

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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**SC Court of Appeals**

Appeal from Newberry County  
R. Knox McMahon, Circuit Court Judge

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THE STATE,

Respondent,

V.

MANDY LENORE SMITH,

APPELLANT,

Appellate Case No. 2013-002209.  
Unpublished Opinion No. 2016-UP-073  
Heard February 9, 2016 - Filed February 24, 2016

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**PETITION FOR REHEARING BY RESPONDENT**

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The Respondent State of South Carolina makes a petition for rehearing pursuant to Rule 221(a), SCACR from the opinion in *The State v. Mandy Lenore Smith*, Appellate Case No. 2013-002209, Unpublished Opinion No. 2016-UP-073 (S.C.Ct.App. filed February 24, 2016). In particular, Respondent respectfully submits that the Court of Appeals overlooked or misapprehended the record related to the showing of harmless error concerning the failure to instruct on voluntary manslaughter. For purposes of potential certiorari pursuant to Rules 242 and 217, SCACR where the Court of Appeals granted the Respondent's Petition to argue against the precedent of *State v. Knoten*, 347 S.C. 296, 555 S.E.2d 391 (2001), Respondent submits that although a voluntary manslaughter instruction may have been appropriate under existing Supreme Court precedent in *Knoten*, as acknowledged, *Knoten* was wrongly decided and under the discrete facts of the case, the trial court did not commit error in denying the request. See S.C. Const. art. V, § 9 ("The decisions of the Supreme Court shall bind the Court of Appeals as precedents."). *State v. Cheeks*, 400 S.C. 329, 342, 733 S.E.2d 611, 618 (Ct. App. 2012) *aff'd as modified*, 408 S.C. 198, 758 S.E.2d 715 (2014).

For each of these reasons, rehearing is appropriate.

#### **RESPONDENT'S STATEMENT OF THE CASE**

A Newberry County Grand Jury indicted Appellant, Mandy Lenore Smith, in August 2011 for the murder of John Henry Mayers (R. pp. 1103–04), for possession of a weapon during the commission of a violent crime (R. pp. 1109–10), and for desecration of human remains (R. pp. 1106–07).

On October 7, 2013, Appellant's case was called to trial before the Honorable R. Knox McMahon. (R. p. 1). Appellant was represented by Public Defender Charles

Verner during the trial. (R. p. 1). Solicitor David Stumbo and Assistant Solicitor Dale Scott represented the State. (R. p. 1). On October 12, 2013, the jury returned verdicts of guilty as to murder and desecration of human remains and not guilty as to possession of a weapon during the commission of a violent crime. (R. p. 1052, lines 13–22).

In a separate proceeding held on October 14, 2013, Judge McMahon sentenced Appellant to forty (40) years imprisonment for murder and to ten (10) years imprisonment for desecration of human remains, to run consecutively. (R. p. 1077).

Appellant filed a timely notice of appeal. (R. pp. 1101–02). In the briefing before the Court the following issues were presented:

#### **APPELLANT'S STATEMENT OF ISSUES ON APPEAL**

- I. The Trial Court erred in charging the jury on the “hand of one is the hand of all” theory of accomplice liability where the State did not present any evidence of a common plan or design between Appellant and her alleged accomplice to commit murder and where the evidence established that it was either one or the other who committed the murder alone.
- II. Appellant’s confession given on May 26, 2011 to police was inadmissible where she had advised investigators that she planned to retain an attorney before she turned herself in and spoke to police and the police interrogated her anyway without an attorney present thereby violating Appellant’s rights under Fifth and Fourteenth Amendments to have counsel present during custodial interrogation.
- III. **The Trial Court erred in refusing to charge voluntary manslaughter where the State presented evidence at trial that the murder may have occurred after Appellant and the decedent had a heated argument after which he hit her numerous times and then she snapped.**
- IV. The Trial Court erred in holding evidence that Appellant’s co-defendant Wise had previously shot and killed her dogs without justification was inadmissible under Rule 608 where Appellant did not offer such evidence to impeach her co-defendant’s credibility, but rather offered such evidence to show her state of mind after the murder to explain why she feared for her life and why she engaged in certain actions after the murder.

