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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

On Petition for Writ of Certiorari to the Court of Appeals
Appeal from Lexington County
Court of Common Pleas
The Honorable Debra R. McCaslin, Circuit Court Judge

THE STATE,

Respondent,

v.

QUAYSHAUN XZANDER CLARK,

Petitioner.

Appellate Case No. 2025-002520

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Court of Appeals erred in upholding the trial court's refusal to charge involuntary manslaughter despite evidence being presented to the jury that petitioner was reckless in the discharge of his firearm in self-defense which caused the death of an innocent bystander and when the record contained evidence from which the jury could have found the fatal shot was fired by petitioner reflexively and without intent?

II. Whether the Court of Appeals erred in rejecting transferred intent for voluntary manslaughter when the fatal shot kills an innocent bystander who was not the source of the provocation and improperly shifted the burden on petitioner to establish entitlement to voluntary manslaughter as a lesser included offense rather than looking for any evidence in the record that supported the charge?

RESPONDENT'S RESTATEMENT OF QUESTIONS PRESENTED

I. Whether the Court of Appeals properly affirmed the lower court for not instructing the jury on involuntary manslaughter where there was no evidence supporting the gun was fired unintentionally?

II. Whether this Court should affirm the Court of Appeals in its conclusion that there was no abuse of discretion in declining to charge voluntary manslaughter when there was no evidence of heat of passion, but vacate the *dicta* portion of the opinion unnecessarily addressing legal provocation and transferred intent when this Court has not yet spoken to transferred intent and the Court of Appeals misapprehended this Court's precedent requiring provocation from the *intended* victim to apply to any victim.

STATEMENT OF THE CASE

On June 9, 2021, 11-year-old Ta'Shya was shot and killed in his home. Petitioner Clark was arrested 2 days later. The Lexington County Grand Jury indicted Clark for murder its June 2022 term, and also for discharging a firearm into a dwelling, and for possession of a weapon during a violent crime. A jury trial was held on June 27, 2022, before the Honorable Debra R. McCaslin. At the conclusion of the trial, the jury found Clark guilty as indicted. Judge McCaslin sentenced him to 48 years for murder, 10 years for discharging a firearm into a dwelling, and 5 years for possession of a weapon during a violent crime. Clark timely appealed.

After briefing and oral argument, the Court of Appeals affirmed the lower court by published decision issued on September 24, 2025. *State v. Clark*, 446 S.C. 640, 922 S.E.2d 239 (Ct. App. 2025). (App. 80- 89). Clark's timely petition for rehearing was denied on November 19, 2025. (App. 103).

Clark filed a petition for writ of certiorari in this Court on December 19, 2025. This return follows.

STATEMENT OF FACTS

For purposes of this return, the State relies upon the brief summary of the facts as included in the Court of Appeals in its opinion:

> On June 9, 2021, Clark was involved in a shootout at the Rocky Lane mobile home park outside of Batesburg, South Carolina. According to the evidence presented at trial, there were two parties in the neighborhood that day—Clark attended a birthday party for his cousin at Lot 7 and a graduation party was also taking place across the street between Lots 15 and 16.
>
> According to Clark's testimony, around 10:30 p.m., he was sitting in his car, which he had parked near the back porch of the mobile home on Lot 7, facing in the direction of Lots 15 and 16. [fn 1] Clark heard gunshots coming from the area in front of the car and initially ran behind the mobile home, but he then returned to his car and retrieved his AK pistol. [fn 2] He testified he saw a man shooting and walking towards him across the street, so he returned fire because he wanted the shooting to stop. In much of his testimony, Clark described what seems to be a single person shooting and "coming across the street." Clark explained that although he only saw one individual whom he could "sort of make out," he saw shots being fired from the direction of Lots 15 and 16 *and* "a guy come across the street shooting." Further, he stated he could see "silhouettes of people" in the area of Lots 15 and 16 but could not identify them.
>
> Clark stated he felt "scared and lost" and "everything around [him was] just kind of ... like a blur." Clark fired approximately fifteen rounds in the direction of Lots 15 and 16 until his magazine "went dry." One of those rounds entered the mobile home on Lot 15, striking and killing an eleven-year-old girl (Victim).
>
> [fn. 1] The State presented conflicting testimony showing Clark armed himself prior to the first shots being fired and gave his 9mm pistol to another man present at the party; no other witness saw anyone cross the street and no shell casings were found in the area where the man firing at Clark was alleged to have been; Clark fled the scene before law enforcement arrived; and Clark gave multiple untrue statements to police about his involvement, including initially denying that he shot a gun or that he saw anyone shooting at him. However, because our

