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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Florence County

R. Knox McMahon, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

JUSTIN R. SIMMS

APPELLANT

APPELLATE CASE NO. 2013-002748

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ANDERS BRIEF OF APPELLANT

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DAVID ALEXANDER  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
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ATTORNEY FOR APPELLANT

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**STATEMENT OF ISSUE ON APPEAL**

Whether the trial court erred in refusing to charge the lesser-included offense of voluntary manslaughter?

## STATEMENT OF THE CASE

On September 30, 2010, a Florence County grand jury indicted appellant Justin R. Simms for murder, attempted armed robbery, and a weapons charge. R. 620. On December 9, 2013, appellant was tried before the Honorable R. Knox McMahon and a jury. R. 1. E. L. Clements represented the State. R. 1. Chevron Scott and Robert Stucks represented appellant. R. 1. The jury convicted appellant. R. 601, ll. 2 – 15. Judge McMahon sentenced appellant to concurrent terms of forty years' imprisonment for murder, twenty years' imprisonment for attempted armed robbery, and five years' imprisonment on the weapons charge. R. 617, ll. 4 – 16. This appeal follows.

## ARGUMENT

The trial court erred in refusing to charge the lesser-included offense of voluntary manslaughter.

In his opening statement, the solicitor anticipated that the defendant would receive a jury instruction on voluntary manslaughter. R. 86, ll. 9 – 12. After explaining the elements of murder, the solicitor told the jury that the trial judge “may also talk about a lesser-included-offense of murder called voluntary manslaughter where you take somebody’s life in the heat of passion with legal provocation.” R. 86, ll. 9 – 12.

The shooting death of Marcus Weaver (“Weaver”) happened at a drug deal gone wrong in the parking lot of a Day’s Inn in Florence. Weaver, his brother Shane Graham (“Graham”), and his friend Squan Davis (“Davis”) traveled together in one car to buy marijuana. R. 276, l. 17 – 277, l. 6. Davis was going to buy marijuana from a man named Curtis Joe (“Joe”). R. 278, ll. 5 – 7. Davis had purchased marijuana from Joe in the past. R. 278, ll. 10 – 13. Graham drove, Weaver was in the passenger seat, and Davis sat behind Graham. R. 279, ll. 8 – 18.

On direct-examination, Davis testified that after they parked at the hotel, the man he did not know came to his side of the car. R. 281, ll. 13 – 25. Davis directed them to the other side. R. 281, ll. 21 – 25. The man opened the door, pulled out a gun, and punched Davis in the face. R. 282, ll. 1 – 7. He held a gun on everyone and told them to “give it up.” R. 282, ll. 8 – 15. The man hit Weaver with the gun. R. 282, ll. 16 – 18. Davis then heard shooting coming from inside the car and he ran. R. 282, l. 23 – 283, l. 11.

Joe testified for the State. He claimed he did not know Davis, but said he received a call from "a boy from Lake City" who wanted some marijuana. R. 338, l. 20 – 339, l. 14. He arranged to meet the man at the Florence Day's Inn and appellant and Joshua Carraway ("Carraway") went with him. R. 339, ll. 15 – 25. Joe claimed that he never had any marijuana, but that Carraway planned to rob the purchasers. R. 341, l. 17 – 342, l. 8. Carraway and appellant went to the purchasers' car while Joe stayed behind. R. 343, ll. 1 – 11. Joe heard gunshots. R. 343, ll. 12 – 15. Appellant came back to the car. R. 344, ll. 18 – 23. Appellant told Joe, "the boy started shooting and Josh was still in the car." R. 345, ll. 6 – 9. Appellant never told Joe that he shot Weaver. R. 346, ll. 13 – 18.

Carraway testified for the State. He claimed no promises had been made to him in exchange for his testimony. R. 413, ll. 22 – 24. He claimed that he and appellant had planned together to rob the men in the other car. R. 413, ll. 13 – 21. Carraway unpersuasively claimed that he went to a car containing three men to rob them and did not take a gun. R. 392, ll. 8 – 12. Carraway testified that appellant had a .380 pistol. R. 392, ll. 15 – 18.

Admitted into evidence was a prior statement Carraway gave the police. R. 642. In this statement, Carraway stated that he and Joe went to the Day's Inn to sell drugs, Joe was talking with the men, and the men began shooting. R. 645. The men in the car fired first. R. 645. On cross-examination, Davis testified that Weaver was the first one to shoot. R. 294, ll. 4 – 8. Graham testified that a man opened the front passenger door, stuck a .380 inside and yelled "give it up." R. 366, l. 21 – 367, l. 23. Graham saw Weaver jump at the man and then Graham put his head down and heard gunshots. R.

368, ll. 5 – 9. When he lifted his head, he saw Weaver lying on his stomach on the ground, pulled him into the car and drove him to the hospital. R. 370, ll. 5 – 15. Weaver died from a gunshot wound to the back. R. 193, ll. 8 – 13. After the close of the evidence, the trial judge ruled that he would not charge any lesser-included offenses. R. 484, l. 22 – 485, l. 1.

The trial court erred in not charging voluntary manslaughter. “A court may eliminate the offense of manslaughter where it clearly appears that there is no evidence whatsoever tending to reduce the crime from murder to manslaughter.” State v. Pittman, 373 S.C. 527, 570, 647 S.E.2d 144, 166 (2008). “In determining whether the evidence requires a charge of voluntary manslaughter, the Court views the facts in a light most favorable to the defendant.” State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001).

