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**STATE OF SOUTH CAROLINA  
In the Supreme Court**

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**S.C. Supreme Court**

The State,

Petitioner,

v.

Brittany Johnson,

Respondent

Appellate Case No. 2013-002027

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Appeal from Horry County  
Edward B. Cottingham, Circuit Court Judge

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Opinion No. 27565  
Heard March 4, 2015—Filed August 19, 2015

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**RETURN TO MOTION TO REMAND**

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**I. INTRODUCTION**

Comes now Petitioner, the State of South Carolina (“The State”), and makes return to Respondent Brittany Johnson’s (“Johnson”) motion to remand. As explained below, because Johnson, rather than raising each of her arguments supporting the court of appeals’ ruling to this Court, instead elected to sit on these arguments in hopes of getting a second bite of the appellate apple via remand, the State submits these grounds are abandoned and asks that Johnson’s motion be denied. To rule otherwise would not only encourage piecemeal litigation of appellate arguments, but would also dis-incentivize a prevailing party below from raising additional sustaining grounds to this Court and would prolong the appellate process. In the alternative, and in the event this Court disagrees with the State’s abandonment analysis, the State asks this Court,

in the interest of judicial economy, to address Johnson's remaining arguments as contained within the Appendix and in light of the proper admission of Johnson's video confession.

## II. BACKGROUND

On June 24, 2008, Johnson shot and killed Monica Burroughs. (Supp. App. 337, 343, 349-52). Johnson was subsequently indicted for murder. (Supp. App. 482-83). She was tried and convicted before the Honorable Edward B. Cottingham and a jury on February 7-10, 2011 in Conway. (Supp. App. 1, 6, 463, 472-73). Johnson received a thirty year sentence. (Supp. App. 472-73).

On appeal, Johnson sought reversal of her conviction arguing the trial court erred by:

- (1) admitting [her] video statement;
- (2) failing to grant a mistrial for alleged premature jury deliberation;
- (3) failing to charge the jury with self-defense; and
- (4) failing to charge the jury with involuntary manslaughter.

(App. 1).

In response, the State, via its Final Brief of Respondent explained:

- (1) the trial court correctly determined [Johnson]'s testimony during the *Jackson v. Denno* hearing regarding her alleged invocation of her right to counsel was simply not plausible;
- (2) [t]he trial court correctly determined the jury did not engage in premature deliberations, but instead, was merely informing the trial court it was unable to hear [Johnson's] statement;
- (3) [t]he trial court was correct in declining to charge the jury regarding self-defense where: (a) defense counsel failed to present an argument supporting such a suggestion at trial; and (b) the record demonstrates Appellant, after approaching the car in which the victim was seated and hitting her with a handgun, then pointed and presented a firearm at the victim and shot her; and
- (4) the trial court correctly declined to charge the jury regarding involuntary manslaughter where the uncontradicted testimony from trial established that

[Johnson] approached the victim, who was sitting in a car, began hitting her with a handgun, pointed and presented a .45 caliber handgun and admitted shooting the victim

(App. 30).<sup>1</sup>

On June 26, 2013 the court of appeals reversed Johnson's murder conviction and sentence finding the trial court erred in admitting her statement to police and declining to address Johnson's remaining issues. See State v. Johnson, No. 2013-UP-288 (S.C. Ct. App. June 26, 2013). The State unsuccessfully sought rehearing in the court of appeals. (App. 73-96); (App. 97-98).

Subsequently, this Court granted the State's petition for writ of certiorari and unanimously reversed the court of appeals, concluding the trial court's credibility determination controlled the issue. State v. Johnson, Op. No. 27565, (filed August 19, 2015). Notably, Johnson, despite having briefed three other arguments in support of reversing her conviction in the court of appeals, failed to raise any of these issues as additional sustaining grounds before this Court.<sup>2</sup> Nevertheless, she now seeks a remand for the court of appeals to consider these arguments.<sup>3</sup> Because we believe these issues are abandoned, and since Johnson's failure to raise

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<sup>1</sup> Pursuant to Rule 242(e), SCACR, the briefs are contained within the appendix. (App. 1-70). The record on appeal is contained within a supplemental appendix. (Supp. App. 1-473).

