draw from her testimony was that Respondent was clearly not experiencing a heat of passion.*

Lastly, Respondent's own testimony, if believed, constitutes direct evidence unequivocally establishing his mental status during the encounter. Respondent:

1) could not recall the topic of the argument;
2) told Victim he "ain't worrying about it";
3) ***admitted to being calm*** during the exchange;
4) asserted Victim was out of control;
5) stated an intent and a completed action of driving home and not pursuing Victim;
6) set forth that he did not need to be talked down from pursuing Victim by the women;
7) could not remember whether a second argument ever took place;
8) stated that he had barely exited his car outside his trailer when Victim started shooting at him;
9) stated that he "***fired back in self-defense***";
10) stated that he was backing up shooting and not paying attention to where he was shooting;
11) stated that he was ***backing up*** because he was ***afraid for his life***;
12) stated that he was "looking back running" and did not see where Victim had run;

13) stated that his thoughts during the shooting were that he was going to be killed or hurt severely by Victim;

14) stated that he had ***no other choice*** but to shoot back;

15) stated that he was backing up, not looking at where he was shooting, and ***was only shooting to get Victim away from him***;

16) does not recall swinging at Victim;

17) denied having any preexisting dispute with Victim; and

18) ***denied having any problem with Victim as a result of the argument that day***.

The direct evidence of Respondent's state of mind, pertinent to the question of whether he experienced a heat of passion during the confrontation with Victim, could not be any more flagrantly lacking of evidence supporting an impulse to do violence. Practically speaking, his testimony could not have been any more contrary to the theory of voluntary manslaughter and supportive to the theory of self-defense. The law acknowledges that those theories *can* exist within the same case – but they do not coexist here. See *State v. Starnes*, 388 S.C. 590, 599, 698 S.E.2d 604, 609 (2010).

The testimony provided by Respondent is arguably even more staunch that that which Niles provided in his own defense. While the Court in Niles felt that the case laid out by the defendant "appear[ed] designed to support a charge of self[-]defense, not heat of passion", Respondent has gone a step further by *explicitly stating* that his actions were in self-defense, and his testimony repeatedly relies upon supposed facts and memories that only support a theory of self-defense.

The Court of Appeals did not accurately apply the law or facts to this case in concluding the presence of a heat of passion. The law requires reasonable and rational inferences from the totality of the evidence, and the Court of Appeals' decision is neither reasonable, rational, nor a

thoughtful product of the totality of the evidence presented. Moreover, the Court of Appeals relied entirely upon the presence of the most basic innocuous facts to draw strained and unreasonable inferences taken out of the context in which they were presented, and it did so while disregarding the direct evidence of Respondent's own testimony to each topic. As such, the Court of Appeals has not properly considered the facts of this case and not applied the correct legal standard to those facts. This Court should reverse the decision of the Court of Appeals.

b) The Court of Appeals reached unreasonable inferences from the evidence that lack the causal relationship required between the legal provocation and heat of passion elements for voluntary manslaughter.

In addition to the Court of Appeals' omission of the reasonable inference standard based upon the totality of the evidence, the court failed to properly analyze the facts within the legal standard it did set forth. The Court of Appeals set forth the following excerpts from its statement of the law:

> Whether a voluntary manslaughter charge is warranted turns on the facts. If the facts disclose any basis for the charge, the charge must be given." *Id.* at 597, 698 S.E.2d at 608.
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> . . .
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> When determining whether the evidence requires a charge on voluntary manslaughter, the court must view the facts in the light most favorable to the defendant." *State v. Niles*, 412 S.C. 515, 522, 772 S.E.2d 877, 880 (2015).
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> A defendant is not entitled to a voluntary manslaughter charge merely because he was in a heat of passion." *Starnes*, 388 S.C. at 596, 698 S.E.2d at 608. Nor is he entitled to a voluntary manslaughter charge merely because he was legally provoked. *Id.* at 597, 698 S.E.2d at 608. "Moreover, there must be evidence that the heat of passion was ***caused*** by sufficient legal provocation." *Id.* Though one's fear immediately following an attack or threatening act ***may cause*** the person to act in a sudden heat of passion, the mere fact that one is afraid is insufficient, alone, to entitle a defendant to a voluntary manslaughter charge. *Id.* at 598, 698 S.E.2d at 609. "[I]n order to constitute 'sudden heat of passion upon sufficient legal provocation,' the fear must be the result of