#### **RESPONDENT'S COUNTER STATEMENT OF ISSUES ON APPEAL**

- I. Whether the trial court erred in charging the jury on the “hand of one, hand of all” theory where there was circumstantial evidence from which the jury could have inferred that Appellant and her co-defendant worked together to murder Victim.
- II. Whether the trial court erred in admitting Appellant’s statement to police where she mentioned retaining an attorney prior to her arrest, prior to her custodial interrogation, and in an ambiguous and equivocal way.
- III. **Whether the trial court’s error in refusing to charge voluntary manslaughter was harmless.**
- IV. Whether the trial court erred in excluding evidence that Appellant’s co-defendant previously shot and killed her dogs pursuant to Rule 608(b), SCRE because that evidence was cumulative.

*Final Brief of Respondent*, p. 1.

#### ***Petition to Argue Against Precedent Granted***

On January 19, 2016, counsel for Respondent made a Petition to argue against precedent pursuant to Rule 217, SCACR Rule. Respondent asserted the precedent of State v. Knoten, 347 S.C. 296, 555 S.E.2d 391 (2001) which allows a jury charge on a lesser included offense based upon a criminal defendant’s previous statement that has been recanted, repudiated by the defendant, and held out by both the prosecution and defense to be false is unworkable as it fails to recognize the legal waiver of the lesser included offense instruction by the completely inconsistent defense and creates a windfall loophole by which the defendant could potentially escape liability altogether based upon a false premise. On **February 1, 2016**, the South Carolina Court of Appeals **granted** the State’s petition to argue against precedent.

#### ***Opinion***

Oral argument was held on February 9, 2016. On February 24, 2016, the Court of Appeals reversed and remanded that case for a new trial due to the trial court failure to

instruct on voluntary manslaughter. In its unpublished opinion, the Court of Appeals set forth the following summary reasons:

We find the trial court committed reversible error by refusing to charge the jury on voluntary manslaughter. Respondent admits the trial court erred in this regard under current South Carolina law but argues the error was harmless. We find the error was not harmless. *See State v. Belcher*, 385 S.C. 597, 611, 685 S.E.2d 802, 809 (2009) ("Errors, including erroneous jury instructions, are subject to harmless error analysis."); *State v. Middleton*, 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2014) ("When considering whether an error with respect to a jury instruction was harmless, we must determine beyond a reasonable doubt that the error complained of did not contribute to the verdict." (internal quotation marks omitted)). Accordingly, we reverse Smith's convictions and remand for a new trial.

*The State v. Mandy Lenore Smith*, Appellate Case No. 2013-002209, Unpublished Opinion No. 2016-UP-073 (S.C.Ct.App. filed February 24, 2016). The Court of Appeals Declined to address Smith's three remaining issues in light of the granting of a new trial, citing *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (noting an appellate court need not address an appellant's remaining issues when its determination of a prior issue is dispositive).

This Petition for rehearing follows.

#### **The State's Theory of the Case**

The State argued at trial that Appellant killed John Henry Mayers (Victim) in a deserted area off Judy B. Road in Newberry County. (R. p. 1016, lines 13–15). However, the State did not argue that Appellant definitely acted on her own in murdering Victim; the evidence proved that there was another person out on Judy B. Road the night Victim was shot and killed, a man named Timothy Wise, and the State argued that it was up to the jury to decide whether Wise "knew what was going to happen that night" or whether "he was [just] the perfect fall guy . . . ." (R. p. 1018, lines 5–9). Though Wise

was not on trial with Appellant, the State noted, “his day is coming.” (R. p. 1021, lines 1–3). In closing arguments, the State asked the jury to focus on Appellant’s conduct, and if they were “firmly convinced that Mandy Smith had a hand in the death of [Victim,]” to find her guilty. (R. p. 1021, lines 3–6). The jury found appellant guilty of murder and of desecration of human remains. (R. p. 1052, lines 13–22). Respondent incorporates by reference its further statement of the State’s theory of the case set forth in the Final Brief of Respondent, pages 3-14.

#### **WHY REHEARING UNDER SCACR RULES 221 AND 243 IS APPROPRIATE.**

- 1. Harmless Error is evident from a reasonable reading of the record concerning the failure to instruct on voluntary manslaughter based upon the assertions by the defense and State concerning their theories of the case.**

In granting a new trial in its summary order, the Court of Appeals concluded the error was not harmless. Respondent respectfully submit that the Court misapprehended the record which strongly supports a conclusion that any arguable error in the failure to instruct on “voluntary manslaughter” was harmless error. The Court of Appeals, unlike Appellant, recognized that the failure to instruct on voluntary manslaughter is subject to harmless error analysis, citing *State v. Belcher*, 385 S.C. 597, 611, 685 S.E.2d 802, 809 (2009) (“Errors, including erroneous jury instructions, are subject to harmless error analysis.”) and *State v. Middleton*, 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2014) (“When considering whether an error with respect to a jury instruction was harmless, we must determine beyond a reasonable doubt that the error complained of did not contribute to the verdict”). However, the record does not support the Court of Appeals’ conclusion that the instructional error was not harmless.