<sup>2</sup> See I'On L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000) ("Of course a respondent may abandon an additional sustaining ground under the present rules . . . by failing to raise it in the appellate brief."); Maxey v. R.L. Bryan Co., Inc., 295 S.C. 334, 336 n.2, 368 S.E.2d 466, 467 n.2 (Ct. App. 1988) (citing May v. Hopkinson, 289 S.C. 549, 347 S.E.2d 376 (Ct. App. 1986) (concluding the failure to argue an additional sustaining ground is deemed an abandonment of the ground)).

<sup>3</sup> Notably, Johnson claims she is "entitled" to a remand pursuant to State v. Grovenstein, 335 S.C. 347, 354 n.6, 517 S.E.2d 216, 219 n.6 (1999). However, a review of footnote six reveals nothing to support Johnson's claim, but instead merely reveals Grovenstein's case was remanded without discussion. While it is indeed true that South Carolina, via Rule 201, SCACR grants aggrieved individuals a right to appeal, such a right is not absolute and does not require that a litigant's claim be heard. In fact, as this Court is well aware, both appeals, as well as arguments, may be waived by failing to comply with any number of procedural requirements. See e.g., Rule 203(b)(2), SCACR, (stating a notice of appeal must be served on all respondents within ten days after the sentence is imposed); State v. Scott, 351 S.C. 584, 587, 571 S.E.2d 700, 701 (2002) (stating the Supreme Court of South Carolina has consistently held Rule 203(b), SCACR's service requirement is jurisdictional); Rule 208(b)(1)(B), SCACR, (stating broad general statements may be disregarded by the appellate court and ordinarily, no point will be considered which is not set forth in the statement of issues of appeal); Tobias v. Rice, 379 S.C. 357, 365, 665 S.E.2d 216, 220 (Ct. App. 2008) overruled on other grounds (holding it is error for an appellate court to consider issues not properly

these grounds would fortuitously provide her with a second bite of the appellate apple, the State opposes Johnson's motion to remand and instead ask this Court to either: (a) find Johnson's argument abandoned and therefore deny the motion; or (b) in the interest of judicial economy, address Johnson's remaining issues in light of, among other things, her properly admitted video-taped confession.

### III. DISCUSSION

#### A. Abandonment of Respondent's Arguments

As an initial matter, the State suggests that Johnson, having already briefed her arguments for reversing her conviction in the court of appeals, abandoned further consideration of those arguments when she failed to raise them as additional sustaining grounds before this Court. See I'On L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000) ("Of course a respondent may abandon an additional sustaining ground under the present rules . . . by failing to raise it in the appellate brief."); Maxey v. R.L. Bryan Co., Inc., 295 S.C. 334, 336 n.2, 368 S.E.2d 466, 467 n.2 (Ct. App. 1988) (citing May v. Hopkinson, 289 S.C. 549, 347 S.E.2d 376 (Ct. App. 1986) (concluding the failure to argue an additional sustaining ground is deemed an abandonment of the ground)). Indeed, there is no question that Johnson, as the prevailing party in the court of appeals, *could* have raised the arguments from her previous brief to this Court as an additional sustaining ground under Rule 208(b)(2), SCACR as her arguments are included as part of the record under Rule 242(e)(1)'s, requirement that the Appendix contain "[a] copy of . . . the briefs." See Rule 208(b)(2), SCACR (2015) ("Respondent's brief may also