> standard of review requires us to view the evidence in the light most favorable to Clark, we have focused on his version of events here.
>
> [fn 2] Clark testified he had three guns in his car—"an AR pistol that shoots 300 blackout, " "an AK pistol that shoots [a] 7.62 [mm bullet,]" and "an FN pistol 509," which is a 9mm pistol. He stated he typically stored the AK and AR pistols in the trunk and the FN pistol in the glove box because he did not want his daughter to gain access to them.

Clark, 446 S.C. at 645–46, 922 S.E.2d at 241–42. (*See also* App. 81).

STANDARD OF REVIEW

Certiorari Review

"A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons." Rule 242(b), SCACR.

Jury Instructions

An appellate court will not reverse the trial court's decision regarding a jury charge absent an abuse of discretion. *State v. Commander,* 396 S.C. 254, 270, 721 S.E.2d 413, 421-22 (2011). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *State v. Pittman,* 373 S.C. 527, 570, 647 S.E.2d 144, 166–67 (2007). "The law to be charged must be determined from the evidence presented at trial." *State v. Cole*, 338 S.C. 97, 101, 525 S.E.2d 511, 512 (2000). "The refusal to grant a requested jury charge that states a sound principle of law applicable to the case at hand is an error of law." *Pittman*, 373 S.C. at 570, 647 S.E.2d at 167.

ARGUMENT

I. There is no "special or important reason" to grant review of the Court of Appeal's affirmance when Judge McCaslin did not abuse her discretion in declining the request to charge involuntary manslaughter where Clark admitted that he intentionally fired his AK/SKS weapon 15 times resulting in the death of the child victim.

Relevant Facts from Trial:

Clark objected to Judge McCaslin's refusal to charge the jury on involuntary manslaughter and voluntary manslaughter. In the Court of Appeals, Clark maintained the failure to give the two charges was reversible error. (*See* App. 5, Question 1). Clark asserted, as to involuntary manslaughter, that the second version of involuntary manslaughter was warranted because Clark was acting lawfully in self-defense, but with a reckless disregard for the safety of others in his handling and shooting of the weapon. The State argued no evidence supported an involuntary manslaughter instruction because "at no point did the defendant testify he accidentally discharged the gun, at no point did the defendant testify he was engaged in a struggle with anyone else and that the gun accidentally went off." Judge McCaslin ruled that she "…didn't hear any evidence to support an involuntary charge. In fact, the opposite. . . There was not any testimony about any accident or [that] it wasn't intentional or none of that, so the Court declined the charge of involuntary manslaughter," and overruled the objection. (R. 1340-1342; 1347).

The Court of Appeals Opinion:

The Court of Appeals affirmed Judge McCaslin's ruling based on clear evidence that Clark intentionally fired his weapon:

> Clark contends there is evidence that the killing was unintentional because he did not intend to kill anyone and he was scared and "everything around [him was] ... just kind of a blur." However, Clark testified repeatedly that he fired his gun aiming at a specific target—the man or group of people he saw shooting at him from the direction of Lots 15 and 16—and for a specific reason—because he was trying

> to stop the gunshots; further, he stated he only stopped shooting because "[his] magazine went dry." Although Clark maintained he only fired in self-defense and did not mean to shoot Victim, we find no evidence that Clark pulled the trigger unintentionally. Thus, we hold Clark was not entitled to an instruction on involuntary manslaughter.

Clark, 446 S.C. at 648, 922 S.E.2d at 243.

Discussion:

Clark has shown no error in the Court of Appeals opinion, either in law or fact. As the Court of Appeals found, "The trial [court] determines the law to be charged on the presentation of evidence at trial." (App. 82, quoting *State v. Shuler*, 344 S.C. 604, 632, 545 S.E.2d 805, 819 (2001)). The Court of Appeals was also guided by this Court's precedent that further explains, "A trial court should refuse to charge a lesser-included offense only where there is no evidence the defendant committed the lesser rather than the greater offense." (App. 83, quoting *State v. Crosby*, 355 S.C. 47, 51, 584 S.E.2d 110, 112 (2003)). While Clark continues to assert that he did not mean to shoot the victim, that was not the critical fact here.