**B. Harmless error exists where the only evidence to support such a voluntary manslaughter charge was in Appellant's first statement, which she later recanted and also denied while testifying at her trial and which was inconsistent with her defense that another person committed the crime and that it was not the result of sudden heat of passion or sufficient legal provocation.**

Though Respondent concedes that the trial court erred in refusing to charge voluntary manslaughter under the precedent of *State v. Knoten*,<sup>1</sup> such error was harmless where there was very little probative evidence to support that charge and neither Appellant nor the State pursued a theory that would support a voluntary manslaughter finding by the jury. To the contrary, the Appellant's theory was that she was uninvolved in the killing according to her testimony at trial and completely repudiated the underlying statement as a completely false statement.

**How the Instructional Issue Was Raised at Trial**

Appellant's May 26<sup>th</sup>, 2011 written statement was introduced by the State during Newberry County Sheriff Captain Robert Dennis's testimony as he described Appellant's first statement to police concerning what happened the night of May 7, 2011. (R. p. 590, line 20–p. 599, line 4). In that statement Appellant describes the night of Victim's murder as follows:<sup>2</sup>

Saturday May 7th 2011 around 11 pm I picked John up hoping to have a nice time. After picking John up John did his normal mental and hitting abuse. I tried to take him back home but he would not let me. He said he did not leave house for nothing and he wanted sex . . . .

I did NOT want to end his life but I felt that it was me or John that night. He had been smoking crack and drinking that night . . . . He found out I was actually moving the night of May 7th 2011. Which started a one sided arguement with me. I beleive that it was him or me that night and it

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<sup>1</sup> This is assuming the instruction issue was adequately preserved. See Petition, *infra*, p. 11-12 n. 5. p.

<sup>2</sup> The below excerpt is only a portion of Appellant's May 26th statement, but the excerpt includes everything Appellant said about the night of May 7th. The remainder of the statement is mostly Appellant's statements of Victim's past mistreatment and abuse of Appellant. (*See* R. pp. 1080–83).

was almost me. I stayed away from everyone for the next week or so to Hide my bruises and black eyes . . . . The gun used I had gotten from Tim shortly after the restraining order was given. John knew I had the gun since then but knew I did have the heart to use the gun. I don't remember a portion of what happen. I blacked out after John had hit me newmous times and when I came out of blackness I was holding gun and he was lifeless on ground in front of me. I sat there on my knees cring and tring to figure out what I did for 15 mins or so before I left. I tried to revive him though mouth to mouth when I first realized what I had done and when I couldn't bring him back I was so scared so I left . . . .

(R. pp. 1080–83 (errors in original)). **It does not appear that the above portion of the statement was read aloud to the jury. (R. p. 597, line 6–p. 598, line 12).**

Capt. Dennis did not testify that Appellant stated that Victim hit her before she shot him. However, Capt. Dennis did testify that Appellant told investigators that that night on Judy B. Road “started off good but then it became more abusive because he was fussing about her moving. He told that she was running around on him and she tried to, as she told, she tried to calm him down . . . .” (R. p. 594, lines 5–8). According to Capt. Dennis, Appellant

stated that she thought she pretty much snapped. That she had been outside the truck and that she had the gun with her because she had it for protection after a restraining order. And she told that after she shot him for the first time Tim freaked. And Tim got in his truck and left. I asked her what happened. She said she was in the woods whenever she shot him first and that John came at her and she shot him again.

(R. p. 594, lines 12–19).<sup>3</sup>

Capt. Dennis further testified that on **June 10, 2011**, he spoke with Appellant again, at her request, and at that time she completely recanted her May 26th statement and gave a new statement implicating only Wise in Victim's murder. (R. p. 599, line 7–

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<sup>3</sup> Appellant also admitted at trial that she confessed to shooting Victim in her May 26th statement. (R. p. 932, lines 12–17).

p. 605, line 13). On that date, she recanted her earlier statement and gave the following statement:

May 7th, 2011 I Mandy Smith texted Tim Wise around 10 pm to call John Mayers so he would come hang out with me. I picked John up about a hour and half later. I texted Tim and let him know where I was going. I always let Tim know where I was going. Always!! When John and I got there Tim was there. I asked Tim why he was there and he said he had a feeling of a need to be there. I just thought he was being protective. John, Tim and I talked and laughed for awhile John and I was standing together John was behind me holding on to me and we was talking and looking up at the night sky. From out of nowhere I was pushed and I fell to the ground and I heard a shot when I looked up John and Tim was struggling with each other. I screamed out to Tim "No TC NO". John took off running. He went between the trucks and down the road. I got to my feet and ran after them Tim chased him down. when I came past the trucks there was a second shot. I seen Tim in the woods. I ran to where Tim was and seen John on the ground laying on his back. I went to where John was on the ground. I was so scared and cring and screaming. Tim grabbed me and pulled me away from John. I tried to go back to John but Tim wouldn't let me. He kept pulling me away. Tim pulled me to Don's truck and told me to get in. I was so scared and in shock. Tim closed the door of the truck and went back to where John was. I don't know what he did when he went back. When Tim came back to the truck Tim told me that he would kill me and my kids (animals) if I told anyone and that I had to be ready to sleep in the shed at his house by Sunday night. Tim followed me out of that place and I am sure he followed me home. I had given Tim the gun back a couple of weeks before the 7th of May. I have never shot that gun before. Around the 18th of May or so Tim took me for a ride which ended up back at the place where John was and he made me get his head and put it in a bucket then went to a river and Tim tossed it in. Tim was not suppose to be there that night. Was suppose to be just John and I. I love John and yes he was a mean mean person most of the time but he did not deserve to die by Tim's hand. This whole situation has caused me a lot mental harm. This past week I found out that Tim is "in love" with me and has been working at destroying my life over the past 3-4 months. He destroyed my relationship with my landlord, my boyfriend (Kris), my relationship with Don and he hated John. When Tim first met my mom he took her out for breakfast and asked as if almost drilled her for information about me and my past. My mom told him many things about my past such as my moms dad sexually abusing me and the trouble I went thur with that she told Tim about me being in Epworth Children's home and the struggle with that. I feel as though Tim has preyed on my mental status when it comes to men and he "played" me. I never knew he was in

love with me. If I would have I would not of been so close of friends with him. Tim used me for some sick twisted game.

(R. pp. 1084–87 (errors in original)).

At trial, Appellant’s testimony was substantially similar to her June 10<sup>th</sup> statement that Wise was the shooter and implicitly that the killing did not occur as a suggested in the May statement. She also specifically denied that her May 26th statement was true, and she stated that she only made that statement because she believed Wise “was still out and he had my dogs and he knew where my family was.” (R. p. 917, line 19–p. 919, line 25). However, she provided additional information about her actions immediately following Victim’s death. Appellant testified that after Victim was shot she and Wise both got in their cars and left. (R. p. 874, line 7–p. 875, line 22). Neither of them went to the police about what happened that night—Appellant testified that Wise threatened her family and her pets if she told, and Wise testified he did not report the murder because he “was in shock” and scared of what might happen. (R. p. 407, line 11–p. 408, line 11; R. p. 874, line 22–p. 875, line 5). According to Appellant, Wise followed her home, but Wise testified that he went back to his parents’ home. (R. p. 407, line 4–p. 408, line 18; R. p. 875, lines 6–22). Appellant spent the night at her home on Wheeland School Road with Buford<sup>4</sup> and her pets. (R. p. 875, line 17–p. 877, line 23). The next morning she continued moving to Wise’s property. (R. p. 877, line 10–p. 879, line 7).

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<sup>4</sup> Buford confirmed at trial that he and Appellant spent the night together at her Wheel and School Road home. (R. p. 758, line 17–p. 761, line 16). He and Appellant got into an argument that night, and he attempted to leave, but she stopped him and said, “[D] on’t leave, I need you now more than ever.” (R. p. 759, line 8–p. 760, line 11). When asked if Appellant seemed emotional when she got back that night, Buford responded, “Mandy has many emotions sometimes. It is hard to figure out which emotion she has. But she didn’t seem, the only thing that was out of the ordinary of that whole sequence that I just said was her coming, running out to me and stopping me.” (R. p. 760, lines 19–24).