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raised to it); Rule 208(b)(1)(D), SCACR (stating an argument must be supported by citations to authority); Doe v. Roe, 379 S.C. 291, 300, 665 S.E.2d 182, 186-87 (Ct. App. 2008) overruled on other grounds (holding conclusory arguments not supported by authority are considered abandoned for purposes of appellate review); State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) (requiring an issue be raised to and ruled upon by the trial court in order to be preserved for appellate review); ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) (holding an unappealed ruling, right or wrong, becomes the law of the case). Stated differently, Johnson is not entitled to a remand, especially since her additional arguments are abandoned and even if they were not, judicial economy favors summary disposition of her remaining arguments.

contain argument asking the court to affirm for any ground appearing on the record as provided by Rule 220(c).”); Rule 220(c), SCACR (2015) (“The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.”); Rule 242(e)(1), SCACR (2015) (explaining that with respect to certiorari to the court of appeals, “[t]he Appendix shall include . . . [a] copy . . . of the briefs”). Furthermore, there is no question that an additional sustaining ground can be “abandoned” by failing to raise the issue in an appellate brief pursuant to I’On, Maxey, and May. See I’On, 338 S.C. at 420, 526 S.E.2d at 723 (“Of course a respondent may abandon an additional sustaining ground under the present rules . . . by failing to raise it in the appellate brief.”); Maxey, 295 S.C. at 336 n.2, 368 S.E.2d at 467 n.2 (citing May, 289 S.C. 549, 347 S.E.2d 376 (concluding the failure to argue an additional sustaining ground is deemed an abandonment of the ground)). Therefore, in light of I’On, Maxey, and May, the State submits Johnson, as the prevailing party in the court of appeals, abandoned the arguments that are the subject of her motion to remand by failing to raise them via her response brief. Accordingly, the State submits a remand to consider these issues is unnecessary.

## **B. Judicial Economy**

In the alternative, and in light of the fact the remaining issues are fully briefed and contained with the Appendix along with the Record on Appeal, the State further opposes Johnson’s motion to remand as the interest of judicial economy is best served by addressing her remaining issues.<sup>4</sup> This is especially true in light of the fact this Court has now determined

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<sup>4</sup> See e.g., Woodson v. D.L.I. Properties, L.L.C., 406 S.C. 517, 528 n.10, 753 S.E.2d 428, 434 n.10 (2014) (finding the court of appeals committed error when it affirmed a grant of summary judgment on the basis of a lack of a sufficient record, but declining to remand the issue for consideration by the court of appeals and addressing the merits of the issue “in the interest of judicial economy”); State v. Kromah, 401 S.C. 340, 354, 737 S.E.2d 490, 497 (2013) (concluding the court of appeals erroneously found an issue was not preserved but declining to remand the merits of the issue to the court of appeals and instead, “in the interest of judicial economy” considering the issue); Furtick v. S.C. Dep’t of Prob., Parole and Pardon Servs., 352 S.C. 594, 599, 576 S.E.2d 146, 149 (2003) (declining

Johnson's video-taped confession was properly admitted. See State v. Johnson, Op. No. 27565, (filed August 19, 2015) ("Because the effect of the credibility finding is that [Johnson] did not unequivocally invoke her right to counsel, we further uphold the trial court's finding that Respondent's statement was voluntary."). For instance, even assuming Johnson's second argument is correct—that the trial court erred when, after instructing the jury not to deliberate, it returned with a note reflecting that they all agreed they needed to re-hear Johnson's confession—the State submits the result of such an error—viewing admissible evidence—could not possibly be prejudicial, especially since the trial court found the jury's reason for asking to replay the video was due to audio issues and was not the product of premature deliberation.<sup>5</sup> (Supp. App. 137, 140, 144-45).

