

STATE OF SOUTH CAROLINA  
In The Supreme Court

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MAY 22 2015

APPEAL FROM MARLBORO COUNTY  
Court of Common Pleas

**S.C. Supreme Court**

The Honorable J. Michael Baxley, Trial Judge  
The Honorable Brooks P. Goldsmith, Post-Conviction Relief Judge

Appellate Case No. 2013-000366

Clarence Kendall Cook, ..... Petitioner,

v.

State of South Carolina, ..... Respondent.

**BRIEF OF RESPONDENT  
PURSUANT TO WHITE V. STATE**

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ATTORNEYS FOR RESPONDENT

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## **STATEMENT OF ISSUE ON APPEAL**

Did the trial judge err in instructing the jury on the lesser-included offense of voluntary manslaughter where the record contains evidence Applicant may have been acting in a heat of passion when he shot the victim?

**STATEMENT OF THE CASE**

For purposes of this brief, Respondent adopts Appellant's statement of the case.

## ARGUMENT

### **The trial judge did not err in instructing the jury on the lesser-included offense of voluntary manslaughter.**

Appellant argues the trial judge erred in granting the State's request to instruct the jury on the lesser-included offense of voluntary manslaughter because there is no evidence in the record that Appellant was acting in a heat of passion.<sup>1</sup> Respondent submits the record contains evidence which could reasonably be interpreted to indicate Appellate was acting under "an uncontrollable impulse to do violence." State v. Starnes, 388 S.C. 590, 598, 698 S.E.2d 604, 609 (2010) (quoting State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007)). Accordingly, Respondent submits the trial judge did not err in instructing the jury on the lesser-included offense of voluntary manslaughter.

Appellant shot the victim after a brief verbal altercation in front of their apartment complex. Kim Brown testified she saw the victim approach Appellant, and then heard a gunshot. (App. p. 93, line 10-p. 94, line 2). She then saw Appellant approach the victim, who was lying on the ground, and fire a second shot. (App. p. 94, lines 3-5). Terrance Bridges corroborated Brown's testimony. He saw Appellant step back from the victim, pull out a gun, and shoot the victim. (App. p. 187, lines 2-3). He then witnessed Appellant walk over to the victim, on the ground, and fire a second shot. (App. p. 187, lines 3-5). Carlos Eaddy also saw Appellant shoot the victim twice. (App. p. 305, line

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<sup>1</sup> As an initial matter, Respondent submits this issue is not properly before this Court. The record from the post-conviction relief hearing clearly demonstrates Appellant was informed of his right to appeal (App. p. 771, line 23-p. 772, line 3), but did not ask for an appeal (App. p. 787, lines 2-4). The post-conviction relief judge found trial counsel's testimony, wherein she maintained Appellant never requested an appeal, credible. (App. p. 817). See Simuel v. State, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010) ("This Court gives great deference to a PCR judge's findings where matters of credibility are involved." (citing Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993))). Accordingly, Respondent submits this Court should dismiss this appeal because certiorari was improperly granted.

23-p. 306, line 13). Appellant's witness, Jessie Simmons, also testified to seeing Appellant shoot the victim the second time. (App. p. 518, lines 18-22).

The State also presented evidence Appellant and the victim had prior difficulties. Brown testified to the following exchange between Appellant and the victim preceding the shooting:

And [Appellant] came down the stairs, looked down at [the victim], and [the victim] was like, man you full of [expletive]. So, [Appellant] looked like, well you know, well what's up. So, [Appellant] came down the stairs like, a little smirk. Came down, came around the staircase, and [the victim] got up and came onto the staircase this way, and he was facing him from this direction at the end of the stairs. [the victim] was standing here, standing up on the end of the sidewalk. And he was like, man, keep my name out of all this mess y'all got going on out here. I don't have nothing to do with that. Keep my name out of this mess --- out of this [expletive]. That is the word he used. Out of this [expletive] that y'all got going on out here. I don't have nothing to do with it."

(App. p. 93, line 11-p. 94, line 1). Brown also testified the victim and Appellant had exchanged similarly argumentative text messages earlier in the day. (App. p. 117, lines 15-p. 119, line 25). Appellant's witness, Chastity Carter, corroborated the content of these text messages. (App. p. 532, line 12-p. 533, line 23). Carter also testified the victim made threats to Appellant in the past. (App. p. 523, line 1-p. 525, line 7). Another of Appellant's witnesses, Jimmy Ridges, also testified he had heard the victim threaten Appellant at other times. (App. p. 448, line 1-p. 449, line 8; p. 450, line 21-p. 451, line 21).

Carter also testified she heard Appellant and the victim "fussing" immediately prior to the shooting. (App. p. 536, lines 16-17; p. 537, line 19). Appellant gave a statement after being arrested. In that statement, he alleged he was in fear for his life when he shot the victim because he believed the victim had a gun. (App. p. 401, line 24-

p. 402, line 1; p. 406, lines 21-25). In the statement, he also stated that “before [he] knew it, [he] fired a bullet.” (App. p. 562, lines 11-15).

Based on the facts presented at trial, the trial judge properly instructed the jury on the lesser-included offense of voluntary manslaughter. “Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation.” Starnes, 388 S.C. at 596, 698 S.E.2d at 608 (citing State v. Wharton, 381 S.C. 209, 672 S.E.2d 786 (2009)). A trial court must charge the lesser-included offense of voluntary manslaughter where there is **any** evidence to support the charge. Id. In deciding whether to instruct the jury on voluntary manslaughter, the Court must view the facts in the light most favorable to the defendant. State v. Cole, 338 S.C. 97, 101, 525 S.E.2d 511, 512-13 (2000) (citing State v. Byrd, 323 S.C. 319, 474 S.E.2d 430 (1996)).