Appellant and Wise gave contradictory testimony about the circumstances under which Appellant removed Victim's head. On May 19, 2011, after Appellant had already spoken to the police twice, Appellant and Wise returned to Victim's body, and Appellant removed his head. (R. p. 885, line 5–p. 898, line 4). Appellant testified that Wise forced her at gunpoint to remove Victim's head. (R. p. 891, line 12–p. 893, line 5). Wise, on the other hand, testified that he took Appellant out to the body to “help[] a friend” and that Appellant “said [removing Victim's head] would make it difficult for anyone to identify it.” (R. p. 411 line 21–p. 412, line 15). Appellant left town the next day. (R. p. 899, line 6–p. 903, line 23).

***The Request and Denial of the Voluntary Manslaughter Instruction***

Prior to closing arguments, defense counsel requested that voluntary manslaughter be included in the jury instructions. (R. p. 953, lines 9–19). In particular, defense counsel only argued, “[T]here is some evidence both from T.C. Wise's testimony and from the statements that Mandy and John Henry were engaged in smoking crack cocaine. Something happened and she shot him at that instance.” (R. p. 953, lines 11–15). Counsel for the State argued that there was no evidence to support such a charge, stating, “We don't believe at this point that there was sufficient, any kind of provocation that would necessitate a voluntary manslaughter.” (R. p. 953, line 22–p. 954, line 8).

Defense counsel countered that “the State is really arguing three inconsistent positions to the jury, that is Mandy operated alone, that is that Mandy operating in conjunction with T.C. and that, if evidence of the statements that the State would introduce into evidence then their third would be the voluntary manslaughter.” (R. p. 954, lines 13–18). Defense counsel specifically noted Wise's testimony that Appellant

and Victim walked off and smoked crack together and evidence that smoking crack changed Victim's temperament. (R. p. 955, line 23–p. 956, line 11).

The trial court denied defense counsel's request to charge voluntary manslaughter, ruling:

I think the law in South Carolina is you can present inconsistent defenses. I agree with that. However, no voluntary manslaughter is the taking of the life of another in the sudden heat of passion based on sufficient legal provocation, both heat of passion and sufficient legal provocation must be present at the time of the killing to constitute voluntary manslaughter. Even if I believe that both [Victim] and [Appellant] were smoking crack cocaine, of course, voluntary intoxication by alcohol and or drugs is not a defense to a specific intent crime. It does not seem to be sufficient legal provocation nor sudden heat of passion.

(R. p. 956, line 16–p. 957, line 6).

Based only upon the South Carolina Supreme Court's opinion in *State v. Knoten*, 347 S.C. 296, 555 S.E.2d 391 (2001), Respondent has conceded that the trial court erred in denying Appellant's request to charge voluntary manslaughter as the charge was warranted based upon Appellant's first statement to law enforcement that she later repudiated. In Appellant's first written statement to police (R. pp. 1080–83), she indicated that she shot Victim after he hit her numerous times. Those facts, combined with Dennis's testimony that Appellant told him in her first oral statement to police that "she thought she pretty much snapped [,]" were sufficient to warrant a voluntary manslaughter charge.<sup>5</sup> Though Appellant recanted her first statement and expressly

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<sup>5</sup> Respondent notes that it is arguable whether this issue was properly preserved. In requesting the voluntary manslaughter instruction, defense counsel only vaguely referred to what happened in the woods that night, saying "[s]omething happened and she shot him at that instance. And some more facts to that but I will submit there is some evidence, Your Honor, that would support a voluntary manslaughter charge to the jury." (R. p. 953, lines 14–17). Defense counsel also pointed out that "[t]here was testimony that the smoking the crack cocaine does at times change [Victim's] temperament." (R. p. 956, lines 9–11). Defense counsel did not reference Capt. Dennis's testimony that Appellant said she thought she snapped, and, importantly, defense counsel did not specifically argue that Appellant's written statement accused Victim of hitting her numerous times before she blacked out and apparently shot him. Though the trial

denied that it was true at trial, under South Carolina law, she was still entitled to the voluntary manslaughter instruction. *See Knoten*, 347 S.C. at 306, 555 S.E.2d at 396 (finding there was evidence to support a voluntary manslaughter charge where the defendant's second statement to police supported the charge though the defendant recanted his second statement and testified that it was a fabrication). Accordingly, Respondent is constrained to concede that it was error to deny Appellant's request to charge voluntary manslaughter even though this lesser offense was repudiated by Appellant's later statements and the defense theory presented at trial.