> sufficient legal provocation **and *cause*** the defendant to lose control and create an uncontrollable impulse to do violence." *Id.* "Succinctly stated, to warrant a voluntary manslaughter charge, the defendant's fear must manifest itself in an uncontrollable impulse to do violence." *Id.* at 598-99, 698 S.E.2d at 609.

State v. Payne, 862 S.E.2d 81, 88-89 (S.C. Ct. App. 2021), reh'g denied (Aug. 31, 2021) (emphasis added). What is present in the recitation of law, but absent from the Court of Appeals' analysis, is the context of the facts relied upon by the court, and the causal relationship between the legal provocation and the heat of passion elements for voluntary manslaughter.

The need for a voluntary manslaughter charge will not arise simply because the evidence demonstrates the existence of an argument and subsequent violence. And, as is demonstrated by *Starnes*, the law does not simply allow for the checking of boxes as to: heat of passion, legal provocation, fear, and uncontrollable impulse to do violence. Instead, each of these facets, fear being the only one not explicitly mandatory[4], is interconnected to the others, and the necessary causal relationship set forth by *Starnes* can only be evaluated when the evidence *is considered in the context it was presented at trial. Id.* at 598, 698 S.E.2d at 608.

At best, the Court of Appeals relied upon five pieces of circumstantial evidence for its finding that Respondent's mental state was one of an uncontrollable impulse to do violence. These include: 1) there was evidence of an argument "heated enough" for the women to instruct Victim to leave and Respondent not to follow; 2) there was testimony, witnessed at a distance, that a second argument occurred; 3) there was evidence that Respondent tried to punch Victim; 4) Victim fired his gun first, causing Respondent to return fire, striking Victim four times, despite Victim

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[4] Respondent is reticent as to the consequences of identifying fear, as opposed to anger, as a foundational emotion for "*heat* of *passion*". Nevertheless, the existing law dictates that fear alone is insufficient, and it must manifest in an uncontrollable impulse to do violence.

running away; and 5) Respondent testified he was afraid for his life. *Id. 862* S.E.2d at 99. Each of these evidentiary grounds lacks the context and causal relationship needed to create a reasonable inference from substantial circumstantial evidence that Respondent acted under a sudden heat of passion. Those errors in factual findings were then compounded by the Court of Appeals marginalizing Respondent's direct evidence testimony as to his own state-of-mind, in favor of its own strained inferences.

Regarding the first piece of evidence, there is indeed evidence of an argument, and there is evidence that someone told Respondent not to follow Victim. The Court of Appeals references this as its first fact supporting reversal. However, neither of these facts addresses Respondent's state-of-mind as it pertains to the creation of an uncontrollable impulse to do violence, and moreover, the Court of Appeals failed to tell the whole story behind that particular piece of evidence.

The context surrounding this first piece of evidence demonstrates that this exchange between Respondent and Victim included Respondent telling Victim: "I ain't worrying about it"; that Respondent testified he was calm during and after the exchange of words with Victim; that Respondent told the women he had no intention to follow Victim; that Respondent testified their instruction not to follow was based on Victim's actions, not on Respondent's demeanor; and that *both* Tyeisha and Respondent testified that Respondent left to go home, as opposed to rekindling an argument with Victim. (App., p. 156-158; p. 166). This additional evidence, which is *necessarily* contextual, reveals that in no way did this initial argument with Victim ***cause*** Respondent to enter into a heat of passion state-of-mind or even cause Respondent to become mildly angry. As demonstrated, *all* of the evidence is to the contrary, as it shows Respondent was capable of cool reflection after the argument ended. Heat of passion does not arise simply from

the existence of an argument, and the court's reliance in part upon this fact was an unreasonable inference as to the heat of passion element.