"To warrant a court's 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. Cole*, 338 S.C. 97, 101, 525 S.E.2d 511, 513 (2000). The denial here was probably based on the lack of evidence to support the charge.

In finding no abuse of discretion by the lower court, the Court of Appeals carefully considered the elements of involuntary manslaughter. The elements can be shown by following one of two pathways: "either 'the unintentional killing of another without malice, but while engaged in an unlawful activity not naturally tending to cause death or great bodily harm' or 'the unintentional killing of another without malice, while engaged in a lawful activity with reckless disregard for the safety of others.'" (App. 83, quoting *State v. Wigington*, 375 S.C. 25, 35, 649

S.E.2d 185, 190 (Ct. App. 2007). Notably, the Court of Appeals underscored by one of its parentheticals a particularly applicable quote from one of this Court's cases: "involuntary manslaughter is at its core an unintentional killing." (App. 84, quoting *Douglas v. State*, 332 S.C. 67, 74, 504 S.E.2d 307, 310 (1998)). *Douglas* is directly on point because, like Clark, "Douglas admit[ted] he intentionally shot the gun" even though he claimed only to do so in self-defense. *Douglas*, 332 S.C. at 74, 504 S.E.2d at 310. The trial record supports the comparison and the Court of Appeals decision to affirm based on this Court's precedent warrants no review.

Clark admitted he intentionally shot his weapon 15 times (until the magazine "went dry") to "stop the shooting[.]" (R. 1177).[1] Clark did not shoot his weapon by accident or because of the struggle over the weapon, or any other scenario; rather, by admission, he intentionally shot his weapon. Thus, Clark was not entitled to an instruction on involuntary manslaughter. *See Douglas, supra. See also State v. Cooney*, 320 S.C. 107, 112, 463 S.E.2d 597, 600 (1995) ("no error in refusal to charge involuntary manslaughter when the defendant admitted intentionally firing the gun, but claimed only he meant to shoot over the victim's head") (citing *Bozeman v. State*, 307 S.C. 172, 414 S.E.2d 144 (1992)); *State v. Craig*, 267 S.C. 262, 269, 227 S.E.2d 306, 310 (1976) (involuntary manslaughter charge not warranted where defendant "admitted intentionally firing his shotgun but claimed he only meant to shoot over [the victim's] head").

Even so, Clark argues the jury could have determined he acted recklessly while acting in self-defense, consequently, he was entitled to an involuntary manslaughter instruction. Again, Clark is wrong and can show no error in the Court of Appeals decision.

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[1] "In determining whether the evidence requires a charge on a lesser-included offense, the Supreme Court must view the facts in the light most favorable to the defendant." *State v. Sams*, 410 S.C. 303, 308, 764 S.E.2d 511, 513 (2014).

This Court faced a nearly identical intent-based argument and in rejecting it found it was "tantamount to imperfect self-defense," which is not recognized in this jurisdiction. *State v. Sams*, 410 S.C. 303, 315, 764 S.E.2d 511, 517 (2014) (citing *State v. Finley*, 277 S.C. 548, 551, 290 S.E.2d 808, 809 (1982) and *Douglas*, 332 S.C. at 75 n. 4, 504 S.E.2d at 311 n. 4). In finding no error there, this Court cited approvingly the Court of Appeals opinion in *State v. Scott*, rejecting a similar intent-based argument:

> … the Court of Appeals recently considered a defendant's assertion that "the trial court erred by not charging involuntary manslaughter because under his version of the facts, he unintentionally caused [the victim's] death when he lawfully but recklessly performed a martial arts move in self-defense." *State v. Scott*, 408 S.C. 21, 22, 757 S.E.2d 533, 534 (Ct. App. 2014). The Court of Appeals found "no basis to conclude Scott acted recklessly in defending himself because the circumstances Scott alleges to be reckless are the same circumstances that justified his use of force." *Id*.

Sams, 410 S.C. at 313-314, 764 S.E.2d at 516. [2]

Here, while Clark claimed he accidentally shot the victim, or was "scared" or "tense," (*see* Pet. 10-13), this does not entitle him to an involuntary manslaughter instruction where his shooting of the weapon was intentional. Judge McCaslin did not abuse her discretion in declining to charge involuntary manslaughter, and the Court of Appeals properly affirmed. The petition to review the decision should be denied.