Though the trial court erred under *Knoten* in refusing to charge voluntary manslaughter, such error was harmless. The Court of Appeals misapprehended the record in summarily conclude otherwise. The erroneous denial of a requested manslaughter jury instruction is subject to a harmless error analysis. *State v. Battle*, 408 S.C. 109, 121, 757 S.E.2d 737, 743 (Ct. App. 2014). "When considering whether an error with respect to a jury instruction [is] harmless, [an appellate court] must 'determine beyond a reasonable doubt that the error complained of did not contribute to the verdict.'" *State v. Middleton*, 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2014). Whether an error with respect to a jury instruction was harmless is a very fact-intensive inquiry. *Middleton*, 407 S.C. at 317, 755 S.E.2d at 435. And a court's "inquiry is not what the verdict would have been

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court had heard extensive testimony about a history of physical abuse, the only evidence that Victim was hitting Appellant immediately before she blacked out was in the written statement. And it does not appear that her written statement was read into the record. (R. p. 597, line 6–p. 598, line 17). It is clear that the trial court did not understand the argument that defense counsel was making to be the same one Appellant now raises in this Court. *See State v. Frieburger*, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005) (finding an argument advanced on appeal was not preserved for review because it was not raised to and ruled on below). Respondent submits that the trial court was not able to rule after considering "all relevant facts, law, and arguments[.]" *State v. Passmore*, 363 S.C. 568, 584, 611 S.E.2d 273, 281–82 (Ct. App. 2005) (quoting *I'ON, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000)), because defense counsel did not draw the trial court's attention to those specific facts that supported a voluntary manslaughter charge.

had the jury been given the correct charge, but whether the erroneous charge contributed to the verdict rendered.” *Id.* (quoting *State v. Kerr*, 330 S.C. 132, 144–45, 498 S.E.2d 212, 218 (Ct. App. 1998)).

Respondent submit that the Court of Appeals misapprehended the record because the failure to instruct on manslaughter did not contribute to the verdict. The facts of this case, as outlined in the Final Brief of Respondent, pages 3-14 Statement of Facts section, largely support a theory propounded by the State, that Appellant and Wise acted in concert in killing Victim, but noting to support that it was the result of heat of passion upon sufficient legal provocation. However, depending on the weight that the jury gave the testimony of Wise and Appellant, the jury also could have found that either of them acted on their own in shooting Victim but not based upon sufficient legal provocation. Of course, there was extremely little development of the information provided by Appellant in her May 26th statement—the only evidence under which the jury could have found Appellant guilty of voluntary manslaughter—because neither side nor witnesses to the crime – Wise or Appellant - represented that the May 26th statement was the truth in their testimony or argument.

The State argued that Appellant’s May 26th statement was just another example of her “lies and manipulations”—that it was her plan B after she initially told police to look at Hill. (R. p. 1010, lines 21–24; R. p. 1013, line 1–p. 1014, line 16; R. p. 1016, line 15–p. 1017, line 20). The State also told the jury during closing arguments, “It has not been the State’s contention all week that you should believe every word that comes out of Tim Wise’s mouth. I don’t think that just because we called him as a witness, folks.” (R. p. 1013, lines 10–13).

The Court of Appeals may have misapprehended the purpose in the admission of the May statement. The false and repudiated statement was introduced not to prove the truth of those statements but as a showing of consciousness of guilt. “As a general rule, any guilty act, conduct, or statements on the part of the accused are admissible as some evidence of consciousness of guilt.” *State v. McDowell*, 266 S.C. 508, 515, 224 S.E.2d 889, 892 (1976). “A false exculpatory statement is probative of a defendant's consciousness of guilt.” *People v. Milka*, 211 Ill.2d 10, 181 (2004); *Guevara v. State*, 152 S.W.3d 45, 50 (Tex.Crim.App.2004) (holding that attempts to conceal incriminating evidence and making improbable statements to police are probative of wrongful conduct and circumstantial evidence of guilt); *King v. State*, 29 S.W.3d 556, 564–65 (Tex.Crim.App.2000) (holding that the act of making false statements to police is circumstantial evidence because it shows a consciousness of guilt); False statements by a defendant may be admitted to “support an inference of consciousness of guilt.” (*People v. Showers* (1968) 68 Cal.2d 639, 643.). Defendant's false and contradictory statements to the responding officers also constitute circumstantial evidence “tending to show consciousness of guilt.” *State v. Walker*, 332 N.C. 520, 537, 422 S.E.2d 716, 726 (1992).