This Court's second piece of evidence – that witnesses viewed a second argument from a distance – is likewise without any context or support demonstrating a change in the state-of-mind of Respondent. Most of the evidence available suggests an argument took place, but there is no basis to demonstrate the topic of the argument or to demonstrate that it had an impact upon Respondent's state-of-mind that caused an uncontrollable impulse to do violence. To the contrary, Respondent's testimony demonstrates that he still could not recall the subject of the argument, *or even if a second argument took place*. Respondent also testified that Victim's attack took place before he could even fully exit his vehicle. (App., p. 171, lines 22-24; p. 168). Respondent testified that he bore no dispute against Victim, and that if such a dispute existed, it existed solely by Victim expressing hostility toward him. (App., p. 172-173). The Court of Appeals dismissed this direct evidence to the issue in favor of its unsupported circumstantial evidence inference to the contrary. The existence of an argument cannot satisfy the heat of passion element without also having legal provocation, and that such legal provocation *caused* Respondent to experience an uncontrolled impulse to do violence. No such causal relationship has been shown to arise. The supposed second argument, and particularly Respondent's clear lack of impact by it, demonstrates that it provides no evidence in support of a voluntary manslaughter charge. Reaching an inference to the contrary is not a reasonable view of the evidence, but a strained and artificial construction of a narrative not supported by the fullness of the record.

Third, the Court of Appeals identified evidence that Respondent threw a punch at Victim. This is the first instance of any violence, but violence alone cannot demonstrate Respondent was suffering an *uncontrollable impulse* to do such violence. When the evidence in connection to this

punch is considered, it is demonstrated to be decidedly unimpulsive and fully controlled. First, Respondent testified that he does not even recall throwing a punch. More importantly, Tyeisha testified that after the punch was thrown and Victim pulled out his gun, Respondent made the decision to put his hands up in a fashion demonstrating that he did not further expect to fight. In doing so, the only evidence available demonstrates that Respondent was in control of his actions and did not continue with violence. Therein, he demonstrated control, deliberation, and specifically, the capability for cool reflection. (App., p. 118).

While this is sufficient to show Respondent's state-of-mind was not one bearing heat of passion, the evidence further shows that after this supposed exchange, and despite Victim having his gun pulled, *Respondent disengaged from the altercation and walked back toward his home.* (App., p. 118-119). Respondent's decision demonstrates he was not only *capable* of cool reflection, but actually ***chose to utilize cool reflection.*** The Court of Appeals' Opinion cites long quotations that included Respondent's decision to turn around and walk away, but the opinion pays this fact no weight in evaluating Respondent's requisite state-of-mind. It is axiomatic to conclude that one who deliberately disengages from an argument cannot also be said to bear an *uncontrollable impulse* for violence as a result of that argument. The context and surrounding circumstances of the evidence presented do not support the elements for voluntary manslaughter, and neither the jury nor the court can "reasonable infer" support for such elements by citing only to the violence and never to a defendant's choice to disengage, turn around, and head home.

Fourth, the Court of Appeals cites testimony demonstrating that Victim started shooting first at Respondent, and that Respondent fired back in response striking Victim four times, even though Victim was running away. Here the Court seems to key in on the assumption that

Respondent "kept shooting" beyond his need for self-defense. The record does not support that inference.

There is nothing to show that Respondent "kept shooting" over an extended period of time, that Respondent knew Victim was fleeing at the time he was still shooting, or that Respondent knew he had hit Victim and wished to cause additional harm despite his effort to flee. The record shows that the opposite is true. Tyeisha's testimony suggests a very short and consecutive burst of gunfire with nothing to show that Respondent fired upon Victim after becoming aware of Victim ending his attack and fleeing. Likewise, and most importantly, in Respondent's own testimony he states clearly that he was "backing up shooting", "not paying attention to where he was shooting", "looking back running", did not see where Victim had run, was not looking where he was shooting, and was only shooting to get Victim away from him. If such testimony was not enough, he explicitly says his actions were in self-defense. (App. p. 159-161; p. 168). The Court of Appeals' conclusion is not a reasonable inference. Frankly, it is irrational to infer from the totality of the evidence that Respondent acted in heat of passion by knowingly continuing to shoot a wounded and fleeing Victim. The Court of Appeals egregiously erred in relying upon such a concoction of strained or unsupported facts to support its ruling.