Moreover, the State submits that the admission of Johnson's video confession, when combined with the uncontroverted facts in footnote one of this Court's opinion, ultimately addresses Johnson's third and fourth arguments, that she was allegedly entitled to a self-defense and involuntary manslaughter charge. Specifically, this Court explained, via footnote one of its opinion, that Johnson "attacked the unarmed victim while the victim was seated in a friend's vehicle, 'pistol whipped' her, and ultimately shot her" adding that this account was "confirmed" by "two witnesses." State v. Johnson, Op. No. 27565, n.1 (filed August 19, 2015). Thus, these facts, which are uncontroverted, necessarily mean Johnson was not entitled to a jury charge on self-defense or involuntary manslaughter.<sup>6</sup>

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to remand question regarding parole eligibility to administrative law judge and instead addressing merits of the claim "for the sake of judicial economy"); Southern Bell Tel. and Tel. Co. v. Hamm, 360 S.C. 70, 75 409 S.E.2d 775, 778 (1991) (addressing an issue on appeal "in the interest of judicial economy" "since this issue would be raised to the Court at some future time and since both parties have fully briefed the issue.").

<sup>5</sup> For a more complete discussion on this matter please consult pages 55-58 of the Appendix.

<sup>6</sup> Specifically, the uncontradicted testimony established Johnson, by attacking the unarmed victim, pistol whipping and shooting her, could not meet the elements necessary for a jury charge on self-defense as "one who provokes or initiates an assault cannot escape criminal liability by invoking self-defense[.]" State v. Bryant, 336 S.C. 340, 345, 520 S.E.2d 319, 322 (1999). These same facts precluded Johnson from receiving a charge on involuntary

Finally, even if Johnson was correct on each of the arguments she now seeks to have addressed via remand, the fact remains that a jury would have never considered any verdict other than murder after: (1) viewing Johnson's video confession; (2) hearing both eyewitnesses; and (3) listening to Johnson's own testimony—specifically that she intended to shoot the victim. Thus, even if we were to assume the trial court erred as to any or all of these issues, any error would be harmless. See State v. Gathers, 295 S.C. 476, 480-81, 369 S.E.2d 140, 143 (1988) (“[I]n view of the overwhelming evidence of appellant's guilt, we hold any error harmless beyond a reasonable doubt.”). As a result, the State submits the interest of judicial economy is best served by addressing these issues rather than remanding them to the court of appeals for further consideration.

#### IV. CONCLUSION

In conclusion, the State asks that Johnson's motion for remand be denied. Specifically, the State submits Johnson should not be rewarded by her failure to raise additional sustaining grounds to this Court, especially where those grounds are plainly meritless as discussed both above and as set out more fully in the Appendix. Further, in the event this Court disagrees with the State's suggestion that Johnson has abandoned the arguments contained within her brief to the court of appeals, we respectfully request that, in the interest of judicial economy, the Court address Johnson's remaining grounds and affirm Johnson's conviction and sentence.

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manslaughter since attacking the unarmed victim, pistol whipping and shooting her would not meet either of the definitions of voluntary manslaughter, and there was no other evidence to support such an instruction. See State v. Brayboy, 387 S.C. 174, 180, 691 S.E.2d 482, 485 (Ct. App. 2010) (“Involuntary manslaughter is (1) 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 (2) the *unintentional* killing of another *without malice*, while engaged in a *lawful activity with reckless disregard for the safety of others.*”) (emphasis added). Indeed, Johnson's actions were clearly unlawful and obviously were intended to cause death or great bodily injury. Likewise, because Johnson was not acting in self-defense as explained above, her use of the firearm was not lawful and therefore she could not receive a charge under the second definition of involuntary manslaughter. For a more complete discussion of these issues please consult pages 58-66 of the appendix.

Respectfully Submitted,

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August 31, 2015.

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**PROOF OF SERVICE**

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The undersigned attorney hereby certifies that a true copy of the Return to Motion to Remand of Petitioner in the above referenced case has been served upon:

Benjamin John Tripp, Esq.  
SCCID/Division of Appellate Defense  
1330 Lady Street, Ste. #401  
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On this 31<sup>st</sup> day of August, 2015.



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