Manslaughter is “the unlawful killing of another without malice, express or implied.” S.C. Code Ann. § 16-3-50. “Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation.” State v. Cole, 338 S.C. 97, 101, 525 S.E.2d 511, 513 (2000). “Words accompanied by hostile acts may, according to the circumstances, reduce a charge from murder to voluntary manslaughter.” State v. Byrd, 323 S.C. 319, 322, 474 S.E.2d 430, 432 (1996).

While Carraway’s testimony and his statement conflicted as to whether he and appellant intended to rob Weaver, it is not the court’s duty to weigh evidence, but merely to determine its existence. See State v. Light, 378 S.C. 641, 648-49, 664 S.E.2d 465, 468-69 (2008) (holding that defendant was entitled to self-defense and involuntary manslaughter charges despite inconsistent statements). In Carraway’s statement, shots

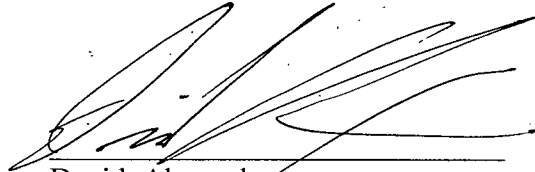
erupted following a discussion during a drug deal and there is no mention of any intent to commit a robbery. Davis testified that Weaver shot first. There were multiple shots from Weaver's gun going from the front of the car towards the back. R. 212, l. 18 – 25. Weaver shot himself in the arm. R. 194, ll. 6 – 12. Weaver was drunk and had marijuana in his system. R. 200, ll. 3 – 23. This evidence establishes that appellant could have been acting under a sudden heat of passion after legal provocation.

Indeed, the solicitor thought this case warranted a voluntary manslaughter instruction and told the jury as much in his opening statement. R. 86, ll. 5 – 12. The jury was conflicted about whether appellant was guilty of murder and sent a note indicating they were not unanimous. R. 588, l. 25 – 589, l. 6. The jury deliberated for ten hours, asked multiple questions, and broke overnight. R. 557, l. 14 – 599, l. 10. Under these circumstances, the failure to give a voluntary manslaughter charge was prejudicial and this case should be reversed and appellant should be given a new trial.

CONCLUSION

For the foregoing reasons, appellant's convictions should be reversed and this case remanded for a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'David Alexander', written over a horizontal line.

David Alexander  
Appellate Defender

ATTORNEY FOR APPELLANT

This 21<sup>st</sup> day of April, 2015.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Florence County

R. Knox McMahon, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

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PETITION TO BE RELIEVED AS COUNSEL

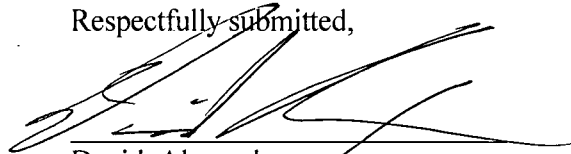
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Counsel for Justin R. Simms states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. He has reviewed the record of appellant's trial before Judge R. Knox McMahon, which was held on December 13, 2013, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, he asks the Court to relieve him as counsel for Justin R. Simms.

Respectfully submitted,



David Alexander  
Appellate Defender

ATTORNEY FOR APPELLANT

This 21<sup>st</sup> day of April, 2015.

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**DESIGNATION OF MATTER TO BE  
INCLUDED IN RECORD ON APPEAL**

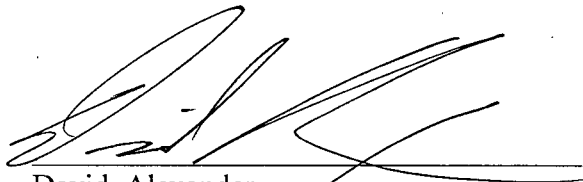
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Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictment(s);
- (2) Trial transcript;
- (3) Defendant's Exhibits 1-3;
- (4) Court's Exhibits 1-8.

I certify that this designation contains no matter which is irrelevant to this appeal.

April 21<sup>st</sup>, 2015



David Alexander  
Appellate Defender

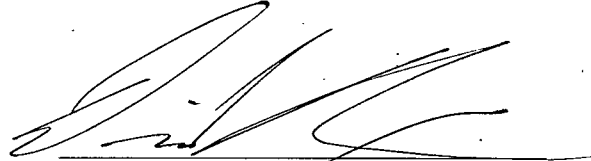
South Carolina Commission on Indigent Defense  
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PO Box 11589  
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Attorney for Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

April 21<sup>st</sup>, 2015

A handwritten signature in black ink, appearing to read "David Alexander", written over a horizontal line.

David Alexander  
Appellate Defender

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STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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THE STATE,

RESPONDENT,

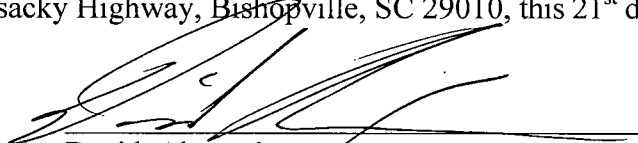
V.

JUSTIN R. SIMMS

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Donald J. Zelenka, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Justin R. Simms, #358130 at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 21<sup>st</sup> day of April, 2015.



David Alexander  
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
this 21<sup>st</sup> day of April, 2015.

Wava Hendrix (L.S.)

Notary Public for South Carolina  
My Commission Expires: July 3, 2023.