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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
Doyet A. Early, III, Circuit Court Judge

Opinion No. 5846 (S.C. Ct. App. filed August 11, 2021)

THE STATE,

RESPONDENT,

V.

DEMONTAY MARKEITH PAYNE,

APPELLANT

APPELLATE CASE NO. 2021-001097

BRIEF OF RESPONDENT

BREEN R. STEVENS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

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PETITIONER'S QUESTIONS PRESENTED

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?

RESPONDENT'S COUNTER QUESTION PRESENTED

Did the Court of Appeals use the correct standard of review, properly analyze the evidence presented, and correctly apply this Court's precedent when it held the facts presented required instructing the jury on voluntary manslaughter because evidence demonstrated that Respondent shot the deceased in the sudden heat of passion based upon sufficient legal provocation?

STATEMENT OF THE CASE

On May 23, 2015, Respondent stopped at his next-door neighbor's home to visit with some friends, Alicia Youmans, Tyeisha Youmans, and Yvette Walker. App. 15, ll. 20-24; App. 18, l. 19 – App. 19, l. 9; App. 20, ll. 2-5; App. 108, l. 12 – App. 109, l. 11; App. 111, ll. 13-14; App. 153, ll. 2-6. The four were sitting outside. App. 16, ll. 9-10; App. 109, ll. 15-19; App. 153, l. 7 – App. 154, l. 1. Suddenly, Devante Odom appeared. App. 19, ll. 10-23; App. 154, ll. 19-23.

Odom asked to buy two cigarettes from Alicia. App. 20, ll. 11-14; App. 155, ll. 15-20. Odom and Respondent began arguing. App. 20, ll. 20-23; App. 36, l. 24 – App. 37, l. 1; App. 112, ll. 1-5; App. 113, ll. 17-23; App. 114, ll. 10-1; App. 156, ll. 7-12. Respondent did not remember what Odom said to him, but he remembered telling Odom that he was not "worrying about it." App. 156, ll. 13-19; App. 164, l. 24 – App. 165, l. 2. The argument ended when Odom walked in the road toward Respondent's home. App. 21, ll. 5-7; App. 21, l. 18 – App. 22, l. 2; App. 157, ll. 4-8; App. 157, ll. 13-15. Shortly thereafter, Respondent got into his car and drove toward his home. App. 21, ll. 5-7; App. 23, ll. 1-8; App. 111, ll. 11-25; App. 115, ll. 11-15; App. 115, ll. 20-25; App. 158, ll. 8-24.

Respondent explained that as he was getting out of his car, he saw Odom approach him. App. 159, ll. 9-11; App. 167, ll. 16-22. The two men then "exchanged words." App. 159, ll. 22-23. Odom fired a shot at him. App. 159, ll. 9-11; App. 159, l. 23. In fear for his life, Respondent then fired back at Odom. App. 159, l. 11; App. 159, ll. 23-24; App. 160, ll. 11-12; App. 163, ll. 6-12.[1] Respondent explained that he was shooting at Odom as he was backing away from Odom and moving toward his house. App. 160, ll. 3-12; App. 169, ll. 3-5. Respondent did not remember how many shots he fired. App. 160, ll. 18-21.

[1] Respondent had started carrying a gun because he had received threats from Odom's friends. App. 172, ll. 14-19.

Tyeisha's testimony differed only slightly from Respondent's memory of the events. Tyeisha explained that Respondent parked his car at his home and walked to the roadway where Odom, who was taunting Respondent, stood. App. 117, ll. 7-15. Respondent and Odom continued to have words with each other. App. 117, ll. 2-6. According to Tyeisha, Respondent swung at Odom, trying to punch him. App. 117, ll. 18-20; App. 118, ll. 1-3; App. 133, ll. 2-7; App. 135, ll. 5-7. Odom stepped back to avoid the hit. App. 118, ll. 4-7.

After the attempted punch, Odom pulled a gun on Respondent. App. 118, ll. 7-18; App. 133, ll. 8-10. Although the two men continued to exchange heated words, Respondent turned to go toward his house and car. App. 118, l. 19 – App. 119, l. 1; App. 133, ll. 11-15. Odom followed Respondent into his yard. App. 119, ll. 5-25; App. 120, ll. 3-8; App. 134, ll. 5-7. As the verbal argument and Odom's pursuit continued, Respondent turned around to face Odom. App. 120, ll. 9-10; App. 134, ll. 7-8. Odom then fired a shot at Respondent, who fired back. App. 121, ll. 4-15; App. 133, ll. 17-21; App. 134, ll. 8-9. When Respondent started shooting at Odom, Odom started running. App. 121, ll. 16-24; App. 122, ll. 1-2. Respondent then got into his car and left. App. 122, ll. 19-24.