Here, Appellant conceded at trial that the record contains evidence of sufficient legal provocation. (App. p. 562, lines 2-3; p. 640, lines 13-16). Appellant argues instead that there is no evidence he acted in a sudden heat of passion. The “sudden heat of passion” that mitigates a murder to a voluntary manslaughter, “while it need not dethrone reason entirely, or shut out knowledge and volition, 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. Knoten, 347 S.C. 296, 303, 555 S.E.2d 391, 395 (2001) (citations omitted). Respondent submits the record contains evidence that, viewed in the light most favorable to Appellant, could indicate he was acting in a heat of passion.

The facts of this case are similar to those in State v. Lowery, 315 S.C. 396, 434 S.E.2d 272 (1993). There, Lowry and the decedent were engaged in a verbal altercation

prior to the shooting. 315 S.C. at 398, 434 S.E.2d at 273. During the altercation, the decedent raised his arms above his head and Lowry shot him in the chest. Id. “After the decedent fell, Lowry cursed him and shot him again, this time in the head.” Id. Based on those facts, this Court held the trial judge erred in not instructing the jury on voluntary manslaughter because the jury could have discerned there was sufficient heat of passion to find Lowry guilty of the lesser-included offense. Id. at 399, 434 S.E.2d at 274 (citing State v. Gilliam, 296 S.C. 395, 373 S.E.2d 596 (1988)<sup>2</sup>).

Here, the evidence, in the light most favorable to Appellant, demonstrates the victim had a long history of threatening behavior toward Appellant. Appellant and the victim had exchanged threatening text messages hours before the shooting. Appellant’s witnesses indicated he was “fussing” with the victim at the time of the shooting. Four witnesses testified Appellant walked over to the victim, after he fell to the ground, and fired a second shot. Appellant also gave a statement indicating he fired the shots “before [he] knew it.”

The trial judge properly ruled a reasonable juror could interpret this evidence to indicate Appellant was acting under a sudden heat of passion. Appellant’s own statement, that “before [he] knew it, [he] fired a bullet,” could be interpreted to mean he was not in control of himself when he shot the victim, and thus acting under an uncontrollable impulse to do violence. The fact Appellant approached the already incapacitated victim and shot him again could be interpreted to mean he was incapable of cool reflection during the shooting. See Lowry, 315 S.C. at 398, 434 S.E.2d at 273

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<sup>2</sup> In Gilliam, the defendant and the decedent got into an argument, during which the decedent made threatening statements to the defendant. 296 S.C. at 396, 373 S.E.2d at 597. In response, the two exchanged gunfire, and the defendant fatally shot the decedent. Id. This Court held the defendant’s testimony there “would support a finding of sufficient legal provocation and heat of passion.” Id. at 397, 373 S.E.2d at 597 (citations omitted).

(defendant fired second shot at decedent on ground). Because this evidence is open to interpretation regarding Appellant's state of mind at the time of the shooting, the trial judge properly submitted the lesser-included offense of voluntary manslaughter for the jury's consideration.

**CONCLUSION**

For the foregoing reasons, Respondent respectfully requests this Court affirm Appellant's conviction and sentence.

Respectfully submitted,

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By:   
ATTORNEYS FOR RESPONDENT

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Appeal from Marlboro County      **S.C. Supreme Court**  
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CLARENCE KENDALL COOK,

PETITIONER,

v.

THE STATE OF SOUTH CAROLINA,

RESPONDENT.

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**CERTIFICATE OF SERVICE**

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The undersigned hereby certifies that a true copy of the **Brief of Respondent Pursuant to White v. State**, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

**Kathrine H. Hudgins, Esquire**  
**SC Commission of Indigent Defense**  
**Post Office Box 11589**  
**Columbia, SC 29201**

This 22<sup>nd</sup> day of May, 2015



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Caroline Collins, Legal Assistant



ALAN WILSON  
ATTORNEY GENERAL

May 22, 2015

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S.C. Supreme Court

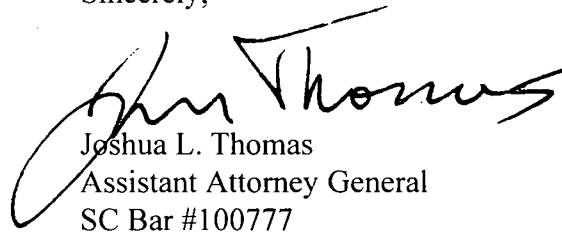
The Honorable Daniel E. Shearouse  
Clerk, South Carolina Supreme Court  
Post Office Box 11330  
Columbia, South Carolina 29211

**Re: Clarence Kendell Cook v. State of South Carolina**  
**Appellate Case No.: 2013-000366**  
**Lower Court Case No.: 2012-CP-34-0041**

Dear Mr. Shearouse:

Attached are the original and thirteen (13) copies of the **Brief of Respondent Pursuant to White v. State** in the above referenced case for filing in your office.

Sincerely,

  
Joshua L. Thomas  
Assistant Attorney General  
SC Bar #100777

JLT/cc

cc: Kathrine H. Hudgins, Esquire  
Trisha Allen, Victim Services