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[2] In both *Sams* and *Scott,* there was not even the use of the weapon, unlike here where Clark fired, repeatedly, an AK pistol. (R. 1168). *See Sams,* 410 S.C. at 310-311, 764 S.E.2d at 515 and n.2. The majority opinion in *Sams* including this relevant cite and parenthetical also applicable here: "[*State v.*] *Smith,* 315 S.C. [547] at 550, 446 S.E.2d [411] at 413 [1994] (holding a murder defendant, who was convicted of the lesser-included offense of voluntary manslaughter, was not entitled to an instruction on involuntary manslaughter where the only evidence was that the defendant acted intentionally in wielding a knife during an argument in which he stabbed the victim; this Court stated whether the defendant 'intended' to harm the victim was irrelevant"). *Sams,* at 11, 764 S.E.2d at 515.

II. There is no "important or special" reason to grant review of the Court of Appeals opinion affirming the lower court on the basis that the record lacked factual support for heat of passion to support the giving of a voluntary manslaughter instruction. However, this Court should vacate the *dicta* portion of the opinion addressing, unnecessarily, the legal provocation prong and transferred intent.

Relevant Facts at Trial:

Judge McCaslin also denied Clark's request for a voluntary manslaughter instruction. The State argued the provocation did not come from the victim; that our courts have not extended transferred intent to voluntary manslaughter; and, "there was not sufficient evidence on the record to support a voluntary manslaughter charge regardless of the transferred intent issue." (R. 1346-1347). Judge McCaslin correctly declined to instruct the jury on voluntary manslaughter stating:

> I read the Childers, the Wharton, and also the Williams case that was supplied by the defendant, and the law as it stands today in this State is our Court has not applied the doctrine of transferred intent to voluntary manslaughter. This Court does not believe the evidence even supports a voluntary manslaughter [instruction] in this case, nor was there any overt act by the victim to indicate any provocation by the victim.
>
> There's ---again, I have to turn back to the defendant arming himself. As a matter of fact, he goes to the back of his car, to the back of the trailer, he goes back to the car, arms himself. There was no testimony or evidence that I heard about a heat of passion or uncontrollable impulse to do violence, so I declined to charge the voluntary manslaughter.

(R. 1347-1348).

The Court of Appeals:

The Court of Appeals first addressed whether there was any evidence of "sudden heat of passion such that [Clark] was overcome by an uncontrollable impulse to do violence." (App. 85-87). Guided by this Court's precedent, the court resolved that there was no evidence that supported an act in sudden heat of passion; rather, the record showed that Clark's testimony was that he did not intend to hurt anyone but shot "because he wanted the shooting to stop." (App. 86). After

failing the first prong, which allows affirmance regardless of the second, the Court of Appeals nonetheless continued to address the second prong, sufficient legal provocation, in context of transferred intent. The court found the record also failed to support provocation from the victim, thus, though the applicability of transferred intent when an unintended victim is killed remains an unsettled question according to this Court, there could be no transferred intent were there was no evidence of provocation from the unintended victim. (App. 87-89).

Discussion:

Once again, Clark has shown no error in the Court of Appeals opinion, either in law or fact, as to the denial of the instruction for lack of evidence showing heat of passion. As the Court of Appeals found, "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." (App. 85, quoting *State v. Wharton,* 381 S.C. 209, 214, 672 S.E.2d 786, 788 (2009)). Moreover, the court carefully considered the required showing, specifically that evidence must be in the record that supports both prongs of the offense—heat of passion and sufficient legal provocation. (App. 85, citing *State v. Starnes*, 388 S.C. 590, 596, 698 S.E.2d 604, 608 (2010)). The Court of Appeals was properly guided by this Court's precedent in review of the record, and both supported that Judge McCaslin did not abuse her discretion.

In his petition to this Court, Clark posits that, contrary to the trial court and the Court of Appeals determinations, the record shows some evidence of both prongs and that transferred intent applies. (*See* Pet. 18-20). That is incorrect. There is no evidence to support an "uncontrollable urge to do violence," thus, regardless of provocation, the instruction could not be given.[3]

[3] Clark also suggests that the Court of Appeals holding recognizing the lack of evidence on this point "improperly shifted the burden of proof onto petition to establish entitlement to a charge on a lesser included offense rather than review the record for any evidentiary support for the

a. There is No Evidence of Heat of Passion in the Record to Support a Voluntary Manslaughter Instruction.