Defense counsel, in both his opening and closing statements, asked the jury to think about “who had the gun.” (R. p. 145, lines 11–25; R. p. 970, lines 5–11). And the defense theory of the case was consistent with Appellant’s trial testimony—that Wise acted entirely on his own in shooting Victim and that Appellant was merely an innocent witness who later confessed to the shooting under his threat.

While the *Knoten* case is most similar to the instant case as it also deals with evidence in a recanted statement that supports a lesser-included offense, our Supreme

Court did not analyze whether the error in *Knoten* was harmless. However, there are other cases that are instructive on the issue of harmless error. In *Middleton* the South Carolina Supreme Court found that a trial court's failure to charge a lesser-included offense was harmless because "the evidence adduced at trial demonstrates that, notwithstanding the failure to charge the lesser-included offense, the only conclusion established by the evidence is that Appellant was guilty of attempted murder . . . . In our view, there is no other way to construe the evidence in this case . . . ." 407 S.C. at 319, 755 S.E.2d at 436. In *Battle* this Court found that the refusal to charge the lesser-included offense of involuntary manslaughter was not harmless because the Court could not "construe the evidence . . . as only showing Appellant intentionally killed Victim." 408 S.C. at 122, 757 S.E.2d at 743-44. The Court distinguished its facts from those in *Middleton*, noting "[u]nlike *Middleton*, the evidence in the present case does not support one clear-cut conclusion." *Id.*

Respondent submits that this case falls somewhere between *Middleton* and *Battle*. Though the evidence presented at trial does not necessarily "support one clear-cut conclusion [,]" *Battle*, 408 S.C. at 122, 757 S.E.2d at 737, the only evidence that would support a voluntary manslaughter conviction was thoroughly repudiated by both the State and defense compared to the entirety of the other evidence presented by both Appellant and the State. Simply put both sides urged that the May statement was **false**. Simply put the theories presented at trial do not support any conclusion of manslaughter. Since they do not, the Court of Appeals erred in concluding the failure to charge "contributed to the verdict."

The defense was particularly forceful when denying the truth of the May 26th statement (which was the sole basis for a suggestion of manslaughter). Appellant recanted her May 26th statement on June 10th and placed the entire blame for Victim's death on Wise. (*See* R. pp. 1084–87). She also explicitly denied shooting Victim in her testimony at trial. (R. p. 932, lines 12–21). She stated that her June 10th statement was the truth, (R. p. 934, lines 11–14), and she also testified that she only confessed to shooting Appellant in her May 26th statement because “[a]s far as [she] knew Tim was still out and he had [her] dogs and he knew where [her] family was.” (R. p. 918, lines 3–4). Additionally, defense counsel asked the jury to consider “who had the gun”—not a very good argument if voluntary manslaughter was a possibility.

Further, the jury's note during deliberations and their verdicts indicate that they likely did not believe that Appellant pulled the trigger. The jury's note read, “In agreeing that she is guilty, is that saying we think she actually shot John?” (R. p. 1100). They also found her guilty of murder but not guilty of possession of a weapon during the commission of a violent crime. (R. p. 1052, lines 13–19). These verdicts may be inconsistent—even if she did not shoot Victim, it was undisputed that Victim died from a gunshot wound, and if the jury thought she was guilty of murdering Victim with Wise's help, she also should have been guilty of the possession charge under “hand of one, hand of all.” The jury's note and their inconsistent verdicts indicate that the jury rejected the notion that the gun was in Appellant's hand when Victim was shot. As such, it is clear that the erroneous lack of a voluntary manslaughter instruction did not contribute to the verdict. Accordingly, the trial court's error is harmless beyond a reasonable doubt and rehearing is appropriate.

**2. The State made a Petition to Argue against Precedent to overrule *State v. Knoten* which was granted. The Court may have misapprehended that the State's concession that that the manslaughter instruction should have been given was conditional based its position with *Knoten*.**

In its Final Brief of Respondent, p. 34 and its Petition to Argue Against Precedent, it was the State's Position that absent the precedent of *State v. Knoten*, because the defense repudiated the May statement which was the basis for any evidence to support manslaughter and the State's sole purpose in its instruction, albeit never read to the jury was to show the Appellant's consciousness of guilt – but not the theory of guilt." *State v. McDowell*, 266 S.C. 508, 515, 224 S.E.2d 889, 892 (1976). "A false exculpatory statement is probative of a defendant's consciousness of guilt." *People v. Milka*, 211 Ill.2d 10, 181 (2004).