Beyond the simple lack of reasonableness, is again, the lack of evidence tending to show that Victim's attack *caused* Respondent to succumb to an uncontrolled impulse for violence, and the context surrounding that evidence which proves the contrary was disregarded by the Court of Appeals. This fourth piece of relied upon evidence demonstrates for the first time under any testimony, from any witness, that there is evidence of sufficient legal provocation.[5] If Tyeisha

[5] As only Tyeisha and Respondent testified that Victim shot first, Alicia's testimony depicting an unprovoked, undefended, and malicious shooting by Respondent, cannot be

and/or Respondent are to be believed, and Victim shot first, the law dictating the need to charge voluntary manslaughter requires the following:

1) There must be evidence that the legal provocation *caused* the Respondent's heat of passion; or
2) That if Victim's attack caused Respondent's fear, there is evidence that that fear "must be the result of legal provocation and *cause* the defendant to lose control and create an uncontrollable impulse to do violence."

Starnes, 388 S.C. at 597-99, 698 S.E.2d at 608-09.

This particular issue is where the Court of Appeals lost the plot as to differentiation between self-defense and voluntary manslaughter. Generally speaking, the allegation that a shooter "kept shooting" could fall into either the anger category or the fear category of an uncontrollable impulse for violence. However, it cannot be so simply argued that legal provocation via gunfire, resulting in fear, and the defendant's reaction to "do violence" by firing back suffices as evidence to warrant a voluntary manslaughter charge. To do so would be completely indistinguishable from the elements of self-defense. The decision to charge voluntary manslaughter demands an assessment of the state-of-mind of the defendant, and that the fear or anger involved from the provocation caused an uncontrollable impulse for violence. The Court of Appeals' characterization of the evidence in this case fails to establish the necessary causal relationship demanded in *Starnes*, disregards the evidence that would demonstrate the absence of that causal connection, and further demonstrates that the record does not support the finding that an uncontrolled impulse for violence even existed. The context of the evidence is crucial, but the context was not considered.

Tyeisha testified that Victim shot first, but she did not offer any testimony as to whether Respondent's reaction to fire back was the result of an uncontrolled impulse to do violence. Nor

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deconstructed and utilized in part to establish the elements of voluntary manslaughter. (*Infra*; See *State v. Funchess,* 267 S.C. 427, 229 S.E.2d 331 (1976)).

did she testify as to the emotions that Respondent was feeling at the time and how he responded to those emotions. Nor did she even offer testimony as to the subject matter of the argument before gunfire ensued. However, Respondent was able to testify to his state-of-mind, and thereby provided extensive *direct evidence* as to this state-of-mind. His testimony demonstrated 1) he explicitly fired back in self-defense; 2) he was "backing up shooting"; 3) he was not paying attention to where he was shooting (demonstrating no desire to harm); 4) he was "looking back running"; 5) that he stated "when you're backing up not looking, you can't see who you're shooting or what you're shooting. You just know you're shooting to get someone away from you, or anything that's firing at you away" (demonstrating no desire to harm); 6) he could not recall how many shots he fired; 7) he only knows how many times Victim was struck because of the police report; and 8) Respondent's *decision* to return fire was the only *option* he believed he had under the circumstances. (App., p. 159-161; p. 163; p. 168). Regardless of whether Respondent's argument is an assertion that he was in fear, or that he was angry, these statements provide direct evidence as to Respondent's true state-of-mind and they directly refute the Court of Appeals' inference that Respondent continued to shoot Victim despite knowing Victim was running away or how many times he had struck Victim.