When Tyeisha saw that Odom had fallen to the ground, she went to check on him. App. 122, l. 19 – App. 123, l. 10. Although only a few other people were gathered around Odom initially, "more and more people" arrived as time passed. App. 123, ll. 11-17. Tyeisha saw Odom's gun beside his body when she first got to him. App. 123, ll. 18-23. Approximately fifteen minutes later, Tyeisha left. App. 125, ll. 3-5. Although the police had not arrived yet, there were about thirty people near Odom at that time. App. 124, ll. 5-16.

Alicia claimed she was alone outside[2] after Respondent left because her sister and Yvette walked inside. App. 24, ll. 11-15. According to Alicia, Respondent drove to where Odom was in the roadway and the two "had another verbal dispute or whatever." App. 24, ll. 16-20; App. 25, ll. 12-16. She further claimed Respondent got out of his car while the two men continued to argue. App. 24, ll. 20-22. Then, Respondent "turned to go back to his car," but he never made it all the way back to his car. App. 24, l. 22; App. 25, l. 22 – App. 26, l. 1.

Alicia was uncertain "if something was said or what happened," but she next saw Respondent turn around to face Odom and begin shooting at him. App. 24, ll. 22-25; App. 26, ll. 2-5. Odom started running. App. 26, ll. 6-8. Alicia claimed she saw Odom "fall to the ground" and "start[] waving his arm in the air." App. 27, ll. 20-23. Alicia called 911. App. 27, l. 24 – App. 28, l. 5. Alicia told the 911 dispatcher that Respondent shot Odom. App. 28, ll. 8-20. Alicia walked up to Odom where she joined more than five people who had gathered already around him. App. 30, ll. 4-11.

Brandy Williams, who was visiting her parents nearby, heard seven to nine gunshots. App. 50, ll. 19-20. After calling for help, Williams went to where Odom was on the ground and performed CPR on Odom for thirty minutes – the time it took law enforcement to arrive. App. 52, ll. 19-20; App. 54, ll. 7-10. By the time the police arrived, there were between ten and fifteen people gathered around Odom. App. 54, ll. 3-6; App. 55, ll. 1-15.

When the first officer arrived on the scene, there were more than twenty people present. App. 135, ll. 10-16. The scene was "chaotic." App. 146, ll. 20-23. Initially, "there was a bit of confusion on exactly where the crime scene was or the incident location was." App. 147, ll. 2-4. When the police "finally got there," they found "a large number of people" and had difficulty

[2] Respondent contradicted Alicia Youmans' testimony on this point. Respondent saw Alicia go inside the house to get the cigarettes for Odom. App. 155, l. 25 – App. 156, l. 6.

securing the scene. App. 147, ll. 4-6. In light of the crowd, the local police department "had to call for additional units from Barnwell, Williston, and Blackville" to help "control the crowd and secure everything." App. 147, ll. 7-10.

When law enforcement finally secured at the scene, the investigator processing the scene collected six .380 caliber shell casings. App. 60, ll. 6-12; App. 61, ll. 12-13. Respondent admitted he was using a Hi-Point .380 firearm. App. 172, ll. 5-8. Unfortunately, there was no way for the jury to know where the shell casings were located because the photographs the investigator took were lost by the police prior to trial. App. 59, ll. 12-17; App. 60, ll. 13-18. When asked where he found the casings, the investigator was uncertain of the exact location, but estimated they were found in the front yard of a particular residence. App. 60, l. 19 – App. 61, l. 7; App. 67, ll. 6-10; App. 68, ll. 6-8. He thought the .380 shell casings were found within six to eight feet of each other. App. 61, ll. 14-17. According to the forensic firearms examiner, the six .380 caliber shell casings were fired by the same firearm. App. 86, ll. 11-17; App. 88, ll. 13-14.

Additionally, and most importantly, the investigator found a .40 caliber shell casing close to where Odom was lying on the ground. App. 62, ll. 3-9. The examiner explained the .40 Smith and Wesson caliber casing that was found close to Odom's body "was not fired by the same gun" that fired the .380 caliber shell casings. App. 87, ll. 17-19; App. 88, ll. 13-16. Furthermore, forensic testing revealed Odom had gunshot residue on both of his hands. App. 77, l. 22 – App. 78, l. 12.