Again, Clark acknowledges his testimony that he did not intend to shoot anyone or injure anyone when he shot his AK weapon, but Clark contends that the "chaotic" atmosphere may have allowed the jury to disregard the evidence and, essentially, speculate that he could have "moved into sudden heat of passion upon sufficient legal provocation[.]" (Pet. 15). This does not help him and merely highlights that the evidence presented on the matter actually fails to support the mental state required. As this Court has repeatedly instructed, there must be evidence in the record to support the submission to the jury of the lesser offense option, which necessary means evidence that could support both prongs. *See generally Starnes, supra.*

Here, former Chief Justice Toal's analysis in *State v. Childers*, 373 S.C. 367, 645 S.E.2d 233 (2007), is instructive and guided the Court of Appeals. (App. 85-86). In her *Childers* concurrence, then Chief Justice Toal wrote that the defendant was shooting in self-defense, returning fire only because a person other than the victim had fired at him first, and that evidence showed no criminal intent at all. *Id.* at 375, 645 S.E.2d at 237 (Toal, C.J., concurring).[4] Therefore, that testimony could not support the criminal intent required, firing under heat of passion, "an uncontrollable urge to do violence." *Id.*

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charge." (Pet. 14). That assertion lacks merit as the Court of Appeals did review the record and did so in the light most favorable to Clark. (*See* App. 83). The evidence simply was not there. Moreover, it could hardly be error to address why *Clark's request* was denied, which is what was addressed by way of the portion of the appeal opinion to which Clark cites. (*See* Pet. 14 and App. 84-85). The criticism of the opinion appears more a semantics stretch than error.

[4] *Childers* was a fractured opinion. In dissent, two justices disagreed with the State's contention the defendant failed to present evidence that he was "inflamed by passion" when he returned fire; rather, the dissent reasoned, "the jury could have found the 'heat of passion' in [the defendant's] testimony that he fired back because he was scared and feared he would be shot at again." *Id.* at 378, 645 S.E.2d at 238 (Pleicones, J., dissenting; Moore, J., concurring in dissent).

That same is true in another case from this Court which also guided the Court of Appeals, *State v. Niles*, 412 S.C. 515, 772 S.E.2d 877 (2015). In *Niles*, the defendant disavowed any act in heat of passion; rather "he was merely attempting to stop the victim form shooting," and hoped to protect his fiancée "rather than of perpetrating violence upon the victim." *Niles*, 412 S.C. at 522-523, 772 S.E.2d at 880. Thus, this Court resolved, "Niles, by his own testimony, lacked the intent to harm the victim" thus, it failed to "see how a voluntary manslaughter charge would have been appropriate." *Id.,* at 523, 772 S.E.2d at 881. *See also Starnes,* 388 S.C. at 598, 698 S.E.2d at 609 (recognizing that while a defendant may have fear during an altercation, to support heat of passion, the "fear must manifest itself in an uncontrollable impulse to do violence").

Here, Clark testified he ran to the corner of the Lot 7 home and hid. He then ran back to his car and retrieved his AK weapon. He then fired intentionally 10 to 12 times *just to make the shooter stop* to protect himself and his friends and family inside and outside Lot 7. He testified *he did not intend to shoot or injure anyone* but just *to cause the other person to stop shooting*. (*See* R. 1177). As a result, based on the above case law, this case is murder or self-defense; it is not voluntary manslaughter. *See Cole*, 338 S.C. at 102, 525 S.E.2d at 513 ("[B]y Appellant's own testimony, he shot at the men *to scare them away*. Appellant's testimony appears designed to *support a charge of self defense, not heat of passion*.") (emphasis added). Clark's suggestion that the jury could have disagreed with the testimony and *assumed* his continued firing "moved into a sudden heat of passion," (Pet. 15), has obstacles. Such an argument depends on the *absence* of evidence. That does not support Clark's argument that Judge McCaslin abused her discretion based on the absence of evidence of heat of passion—it rather supports that she did not.

