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THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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APR 9 2015

S.C. Supreme Court

THE STATE,

PETITIONER,

V.

RICHARD BILL NILES, JR.,

RESPONDENT.

APPELLATE CASE NO. 2012-213592

Appeal from Horry County
Benjamin H. Culbertson, Circuit Court Judge

Opinion No. 27510

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, respondent respectfully requests rehearing because this Court may have misapprehended the fact that, as former Justice Waller of this Court once stated during an oral argument: "If someone is aiming a gun at me I am scared." In this case, there was evidence that respondent Niles went to what he expected to be an uneventful, non-violent marijuana deal. This was with a dealer (decedent) who he had done business with on prior occasions. Co-defendant Moore unexpectedly decided to rob the victim, and shots were fired towards respondent and his girlfriend as they sat in the car. Any person, Respondent Niles included, would have been scared for his life, and the life of his girlfriend, in this situation.

A sufficient legal provocation (being shot at) that is likely to produce a sudden urge to respond with violence (heat of passion), and being in great fear because you are being shot are **not** mutually exclusive concepts. In fact, the complete opposite is the intuitive experience of man, and the well settled case law of this case.

In State v. Gilliam, 296 S.C. 395, 373 S.E.2d 596 (1988), this Court, in an opinion by Chief Justice Gregory, that was joined in by now Chief Justice Toal, held that the defendant was entitled to a voluntary manslaughter, as well as self-defense instruction where he went to a club even though violence could result because of his difficulties with the decedent. Gilliam was told that the angry decedent was looking for him. Gilliam testified, as did respondent Niles, that he had no intention of shooting the decedent. Gilliam should have expected trouble, and Niles conversely had no reason to expect anything out of the ordinary.

Gilliam found the decedent at a bar and motioned for him to come outside. The two men argued and the decedent shot at Gilliam. Gilliam shot back at the decedent, killing him. This Court held that Gilliam was entitled to a voluntary manslaughter instruction given the evidence that he was shot at by the decedent. This Court noted that to warrant refusal of a charge on voluntary manslaughter, there must be no evidence tending to reduce the crime from murder to manslaughter. "To warrant the court in eliminating the offense of manslaughter it should very clearly appear 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). (emphasis added). As the Court held: "Appellant's testimony that the victim threatened him and then fired at him would support a finding of sufficient legal provocation AND heat of passion." (emphasis added). This is a common sense inference.

In this case, the majority found that respondent shooting back in self-defense (to stop the decedent from shooting any more) or shooting back in anger (an uncontrollable impulse to do violence) are implicitly mutually exclusive concepts, as is respondent shooting back while in fear of the incoming bullets. The majority focused on respondent's testimony "that he did not want to hurt the victim; that he shot with his eyes closed; that he was merely attempting to stop the victim from shooting; and that when he shot the gun, he was thinking of Hammond rather than perpetrating violence upon the victim." State v. Richard Niles, Jr., Op.No. 27510, Shearouse's Adv. Sh. #12, at 15-16. Respondent respectfully submits that even this carefully chosen testimony of the respondent does not justify the denial of a verdict option for voluntary manslaughter, and it certainly should not be used to justify the overturning of the Court of Appeals' unanimous well-reasoned holding that respondent was entitled to a voluntary manslaughter instruction.

The fact that respondent testified that he was only attempting to get the decedent to stop shooting at them (self-defense) did not mean that he also was not also in grave fear, that he had the natural instinct to shoot back in self-preservation, and out of sudden heat of passion at being shot at by the decedent (sufficient legal provocation). State v. Gilliam holds that respondent was entitled to a voluntary manslaughter instruction given the fact that he was being shot at before he returned fire. See Brief of Respondent citing Gilliam at 9, 11, and 14.

Also instructive in Gilliam, Appellant Gilliam did not appeal an ABHAN conviction for which he was tried along with his murder case. This involved an assault on Daisy Mae Reed (his prior seven year live in lover and the victim's new lover) by hitting her on the head with a walking stick and slashing her severely with a switchblade. The fatal encounter with the victim took place only "a few hours" later, and could have interpreted as Gilliam being on a mission to destroy the decedent and Reed (malice aforethought). This Court did not try and use the "unappealed"

conviction as a conclusive factor negating the duty to charge. Appellant Gilliam testified he had no intent to shoot the victim. "[T]here must be no evidence tending to lessen the crime from murder to manslaughter."