The pathologist observed four gunshot wounds on Odom's body. App. 184, ll. 21-23. The first wound she observed was an entrance wound on the upper left chest. App. 186, ll. 10-14. This bullet went out of Odom's left back. App. 186, ll. 10-14. The second went through the right arm, then entered the right chest and out the right back. App. 186, ll. 15-21. The third

wound entered the left lower back. App. 186, ll. 24-25. This one hit the aorta and pancreas. App. 187, ll. 1-2. The pathologist found this bullet under the skin of the abdomen. App. 187, ll. 2-3. The fourth shot went through the right calf. App. 187, ll. 4-6. There was some soot and stippling around the wound to the upper left chest. R. 183, l. 22 – App. 188, l. 15. According to the pathologist, this meant the barrel of the gun was within eighteen inches to two feet of Odom's chest at the time the gun was fired. App. 188, ll. 16-24.

According to the firearms examiner, the projectile removed from the deceased's body by the pathologist during the autopsy was a .380 auto-caliber bullet. App. 91, ll. 5-6. Further, the examiner explained that the casings that were found at the scene could have been fired by the same firearm that fired the projectile that was removed from the deceased's body. App. 92, ll. 8-13.

A Barnwell County grand jury indicted Respondent for murder (2017-GS-06-00066) on March 9, 2017. App. 250—251. On September 18-19, 2017, the state, represented by David Miller and Jackson Cooper, called the case for trial before the Honorable Doyet A. Early, III, and a jury. App. 5. Joshua Koger represented Respondent. App. 5.[3]

During the charge conference, defense counsel requested the judge instruct the jury on the lesser-included offense of voluntary manslaughter. App. 175, ll. 6-7; App. 175, ll. 17-21. Counsel explained that two witnesses testified regarding "interactions exchanged" at the residence. App. 176, l. 21 – App. 177, l.4. The state objected to the instruction, arguing there was no evidence of "any sufficient legal provocation." App. 175, ll. 9-16.

[3] In its Brief of Petitioner, the state refers to a pre-trial hearing on Respondent's Motion to Dismiss pursuant to the Protection of Persons and Property Act. Brief of Pet. at 1. This information is outside of the record on appeal.

Despite recognizing there was evidence in the record regarding an argument between Respondent and Odom and testimony that Respondent swung at Odom prior to the shooting, the judge refused to instruct the jury on voluntary manslaughter based upon Respondent's testimony. App. 177, l. 5 – App. 179, l. 3. According to the judge, Respondent's testimony that he did not remember an argument with or swinging at Odom barred an instruction on voluntary manslaughter. App. 177, l. 5 – App. 179, l. 3. The judge questioned how defense counsel could get a sudden heat of passion during an argument if Respondent testified he did not remember the argument occurring. App. 177, ll. 5-20. The judge explained that in light of Respondent not remembering the argument, or more specifically that Respondent did not remember the exact words the two men exchanged during the argument, then the argument "certainly wasn't the kind of argument that would arise to the level of sudden heat of passion." App. 177, l. 23 – App. 178, l. 3.

Relying upon Cook v. State, 415 S.C. 551, 784 S.E.2d 665 (Ct. App. 2015), the judge determined the evidence did not warrant a charge of voluntary manslaughter. App. 178, ll. 4-8. The judge found "no factual basis that [Respondent] was in a sudden heat of passion." App. 178, ll. 9-15. In the judge's view, the evidence presented showed the death was "either a murder case or self-defense." App. 178, ll. 16-18. Put succinctly, the judge determined there was "certainly nothing in the evidence to warrant a sudden heat of passion to the extent that is required to mandate a voluntary manslaughter charge." App. 178, ll. 16-21. The judge found "no evidence that [Respondent] was acting under an uncontrollable impulse resulting from an argument he can't even remember happening. That's the argument that allegedly took place right before they started shooting at each other." App. 178, l. 23 – App. 179, l. 3.

Judge Early refused defense counsel's request to instruct the jury on the lesser-included offense of voluntary manslaughter; therefore, the jury considered only the murder charge. App. 177, l. 23 – App. 179, l. 3.

During the deliberations, the jury requested the elements of self-defense in writing. App. 238, ll. 23-25; App. 248. Judge Early declined the jury's request to provide the instruction in writing, but he verbally re-instructed the jury on self-defense. App. 239, l. 2 – App. 240, l. 16. Additionally, the jury questioned what would happen if the jurors could not agree. App. 240, ll. 17-18; App. 249. Judge Early told the jurors that it was "way too early to be deciding that." App. 240, ll. 18-19. He noted the jury had "only been out less than two hours." App. 240, ll. 19-20. However, he then told the jurors:

> So, you know, there's been a lot of time and effort put into the trial of this case. And, I mean, if at the end of six or seven hours you aren't able to agree, then I may - - but here's what happens: We do it again. It's a mistrial we bring in another set of jurors, the same witnesses, maybe the same judge or another judge will be telling the jury the same thing.
>
> So we encourage, please try to reach a unanimous decision. Obviously, if you can't - - but we're way too early in it to decide that. You know it's 5:30 now.