Moreover, Clark's reliance on *State v. Payne*, 434 S.C. 121, 862 S.E.2d 81 (Ct. App. 2021), is misplaced. In fact, Clark acknowledges a critical difference; in *Payne*, the defendant continued

to shoot at the victim as the victim ran away from him. (*See* Pet. 16, citing *Payne*, 343 S.C. at 156-157, 862 S.E.2d at 99). There is nothing here to indicate Clark continued to engage though he could clearly see the threat was no longer there and was actually retreating. Moreover, *Clark,* being a Court of Appeals opinion, would not show the Court of Appeals misapplied this Court's precedent; so, again, Clark has shown no good and sufficient reason that certiorari review should be granted. *See* Rule 242(b)(3), SCACR (indicating a possible reason to grant certiorari review would be that the Court of Appeals decision is in conflict with one of this Court's decisions).

In essence, Clark's argument that the jury could substitute speculation for fact to return a lesser offense is insufficient and leans toward a hope for disfavored jury nullification. *See generally United States v. Sepulveda*, 15 F.3d 1161, 1190 (1st Cir. 1993) ("while jurors may choose to flex their muscles, ignoring both law and evidence in a gadarene rush to acquit a criminal defendant, neither the court nor counsel should encourage jurors to exercise this power."). At any rate, it shows no legal error in the Court of Appeals opinion. Clark has failed to show any cause to grant certiorari review of the Court of Appeals' opinion on this point. The record shows that Judge McCaslin did not abuse her discretion in finding no evidence in the record before the court that could support heat of passion and resolving to deny Clark's request to charge voluntary manslaughter. Therefore, the Court of Appeals properly affirmed on this point. The petition to review that decision should be denied.

b. The Court of Appeals Misapprehended this Court's Precedent Establishing that Sufficient Legal Provocation Must Come from the *Intended* Victim.

The Court of Appeals unnecessarily addressed whether the record supported sufficient legal provocation as it first determined that was no heat of passion evidence. Without evidence of heat of passion, the instruction could not be given. *See Starnes, supra.* Thus, the Court of Appeals

needlessly considered whether the heat of passion, which was clearly lacking in the evidence,[5] could have been caused by sufficient legal provocation. Because this was wholly unnecessary to the resolution, that portion of the opinion is most naturally read as *obiter dictum.* *See* DICTUM, Black's Law Dictionary (12th ed. 2024) ("A judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive)."); *see also State v. Blackwell,* 420 S.C. 127, 170, 801 S.E.2d 713, 736 (2017) (Few, J., concurring) (noting that matter "not necessary to the decision of the case is obiter dictum," citing *Cawood v. Hensley,* 247 S.W.2d 27, 29 (Ky. 1952)); *Jowers v. S.C. Dep't of Health & Env't Control,* 423 S.C. 343, 357, 815 S.E.2d 446, 453 n. 10 (2018) ("While the expansive statement we quoted was useful in conveying the general nature of the public trust doctrine" in other precedent, "any portion of the statement that goes beyond the doctrine's applicability to 'marine life, water quality, or public access' was not necessary to our decision, and is therefore dictum."); *State v. Colby,* 263 S.C. 468, 471, 210 S.E.2d 914, 915 (1975) ("Since the legality of the search was immaterial to the admissibility of the evidence, the court's finding of illegality was mere obiter dictum," and neither binding nor persuasive"). However, where normally harmless, or even helpful or instructive in some cases, here the dictum misapprehends and misapplies the principle the Court of Appeals attempted to follow. This Court should vacate that unnecessary part of the opinion.

[5] Indeed, the lower court's decision appeared to rest ultimately on the lack of evidence of the requisite mental state. (*See* R. 1347-1348, reading in conclusion: "…I have to turn back to the defendant arming himself. As a matter of fact, he goes to the back of his car, to the back of the trailer, he goes back to the car, arms himself. There was no testimony or evidence that I heard about a heat of passion or uncontrollable impulse to do violence, so I declined to charge the voluntary manslaughter.").

The main disconnect underpinning the misapprehension appears to be when transferred intent is considered. Whether transferred intent could be applied in a voluntary manslaughter context has not been decided by this Court and remains an open question. *See State v. Wharton,* 381 S.C. 209, 215, 672 S.E.2d 786, 789 (2009). It need not be addressed here because there was no evidence of the requisite mental state regardless. However, a look at the factual context of the cases the Court of Appeals considered for the principle shows the error in understanding.