Further, this Court incorrectly states in Footnote 11 that respondent did not appeal his armed robbery conviction. Respondent did appeal his armed robbery and his murder conviction when his trial attorney filed and served a notice of intent to appeal.

Present appellate counsel simply could not find a meritorious issue upon which to challenge that armed robbery conviction. This was not a directed verdict appellate issue on armed robbery given the disputed evidence. Appellate counsel here also did not find a meritorious evidentiary issue he thought could warrant reversal on the armed robbery conviction. None of this logically leads to the conclusion that respondent conceded his guilt to armed robbery. To the contrary, respondent has been advised that the challenge to that conviction must await another day in post-conviction relief. Moreover, there is not any "hybrid" representation in this state where appellate counsel could have filed a merit brief on the murder conviction, and an Anders brief on the armed robbery conviction.

Importantly, this footnote is respectfully going to be read to mean that appellate counsel must challenge each jointly tried conviction on appeal no matter how weak or frivolous the argument challenging such conviction may be in any given case, or the propriety of that conviction and others is somehow **conceded**. That does violence to the law for several reasons.

First, in Appellate Practice in South Carolina, Chief Justice Toal wrote that: "One of the first steps in effective brief-writing is identifying the few issues that are most likely to lead to a successful result on appeal . . . . The attorney who discusses numerous issues is like an amateur enthusiast firing a machine gun, hoping randomly to hit some object. However, the advocate who

homes in on a few issues is akin to the skilled marksman carefully aiming a rifle at select strategic targets. The latter approach is much more likely to produce the desired result . . . Limiting the number of arguments not only implicitly conveys the message that the issues presented are all very significant, but it also gives the attorney the opportunity to develop those arguments in greater depth." Toal, Vafai, and Muckenfuss, Appellate Practice in South Carolina at 224-225 (1989 ed.).

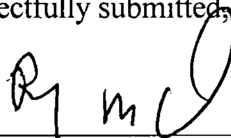
Respectfully, while this footnote should be removed from the opinion after rehearing is granted, that is not enough. It is elementary that the jury must separately consider each charge before it.

Finally, respondent would ask the majority to reconsider its statement that "There was nothing *sudden* about Niles' decision to shoot the victim." Many people carry weapons in this state, and this country. Many are legally concealed handguns by permit, and some of them are not legally carried weapons.

Regardless, the fact that a person had a weapon on his person does not lead to the rational conclusion that there was "nothing sudden" about the person's shooting back when provoked by someone who unexpectedly shot at them. Respectfully, this Court does not have jurisdiction to weigh testimony in a law case. Niles' testimony was that *while the decedent was shooting into his car*, Niles grabbed his pistol and shot two times. It is difficult to envision a more "sudden" reaction. In any event, "sudden" refers to the onset of heat of passion. Once established, as it was here, this issue then analytically becomes one of "cooling time." And this is a matter for the jury. See State v. Jones, 90 S.C. 290, 73 S.E. 177 (1912). Respondent's testimony that he fired while being shot at inside his car precludes any finding as a matter of law that any cooling time excluded manslaughter. There was none, in fact.

Respondent strongly submits for the reasons above that this Court should grant rehearing and reconsider its opinion in this case. It most respectfully is unfair in several respects, including the realities of appellate advocacy contained in Footnote 11 in the opinion as discussed above. This is a rehearing petition about fundamental fairness.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

This 9th day of April, 2015.

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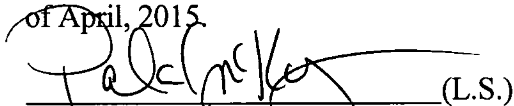
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Brendan J. McDonald, Esquire, Assistant Attorney General, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 9th day of April, 2015.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR RESPONDENT

SWORN TO BEFORE ME this 9th day of April, 2015.



_______________(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.