App. 240, l. 20 – App. 241, l. 6. An hour later, the jury returned to the courtroom to announce its verdict. App. 241, ll. 12-22. The jury found Respondent guilty as charged. App. 242, l. 23 – App. 243, l. 9. Judge Early sentenced Respondent to thirty-five years imprisonment. App. 244, ll. 6-8; App. 252.

On September 29, 2017, Respondent served his notice of appeal. After the completion of briefing and entertaining oral argument, the Court of Appeals reversed Respondent's conviction in a unanimous decision authored by the Honorable Thomas E. Huff. App. 318—App. 347; State v. Payne, Op. No. 5846 (S.C. Ct. App. filed Aug. 11, 2021) (Howard Adv. Sh. No. 27 at 116). The state filed its petition for rehearing on August 26, 2021. App. 366. The Court of Appeals

denied the petition on August 31, 2021. App. 367. Thereafter, on September 29, 2021, the state filed a petition for writ of certiorari seeking review in this Court to correct alleged errors by the Court of Appeals. Brief of Pet. at 1. Respondent filed his return on November 1, 2021. Brief of Pet. At 1. This Court granted certiorari on March 30, 2023.

This Brief of Respondent follows.

ARGUMENT

The Court of Appeals used the correct standard of review, properly analyzed the evidence presented, and correctly applied this Court's precedent when it held the facts presented required instructing the jury on voluntary manslaughter because evidence demonstrated that Respondent shot the deceased in the sudden heat of passion based upon sufficient legal provocation.

This Court should deny certiorari because the state has failed to provide any special or important reason to invoke this Court's review. See Rule 242(b), SCACR. The issue presented is not novel. See Rule 242(b)(1), SCACR. There is no dissent from the opinion issued by the Court of Appeals, and that opinion is not in conflict with prior decisions of this Court or the United States Supreme Court. See Rule 242(b)(2), (3), (5), SCACR. While the case involves Respondent's substantial constitutional right to a fair trial through the jury instructions, the Court of Appeals correctly decided the issue based upon binding authority from this Court. See Rule 242 (b)(4), SCACR. .Finally, the state simply asks this Court to act as an error correction court, which this Court is not. See Toal, Walker, & Baker, Appellate Practice in South Carolina, at 21 (3d ed. 2016) (explaining "the Supreme Court has been described as a law-giving court, the Court of Appeals has been described as an error-correcting court").

A. The Court of Appeals applied the correct standard of review.

"The law to be charged to the jury is determined by the evidence presented at trial." *State v. Hill*, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993). A trial court commits reversible error if it fails to give a requested charge on an issue raised by the evidence. Frasier v. State, 306 S.C. 158, 162, 410 S.E.2d 572, 574 (1991) (citing State v. Lee, 298 S.C. 362, 364, 380 S.E.2d 834, 835 (1989)). A jury charge to a lesser-included offense is required when the evidence warrants such an instruction. State v. Geiger, 370 S.C. 600, 606, 635 S.E.2d 669, 673 (Ct. App. 2006). "The trial court is required to charge a jury on a lesser-included offense if there is evidence from

which it could be inferred that the defendant committed the lesser, rather than the greater, offense." State v. Sams, 410 S.C. 303, 308, 764 S.E.2d 511, 513 (2014); see also *Dempsey v. State*, 363 S.C. 365, 610 S.E.2d 812 (2005); State v. Watson, 349 S.C. 372, 375, 563 S.E.2d 336, 337 (2002); *State v. Gourdine*, 322 S.C. 396, 472 S.E.2d 241 (1996); *State v. Drafts*, 288 S.C. 30, 340 S.E.2d 784 (1986).

"In determining whether the evidence requires a charge on a lesser-included offense, the [appellate court] must view the facts in the light most favorable to the defendant." Sams, 410 S.C. at 308, 764 S.E.2d at 513 (citing *State v. Cole*, 338 S.C. 97, 525 S.E.2d 511 (2000)). "The charge request is properly rejected when there is **no** evidence tending to show the defendant was guilty of the lesser offense." Id. (citing *State v. Tucker*, 324 S.C. 155, 478 S.E.2d 260 (1996); *State v. Cooney*, 320 S.C. 107, 463 S.E.2d 597 (1995); *State v. Gadsden*, 314 S.C. 229, 442 S.E.2d 594 (1994)) (emphasis added).