First, the Court of Appeals looked to *State v. Locklair*, 341 S.C. 352, 535 S.E.2d 420 (2000). (App. 87-88). In *Locklair,* this Court rejected that the provocation could not come from a *third party* to support an instruction on voluntary manslaughter. *Id.*, at 363, 535 S.E.2d at 425. *See also State v. Tucker,* 324 S.C. 155, 171, 478 S.E.2d 260, 269 (1996) (rejecting suggestion that defendant "was under severe stress from financial pressure" as sufficient legal provocation given the provocation must relate to "some act of or related to the victim"). This Court rejected the transfer *of the provocation*; it did not address what happens when evidence of both prongs are presented— *i.e.,* evidence of an act of provocation by the *intended* victim, and evidence of heat of passion—and the *intended* victim is missed. Stated simply, the principle from *Locklair* is this: evidence supporting that both prongs have come together must first exist before the lesser offense is applicable; if the prongs do not exist together, the instruction is not warranted. *See also Wharton,* 381 S.C. at 214, 672 S.E.2d at 788 (noting evidence of rage but no sufficient legal provocation from either victim or another party involved, thus, nothing to support voluntary manslaughter).

Second, the Court of Appeals reviewed *State v. Childers, supra.* (App. 88). As referenced above, this is a badly fractured opinion with little clear guidance since a majority on the principle was never reached, but for this case, it shows how the principle of provocation coming from the victim may be misconstrued. In *Childers,* the defendant claimed to be shooting in self-defense

after being fired upon by a third party. As here, without evidence of the requisite mental state, the instruction is not warranted. However, had the evidence shown, as in *Locklair*, that the actual victim was the *intended* victim, the principle would be correctly stated, *i.e.,* the principle is more correctly stated that the legal provocation must come from the *intended* victim.

Third, the Court of Appeals looked to its own precedent, *Leggette v. State,* 440 S.C. 590, 892 S.E.2d 153 (Ct. App. 2023) for guidance. (App. 88). The court noted in that case that while there was an unintended victim according to the defendant's testimony, both the intended and unintended victim joined in the provocation. (App. 88). *See Id., at* 604, 892 S.E.2d at 161 ("Although Petitioner's testimony established the main provocation on the night of the shooting came from Ingram, Tisdale accompanied Ingram in following Petitioner and both were clearly part of the approaching, threatening westside group."). The Court of Appeals suggested such a situation could "harmonize" this Court's prior precedent both on transferred intent and the principle the legal provocation must come from the victim. (App. 88-89). Yet this analysis seems to be slightly left of the mark. Again, under *Locklair* it matters whether the offense comes together in response to the intended victim. At any rate, this Court, in the appropriate vehicle, could address any misunderstanding or refinement of its precedent. Moreover, to vacate this unnecessary portion of the appeal would follow this Court's course in *Wharton.* There, this Court vacated the portion of the Court of Appeals opinion touching on transferred intent, which was also guided by the fractured *Childers* opinion, reasoning:

> … the plurality of this Court [in *Childers*] held that the doctrine of transferred intent was not applicable to voluntary manslaughter cases because the overt act that produces the sudden heat of passion must come from the victim. However, the dissent would have held that if a defendant kills an unintentional victim upon sufficient legal provocation committed by a third party, the doctrine of transferred intent applies, entitling the defendant to a voluntary manslaughter charge.

> In this case, the court of appeals held that the trial court erred in charging the jury on voluntary manslaughter because there was no evidence of sufficient legal provocation and because transferred intent does not apply to voluntary manslaughter. We find, however, that *Childers* was not a majority opinion, and the applicability of the doctrine of transferred intent to voluntary manslaughter cases where the defendant kills an unintended victim upon sufficient legal provocation committed by a third party remains an unsettled question in South Carolina. However, because we find no evidence of sufficient legal provocation by a third party in this case, we need not address this issue. We therefore vacate the portion of the court of appeals' opinion addressing this issue.

Wharton, 381 S.C. at 215, 672 S.E.2d at 789. While the transfer concept is moot here, this Court should, as it did in *Wharton,* vacate the unnecessary portion of the Court of Appeals opinion on sufficient legal provocation and transferred intent.

CONCLUSION

For the above stated reasons, Clark has shown no "special or important " reasons to review the Court of Appeals decision affirming the trial court in declining to instruct on involuntary and voluntary manslaughter for the reasons stated above; however, this Court should, consistent with *Wharton, supra,* vacate the portion of the Court of Appeals' published opinion that unnecessarily addressed legal provocation and transferred intent.

Respectfully Submitted,

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March 11, 2026

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