Absent *Knoten*, there would have been no duty to request an instruction that was inconsistent with the defendant's theory (and the state's theory) and would only suggest a false and repudiated compromise verdict possibility which is not in the interest of justice. Respondent submits that this precedent set forth by Knoten is unworkable as it fails to recognize the legal waiver of the lesser included offense instruction by the completely inconsistent defense and creates a windfall loophole by which the defendant could potentially escape liability altogether despite a jury's finding the defendant guilty of a lesser-included offense based as a compromise arising from evidence known to be false. Simply put when the repudiated statement by a criminal defendant is contrary to both the defense case at trial and the state's theory of the case, a lesser included offense instruction should not be based solely upon that repudiated statement. The precedent of *Knoten* suggests that this may be appropriate albeit suggests reliance on a statement known to be false by both parties. The precedent further impedes the administration of

justice by requiring instructions based upon false evidence which neither side is relying upon as the truth.

### CONCLUSION

For all of the foregoing reasons, it is respectfully submitted Petition for Rehearing be granted and that the judgment, conviction, and sentence of the trial court should be affirmed. Further, in the opinion, because the Court of Appeals reversed and remand for a new trial due to the trial court's refusal to charge the jury on voluntary manslaughter, it declined to address Smith's remaining issues, citing Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (noting an appellate court need not address an appellant's remaining issues when its determination of a prior issue is dispositive). Should rehearing or certiorari be granted, the three remaining issues also need to be addressed.

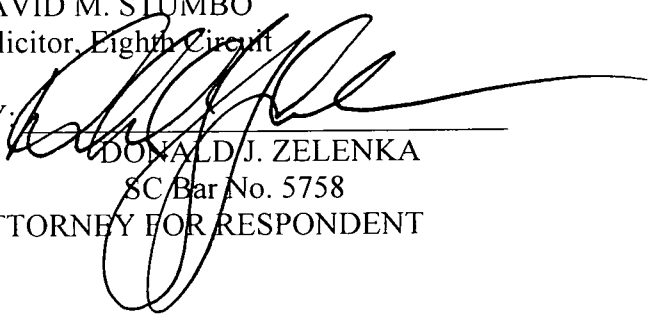
Respectfully submitted,

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March 10, 2016

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal from Newberry County

R. Knox McMahon, Circuit Court Judge

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**RECEIVED**

MAR 10 2016

**SC Court of Appeals**

THE STATE,

Respondent,

V.

MANDY LENORE SMITH,

Appellant,

Appellate Case No. 2013-002209.

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**PROOF OF SERVICE**


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I, Donald J. Zelenka, counsel for the Respondent, certify that I have served the within Respondent's Petition for Rehearing by depositing copies of the same in the InterAgency Mail addressed to her attorney of record:

Laura Ruth Baer, Esquire  
South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
1330 Lady Street, Suite 401  
Columbia, SC 29201

I further certify that all parties required by Rule to be served have been served.

This 10<sup>th</sup> day of March, 2016.

  
\_\_\_\_\_  
Donald J. Zelenka  
Senior Assistant Deputy Attorney  
General  
SC Bar No. 5758



ALAN WILSON  
ATTORNEY GENERAL

RECEIVED  
MAR 10 2016  
SC Court of Appeals

March 10, 2016

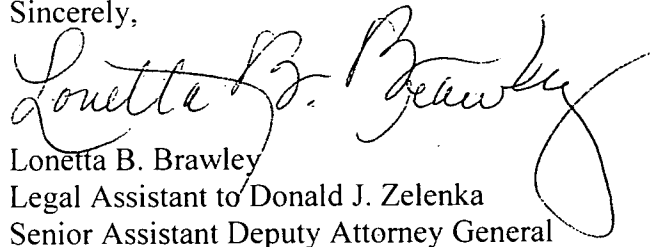
Honorable Jenny A. Kitchings  
Clerk, South Carolina Court of Appeals  
P. O. Box 11629  
Columbia, SC 29211

Re: The State v. Mandy Lenore Smith  
Appellate Case No. 2013-002209

Dear Ms. Kitchings:

Enclosed please find the original and six (6) copies of the *Petition for Rehearing by Respondent*, along with proof of service, in the above-referenced case. By copy of this letter, I am serving opposing counsel with same.

Sincerely,

  
Lonetta B. Brawley  
Legal Assistant to Donald J. Zelenka  
Senior Assistant Deputy Attorney General

/lbb  
Enclosures

cc: Laura Ruth Baer, Esquire  
Honorable David M. Stumbo, Solicitor  
Trisha Allen, Victim Services