To put a finer point on it, this Court has held that only when the record contained no evidence to support voluntary manslaughter should the trial court decline to charge the jury concerning the lesser-included offense. State v. Cooley, 342 S.C. 63, 67-68, 536 S.E.2d 666, 668-669 (2000). "To warrant the court in eliminating the offense of manslaughter it should very clearly appear that there is no evidence whatsoever tending to reduce the crime from murder to manslaughter." State v. Wharton, 381 S.C. 209, 214, 672 S.E.2d 786, 788 (2009); see also Casey v. State, 305 S.C. 445, 447, 409 S.E.2d 391, 392 (1991) (emphasis in original) (holding that in murder cases, trial courts should charge manslaughter unless "there is **no evidence whatsoever** tending to reduce the crime from murder to manslaughter").

In other words, the evidence must allow "a rational inference" that the defendant committed the lesser offense. Geiger, 370 S.C. at 607, 635 S.E.2d at 673. In determining

whether such a rational inference exists the court must examine the totality of evidence. Id. "In order to justify a charge of a lesser included offense, the evidence must be capable of sustaining either the greater or the lesser offense, depending on the jury's view of the facts." State v. Patterson, 337 S.C. 215, 233, 522 S.E.2d 845, 854 (Ct. App. 1999).

The Court of Appeals followed this standard precisely. State v. Payne, Op. No. 5846 (S.C. Ct. App. filed Aug. 11, 2021) (Howard Adv. Sh. No. 27 at 127-128). The state now argues the Court of Appeals erred by relying "upon a superficial application of the 'any evidence' standard." Brief of Pet. at 7. The state faults the Court of Appeals for "citing random and disjointed facts" and for not "consider[ing] these facts in context." Brief of Pet. at 7. In making such an argument, the state necessarily concedes that "any evidence" existed to support the jury instruction, which is exactly what this Court's precedent requires. Nevertheless, the state begs this Court to alter how courts – at all levels – determine whether a jury instruction on a lesser included offense is required. The state wants to cherry pick the facts and put those facts in the context the state prefers. This is not the standard, and it must not be the standard. Respondent requests this Court reject the state's invitation to alter the analysis for determining whether a trial judge must instruct a jury on a lesser-included offense.

In requesting this Court admonish the Court of Appeals for its thorough analysis in this case, the state cites to a previous opinion from the Court of Appeals, which the state argues sets forth the correct standard by which to view the evidence in order to determine whether a lesser included instruction must be given. Brief of Pet. at 10-11 (citing State v. Gilmore, 396 S.C. 72, 719 S.E.2d 688 (Ct. App. 2011)). The state urges this Court to require the record show any direct evidence or any substantial circumstantial evidence to support the lesser-included offense. Brief of Pet. at 10-11. In other words, the state wants trial courts and appellate courts to weigh

the evidence presented, which is not the province of the courts. Not only is the state's reliance on Gilmore misplaced because this Court has never endorsed the test espoused in Gilmore, but even under the Gilmore standard, there exists any direct and substantial circumstantial evidence to support the voluntary manslaughter instruction as the opinion from the Court of Appeals sets forth in painstaking detail.

B. The Court of Appeals carefully analyzed the evidence.

The state claims the Court of Appeals failed to examine the context of the facts on which it relied and failed to determine the existence of a causal relationship between the legal provocation and heat of passion elements of voluntary manslaughter. Brief of Pet. at 8, 16, and 17. To the contrary, the Court of Appeals undertook a comprehensive assessment of the facts presented.

Manslaughter is defined by Section 16-3-50 of the South Carolina Code as "the unlawful killing of another without malice, express or implied." S.C. Code Ann § 16-3-50. Voluntary manslaughter is the unlawful killing of another in sudden heat of passion upon sufficient legal provocation. State v. Kornahrens, 290 S.C. 281, 350 S.E.2d 180 (1986). This Court made it clear that both of these elements must be present in order to warrant a voluntary manslaughter charge. See State v. Starnes, 388 S.C. 590, 596, 698 S.E.2d 604, 608 (2010). Thus, "[w]hether a voluntary manslaughter charge is warranted turns on the facts." Starnes, 388 S.C. at 597, 698 S.E.2d at 608; see also, State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001) ("The law to be charged must be determined from the evidence presented at trial.").

Quoting a trial judge's jury instruction, this Court explained voluntary manslaughter as follows:

> The law recognizes the frailties of human nature, and appreciates the fact that there may be occasions in one's life when he may lose control of himself temporarily, be swept off his feet, to act upon the spur of the moment rather from premeditation or design. And, if under those circumstances one slays his fellow

> man, the law will not excuse him entirely, but will not visit upon him the extreme penalty it would have if the act had been accompanied by malice. ... **[T]he provocation which the law recognizes as being one sufficient to reduce the homicide from murder to manslaughter must be such as to involve some indignity to throw a man in sudden heat and passion.** ... So, also by way of illustration, if he should meet another on the street and that one should pull his nose, or spit in his face, and on the spur of the moment he should slay him, he would be guilty, not of murder, but of manslaughter.