This evidence is exclusively indicative of an individual *trying to get away* from violence, not someone looking to inflict additional injury to a fleeing assailant. Contrary to Court of Appeals' findings, the record is devoid of evidence which would characterize Respondent's actions as an uncontrolled desire to do violence against another out of fear or anger. Evidence taken in the light most favorable is limited to only the reasonable inferences that can be drawn from that evidence. None of the defense's evidence can be reasonably inferred to show that Victim's attack created an uncontrolled impulse to desire violence. The simple act of shooting back at Victim does not

demonstrate Respondent's state-of-mind. All of the correlating evidence that does relate to state-of-mind demonstrates that it was a *decision* made by Respondent who desired to get away from violence and to get the ensuing violence away from him – it therefore cannot be reasonably inferred as an uncontrollable desire to do violence upon another.

Lastly, the court cites to the quotation that Respondent was "afraid for [his] life" as its fifth piece of circumstantial evidence. However, the Court of Appeals again improperly applied the law and disregarded the facts concerning that statement of fear. The need for the legal provocation to cause the heat of passion is no more greatly demonstrated than in reliance upon "fear" as the basis for voluntary manslaughter. The law is well established by *Starnes*, but it is perhaps incapsulated by Chief Justice Toal in her concurrence in *Childers*: the law cannot support "the proposition that a person who simply defends himself while in fear for his life is entitled to a voluntary manslaughter charge". *State v. Childers*, 373 S.C. 367, 376, 645 S.E.2d 233, 238 (2007). Respondent's testimony clearly establishes that he was afraid he would die or sustain severe injury, and it clearly establishes that he only returned fire in an effort to get Victim away from him. Moreover, Respondent agreed that his decision to shoot was the only ***choice*** he believed he had available. That is direct evidence contrary to the inference of an impulse to do violence, and it is the only testimony in the record that addresses Respondent's "fear". The Court of Appeals committed both factual and legal error in relying upon such as a basis for heat of passion in this case, as the record shows that his fear did not cause an uncontrollable impulse to do violence. As was succinctly stated in *Starnes,* the same applies to the case at hand:

> [W]hile [defendant] testified he shot . . . out of fear, there is no evidence he was out of control as a result of his fear or was acting under an uncontrolled impulse to do violence. The only evidence in the record is that Respondent deliberately and intentionally shot [victims] and that he either shot the men with malice aforethought or in self-defense.

Id. at 599, 698 S.E.2d at 609. Therefore, based upon the facts of this record, it is an entirely unreasonable inference to find that Respondent's fear *caused* an uncontrollable impulse for violence, as is required when relied upon for a charge of voluntary manslaughter.

Each supposed fact relied upon by the Court of Appeals was taken out of context or in disregard for blatantly contrary evidence. The manner in which these facts were relied upon by the Court of Appeals simply does not constitute a fair reading of the record. Under the law, not only is the factual analysis in error, but the Court of Appeals failed to demonstrate how these relied upon facts, supposedly tending to show a heat of passion, were caused by legal provocation from the Victim. The legal and factual errors by the Court of Appeals in this case are numerous and reversal is warranted.

II. The Court of Appeals failed to properly apply precedent set forth by this Court in *Knoten* and *Funchess.*

The Court of Appeals provided a partial concession that "Payne's testimony alone" may leave the evidence insufficient to support a jury charge for voluntary manslaughter. However, the opinion then relies upon *State v. Knoten*, 347 S.C. 296, 305-09, 555 S.E.2d 391, 396-98 (2001) and attempts to dodge the utility of such testimony in favor of the circumstantial evidence it has chosen to focus upon. Therein, the Court of Appeals stated:

> We acknowledge that, under Payne's testimony alone, the evidence may be insufficient to support a jury charge for voluntary manslaughter. However, we are not limited to considering a defendant's *trial testimony* on the matter. See *Knoten*, 347 S.C. at 305-09, 555 S.E.2d at 396-98 (noting, in spite of the State's contention the defendant was not entitled to a voluntary manslaughter charge because he recanted his confession at trial, one of defendant's statements to police that was introduced at trail supported such).