State v. Cleland, 148 S.C. 86, 86, 145 S.E. 628, 629 (1928) overruled on other grounds by State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009) (emphasis added).

As an initial matter, the Court of Appeals agreed with the state and Respondent that there was "clearly evidence of legal provocation." App. 344; State v. Payne, Op. No. 5846 (S.C. Ct. App. filed Aug. 11, 2021) (Howard Adv. Sh. No. 27 at 143). The only question was whether there was evidence that Respondent acted in the sudden heat of passion based upon the sufficient legal provocation.

"Sudden heat of passion upon sufficient legal provocation" mitigating felonious killing to manslaughter "must be such as would naturally disturb the sway of reason, and render the mind of an ordinary person incapable of cool reflection, and produce what, according to human experience, may be called an uncontrollable impulse to do violence." State v. Wiggins, 330 S.C. 538, 549, 500 S.E.2d 489, 495 (1998) (citing State v. Lowry, 315 S.C. 396, 399, 434 S.E.2d 272, 274 (1993)) (quotations omitted).

"The provocation must be such as to render the mind of an ordinary person incapable of cool reflection and produce an uncontrollable impulse to do violence." Cooley, 342 S.C. at 67, 536 S.E.2d at 668. "A legal provocation is some act which, either alone or in connection with words or circumstances is calculated to throw one into a passion." State v. Gadsden, 314 S.C. 229, 232, 442 S.E.2d 594, 596 (1994). "[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." State v. Starnes, 388 S.C. 590, 598, 698 S.E.2d 604, 609 (2010). "[A]n overt, threatening act or a physical encounter may constitute sufficient legal provocation." State v. Pittman, 373 S.C. 527, 573, 647 S.E.2d 144, 168 (2007) (citing State v. Gardner, 219 S.C. 97, 105, 64 S.E.2d 130, 134 (1951)).

"[F]ear resulting from an attack can constitute a basis for voluntary manslaughter." Starnes, 388 S.C. at 598, 698 S.E.2d at 609. While fear of an attack, by itself, is not enough to satisfy the heat of passion element, Starnes reaffirmed "the principle that a person's fear immediately following an attack or threatening act may cause the person to act in a sudden heat of passion." Id. One's mind may be rendered incapable of cool reflection by "exasperation, rage, anger, sudden resentment, or terror." State v. Franklin, 310 S.C. 122, 125, 425 S.E.2d 758, 760 (Ct. App. 1992).

This Court reversed a murder conviction and remanded for a new trial where a trial judge refused to charge the jury on voluntary manslaughter where the evidence required such an instruction. State v. Lowry, 315 S.C. 396, 399, 434 S.E.2d 272, 274 (1993). Lowry and the deceased were "arguing and 'bumped chests'" during an altercation near a grocery store. Id. at 398, 434 S.E.2d at 273. Lowry aimed his pistol at the deceased and pulled the trigger; however, the pistol was not loaded. Id. Lowry's friend broke up the fight, and the deceased entered the grocery store. Id. Lowry then loaded his pistol, fired a single shot, and entered the grocery store as well. Id. The men "began arguing and shouting at each other again." Id.

The state's witnesses claimed the deceased told Lowry he was unarmed and refused to "take it outside" as Lowry suggested. Id. The deceased also spread his arms away from his body purportedly to show he was unarmed. Id. However, Lowry's witnesses claimed the deceased

denigrated Lowry by saying, "You think you are a big man because you got a gun." Id. Then, the deceased "moved toward Lowry in a menacing fashion with his arms and hands outstretched toward Lowry as if to grab him." Id. All witnesses agreed that after the deceased raised his arms, Lowry shot him in the chest. Id. The witnesses agreed that after the deceased fell, Lowry cursed him and shot him in the head. Id.

This Court held the trial judge erred by refusing to instruct the jury regarding voluntary manslaughter. Id. at 399, 434 S.E.2d at 274. This Court explained there was "testimony which, if believed, tend[ed] to show that the decedent and Lowry were in a heated argument and that the decedent was about to initiate a physical encounter when the shooting occurred." Id. Because it did not "very clearly appear that there [was] no evidence whatsoever tending to reduce the crime from murder to manslaughter," the judge erred in failing to so instruct the jury. Id.

This Court concluded a trial judge correctly instructed a jury on voluntary manslaughter where "there [was] evidence in the record which [tended] to show [Wiggins] acted in sudden heat of passion upon sufficient legal provocation" because it was undisputed Wiggins was in a "heated argument" with the deceased and the deceased's sister and the deceased "physically threatened him." State v. Wiggins, 330 S.C. 538, 549, 500 S.E.2d 489, 496 (1998).

Like the evidence in State v. Gilliam, 296 S.C. 395, 373 S.E.2d 596 (1988), the evidence at Respondent's trial supported a charge of voluntary manslaughter. Believing that his former girlfriend's lover wanted to see him, Gilliam went to the lover's place of business. Gilliam, 296 S.C. at 396, 373 S.E.2d at 597. The two men argued and the lover "made threatening statements" to Gilliam. Id. Gilliam claimed the lover "took a gun from his pocket and shot at" Gilliam. Id. Gilliam then shot back at the lover, killing him. Id. After confirming that self-defense and voluntary manslaughter are not mutually exclusive, this Court held that "the jury

may fail to find all the elements of self-defense but could find sufficient legal provocation and heat of passion to conclude the defendant was guilty of voluntary manslaughter." Id. at 397, 373 S.E.2d at 597. According to this Court, Gilliam's "testimony that the victim threatened him and then fired at him would support a finding of sufficient legal provocation and heat of passion." Id.

Finding evidence that Respondent acted upon a sudden heat of passion brought about by sufficient legal provocation, the Court of Appeals relied upon (1) testimony that Respondent and the deceased were in a verbal argument immediately prior to the shooting, which was so heated that the deceased was ordered to leave; (2) the argument continued when the two men argued down the street, and this argument was so intense, two witnesses described it despite being a considerable distance away; (3) Respondent tried to walk away from the deceased, but the deceased followed him and continued the argument; (4) Respondent was so angry with the deceased that he tried to punch him before the shooting; and (5) the deceased fired a shot at Respondent provoking Respondent to return fire while trying to run away. App. 344—App. 346; State v. Payne, Op. No. 5846 (S.C. Ct. App. filed Aug. 11, 2021) (Howard Adv. Sh. No. 27 at 145-146).

The Court of Appeals did not, as the state repeatedly claims, take the facts out of context or misinterpret this Court's binding precedent. Rather, the Court of Appeals examined the facts as those facts were presented and applied this Court's precedent to those facts. First, the evidence presented showed the deceased pulled a gun and fired a single shot at Respondent, which supported a charge on voluntary manslaughter according to the case law. See Lowry, 315 S.C. at 399, 434 S.E.2d at 274 (explaining that "when death is caused by the use of a deadly weapon, the opprobrious words must be accompanied by the appearance of an assault – by some

overt, threatening act – which could have produced the heat of passion"); Gilliam, 296 S.C. at 397, 373 S.E.2d at 597 (finding evidence to support a charge of voluntary manslaughter where the defendant testified that the victim threatened him and then fired at him because this testimony supported a finding of sufficient legal provocation and heat of passion); State v. Johnson, 333 S.C. 62, 66, 508 S.E.2d 29, 31 (1998) ("Here, Johnson and the victim had 'had words' and were engaged in a fight at the time the shooting occurred. ... [I]t is patent Johnson was entitled to a voluntary manslaughter charge").

Second, the undisputed evidence showed Respondent and the deceased argued so forcefully that Odom was asked to leave a residence and that the argument continued down the road at such an intensity that witnesses noticed it a substantial distance away. Finally, two witnesses saw the deceased pull a gun and shot at Respondent prior to Respondent returning fire. This was corroborated by physical evidence. The police officers recovered two types of shell casings from the area around the shooting. The .380 shell casings corresponded with the gun Respondent said he was using. However, the .40 shell casing, which was undisputedly not shot from the gun used by Respondent, was found very close to the deceased's body. Further, there was evidence that the deceased actually shot a gun. According to the forensic testing conducted on the gunshot residue kit administered on the deceased, there was gunshot primer residue on his hands. As the Court of Appeals correctly concluded, the evidence presented supported a jury instruction for voluntary manslaughter.

C. The Court of Appeals properly applied this Court's precedent.

The state's contention that the Court of Appeals failed to apply this Court's precedent, particularly State v. Knoten, 347 S.C. 296, 555 S.E.2d 391 (2001) and State v. Funchess, 267 S.C. 427, 229 S.E.2d 331 (1976), is absurd. The Court of Appeals undertook a comprehensive

examination of this Court's opinions concerning voluntary manslaughter. App. 328—App. 343; State v. Payne, Op. No. 5846 (S.C. Ct. App. filed Aug. 11, 2021) (Howard Adv. Sh. No. 27 at 116). The Court of Appeals' opinion in this case is the equivalent of a hornbook or treatise on voluntary manslaughter in this state.