Id. 862 S.E.2d at 98. The Court of Appeals' reliance upon *Knoten* in such a way is misplaced. In *Knoten*, the Court resolved that the defendant's recanted statements to police introduced at trial could be not be ignored as evidence of defendant's state-of-mind, even if it was not consistent with his subsequent trial testimony. *Id.* Understandably so, as such would constitute a question for the jury as to which of defendant's stories they find most credible. The court's reliance on *Knoten* seems simply inapplicable, as there is no self-contradictory testimony at issue in Respondent's case.

Petitioner acknowledges that a reviewing court is not limited to any certain portion of the evidence, but likewise, *Knoten* does not stand for the proposition that a reviewing court can evaluate only the evidence it chooses, in isolation of the remaining evidence, or outside the context for which the evidence was offered. Petitioner argues precisely the opposite; the Court of Appeals erred because it focused solely on "certain evidence" that in isolation *might* pass muster to warrant the requested charge. To do so is in contradiction to previous holdings that "the evidence presented must allow a rational inference the defendant is guilty only of the lesser offense" in order to justify the requested charge and "the court looks to the totality of the evidence in evaluating whether such an inference has been created." *Geiger*, 370 S.C. at 607, 635 S.E.2d at 673. *Knoten* does not relieve a court of that responsibility.

Lastly, the Court of Appeals also erred in failing to abide by the limitations set forth in *State v. Funchess*, 267 S.C. 427, 229 S.E.2d 331 (1976). Therein, this Court set forth that reversal of a denial of a lesser included offense charge cannot be based upon the contention that the jury would accept in part and reject in part the evidence presented by the State in support of the greater charge. *Id.* at 430, 229 S.E.2d at 332. This limitation is monumentally important to the case at hand, because the Court of Appeals expressly did so by relying upon part of Alicia's testimony to

supplement the complete absence of heat of passion demonstrated by the defense. *Payne*, 862 S.E.2d at 99.

Alicia's testimony described Respondent as clearly having a state-of-mind that desired violence. However, that evidence cannot be excised from Alicia's remaining testimony that such a state-of-mind was one that acted *in malice* by shooting Victim without any threat of violence or any legal provocation. Alicia's testimony as to how the shooting took place does not support voluntary manslaughter, and under *Funchess*, the Court of Appeals erred by taking the portions of that testimony that might be inferred to satisfy the heat of passion element and pairing them with defense's assertion that legal provocation existed when Victim shot first. Such a limitation is further demonstrated by again referring to the need to show that the heat of passion was *caused* by the legal provocation. *Starnes*, 388 S.C. at 596, 698 S.E.2d at 608. The seemingly brutal violence described by Alicia lacks a causal connection due to the absence of legal provocation. The legal provocation supposedly testified to by Tyeisha and Respondent lacks any proof that it caused Respondent to succumb to a heat of passion state-of-mind. To disregard *Funchess* and permit the mix and match of facts, such that the elements are satisfied, would essentially render all murders worthy of voluntary manslaughter charges. The Court of Appeals erred in its application of *Knoten* and in its disregard for *Funchess*, and this Court should reverse.

CONCLUSION

The Court of Appeals fell into the very confusion this Court warned of in *State v. Starnes.* This Court has cautioned judges on the frequent struggle to untangle the interplay between murder, voluntary manslaughter, and self-defense, and that the struggle may be the result of prior precedent being taken out of the evidentiary context, and removing any "boundaries as to what circumstances give rise to a sudden heat of passion upon sufficient legal provocation." *Starnes,* 698 S.E.2d at

608; *Sims*, 825 S.E.2d at 739. This Court was nothing less than prophetic in *Starnes;* the confusion that now exists in determining the propriety of charging lesser included offenses has resulted in the Court of Appeals' errors in the case at hand. For all the foregoing reasons, this Court should clarify the interplay between these legal issues, reverse the holding reached by the Court of Appeals, and affirm Petitioner's conviction and sentence.

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