This Court held a defendant was entitled to a jury instruction on voluntary manslaughter based upon one of the defendant's statements to law enforcement indicating the decedent had cut the defendant prior to the defendant striking the final blow. State v. Knoten, 347 S.C. 296, 305-306, 555 S.E.2d 391, 396 (2001). In the second statement, Knoten told police that the decedent cut him, then chased Knoten out of the apartment. Id. at 305, 555 S.E.2d at 396. Outside, Knoten went to his car and got a metal pipe. Id. Thereafter, Knoten reentered the apartment and killed the decedent after she cut him again. Id. This Court explained that if the jury were to believe the facts presented in Knoten's second statement, then the jury could conclude Knoten and the decedent were in a heated encounter and the decedent had twice cut him with a knife when he struck her with a pipe; thus, "it follow[ed] that a charge on voluntary manslaughter was required." Id. at 306, 555 S.E.2d at 396.

The Court of Appeals properly relied upon this Court's Knoten opinion when it explained that it was not limited to considering Respondent's trial testimony on appeal. App. 344; State v. Payne, Op. No. 5846 (S.C. Ct. App. filed Aug. 11, 2021) (Howard Adv. Sh. No. 27 at 143). The state argues that "[t]he Court of Appeals' reliance upon Knoten i[n] such a way is misplaced." Brief of Pet. at 26. In the state's view Knoten stands only for the proposition that a prior statement of the defendant regarding state of mind that is contrary to the defendant's trial statement cannot be ignored when determining how to instruct the jury. Brief of Pet. at 26. This narrow reading of Knoten must be rejected.

The state's claim that 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)" is a bit disingenuous considering the state never cited Funchess in its brief before the Court of Appeals. Nevertheless, the Court of Appeals followed the holding of Funchess even if the Court did not cite to the case.

This Court held the defendant was not entitled to a jury instruction on the lesser-included offense of assault and battery of a high and aggravated nature (ABHAN) where the evidence showed only that the defendant was guilty of the greater offense of assault with intent to ravish. State v. Funchess, 267 S.C. 427, 428-430, 229 S.E.2d 331, 331-332 (1976). The evidence showed the defendant placed his hand under the complaining witness's clothes touching her private parts. Id. at 331, 229 S.E.2d at 331. He then forced her onto the bed where he said he was going to rape her. Id. When she tried to get off the bed, she was struck and knocked back. Id. The attack ended when a third party shot a codefendant. Id.

The defendant argued he was entitled to the instruction on the lesser-included offense because "the jury might have disbelieved the state's evidence as to intent to rape." Id. at 430, 229 S.E.2d at 332. This Court rejected the defendant's argument, explaining there must be evidence to sustain the crime of a lesser degree. Id. In Funchess, there was only evidence of attempt to ravish and no evidence of ABHAN. Id. This Court explained that "the mere contention that the jury might accept the state's evidence in part and might reject it in part will not suffice." Id.

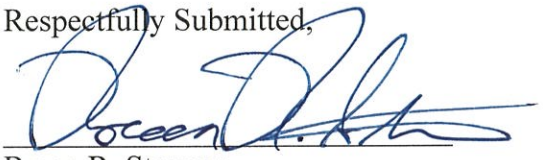
The state misapprehends the holding of Funchess. The state appears to argue that the trial court must look only at an individual witness's testimony in order to determine whether evidence exists for a lesser included offense jury instruction. See Brief of Pet. at 26-27. However, the law

requires a court to examine all of the evidence in order to decide whether a jury instruction is proper. Funchess stands for the proposition that a lesser-included instruction cannot be based upon speculation that the jury may reject some evidence offered. Rather, a trial judge must give an instruction on a lesser-included offense if evidence supports that offense, and not mere speculation that a jury will reject evidence offered. It is the presence of the evidence, and not the possibility that the jury will reject portions of the evidence, that controls. The Court of Appeals followed this mandate to the letter.

CONCLUSION

Respondent respectfully requests this Court affirm the Court of Appeals. If this Court instead reverses the Court of Appeals, Respondent respectfully requests this Court remand the case to the Court of Appeals for consideration of the second issue raised on appeal, but not reached by the Court of Appeals in light of the Court's reversal on the first issue. See State v. Grovenstein, 335 S.C. 347, 354 n.6, 517 S.E.2d 216, 219 n.6 (1999).

Respectfully Submitted,



Breen R. Stevens
Appellate Defender

ATTORNEY FOR PETITIONER

This 15th day of June, 2023.