STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Appeal from Newberry County

R. Knox McMahon, Circuit Court Judge

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THE STATE,

Petitioner,

V.

MANDY LENORE SMITH,

Respondent,

Court of Appeals Appellate Case No. 2013-002209.
Unpublished Opinion No. 2016-UP-073
Heard February 9, 2016 - Filed February 24, 2016; rehearing denied April 22, 2016

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# PETITION FOR WRIT OF CERTIORARI

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## CERTIFICATE OF COUNSEL PURSUANT TO SCACR RULE 242(d)(1).

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on April 22, 2016 pursuant to SCACR Rule 242(d)(1) .

## QUESTIONS PRESENTED ON CERTIORARI

1. Does this case present a novel and important question that shows that the precedent of *State v Knoten, 347 S.C. 296, 555 S.E.2d 391 (2001).*should be overruled because it is unworkable, not grounded in sound principles, is not in the interest of justice and if strictly complied against the interests of both parties by encouraging a compromise and incorrect verdict, as reflected by Mandy Smith's theory at trial being completely incompatible with manslaughter?

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

3. Where harmless error concerning the failure to instruct on voluntary manslaughter exists from a reasonable reading of the record based upon the incompatible theories by both the defense and State, did the Court of Appeals err in granting a new trial when the failure to instruct could not have contributed to the verdict of guilt and made evidence of murder overwhelming.

4. Does harmless error exist where the only potential evidence to support a voluntary manslaughter charge was in Appellant's first statement, which she later recanted and 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?

## INTRODUCTION

The State of South Carolina makes a petition for writ of certiorari pursuant to Rule 242, 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), rehearing denied April 22, 2016. The State submits there are special and important reasons for this Court to exercise its discretion to grant certiorari and to review the decision of the Court of Appeals in this matter pursuant to Rule 242(b), SCACR. The State acknowledges that a writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons. The Court's rules recognize that, "while neither controlling nor fully measuring the Supreme Court's discretion or power to grant review in general, indicate the character of reasons which will be considered:

1. Where there are novel questions of law.
2. Where there is a dissent in the decision of the Court of Appeals.
3. Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.
4. Where substantial constitutional issues are directly involved.
5. Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

SCACR Rule 242. The State asserts extraordinary reasons exist for certiorari in the interest of justice.

First, the State respectfully submits that the Court of Appeals overlooked or misapprehended the record related to the persuasive showing of harmless error concerning the failure to instruct the jury on voluntary manslaughter in the murder prosecution. Relief was improvidently granted based upon a ungrounded theory repudiated by both parties and Mandy Smith's own testimony. Even if it was state law error to fail to give an instruction on the lesser

offense of manslaughter, the failure to do so did not contribute to the verdict under the discrete facts in this case.

Second, the Court of Appeals granted the State's petition to argue against the precedent of *State v. Knoten*, 347 S.C. 296, 555 S.E.2d 391 (2001). For purposes of certiorari pursuant to Rules 242 and 217, SCACR, where the State asserts 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). Like the defendant in *Knoten*, his admittedly false statements should not require a new trial for the failure to base an lesser offense instruction on it when his defense at trial was non-involvement in the crime committed by another and the State did not rely upon the truthfulness of the repudiated statement. For these reasons, the State respectfully asks this Court to grant this petition for a writ of certiorari and issue an opinion, which reverses the Court of Appeals' decision.

For each of these reasons, certiorari is appropriate.

## STATEMENT OF THE CASE

### A. *Statement of the Proceedings.*

A Newberry County Grand Jury indicted 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, Smith's case was called to trial before the Honorable R. Knox

McMahon. (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 Smith to forty (40) years imprisonment for murder and to ten (10) years imprisonment for desecration of human remains, to run consecutively. (R. p. 1077).

## DIRECT APPEAL

Smith filed a timely notice of appeal. (R. pp. 1101–02). Smith filed a Final Brief of Appellant, prepared by Appellate Defenders Laura R. Baer and Carmen V. Ganjehsani. App.p. 1-45. In the Final Brief of Appellant, Smith raised the following issues:

## 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.

App.p. 4.

The State of South Carolina, through then Assistant Attorney General Kaycie S. Timmons, made the following assertions in the Final Brief of Respondent:

**STATE'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. App.p. 67-113.

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

On January 19, 2016, counsel for the State made a Petition to argue against precedent pursuant to Rule 217, SCACR Rule. App.p. 114-120. The State asserted the precedent of *State v. Knoten*, 347 S.C. 296, 555 S.E.2d 391 (2001) which requires 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. The State moved that this precedent 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. App.p. 121.

### *Court of Appeals Opinion*

On February 24, 2016, the Court of Appeals reversed the conviction and remanded that case for a new trial due to the trial court's failure to instruct on voluntary manslaughter. In its unpublished opinion, the Court of Appeals set for 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). App.p. 122-123. 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).

### ***Petition for Rehearing Denied.***

This State made a petition for rehearing on March 10, 2016. App.p. 124-143. On April 22, 2016, the South Carolina Court of Appeals denied the petition for rehearing. App.p. 144.

This Petition for writ of certiorari by the State follows.

### ***B. Statement of The State's Version of the Facts.***

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

The State argued at trial that Smith 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 Mandy Smith acted on her own in murdering Victim. It was uncontradicted 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 Smith, the State noted, "his day is coming." (R. p. 1021, lines 1–3). In closing arguments, the State asked the jury to focus on Smith'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 Smith guilty of murder and of desecration of human remains. (R. p. 1052, lines 13–22). The State 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. App.p. p. 74 -85.

## WHY CERTIORARI UNDER SCACR RULES 242 IS APPROPRIATE.

### I. 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 and the failure to instruct could not have contributed to the verdict of guilt.

Any failure to instruct the jury on voluntary manslaughter as a possible verdict did not contribute to the verdict where the defense and state repudiated the evidence to support the charge as false and unworthy of belief. In granting a new trial in its summary order, the Court of Appeals summarily concluded the instructional error was not harmless. The State respectfully submits that the Court of Appeals misapprehended the record, which strongly supports the only conclusion that any arguable error in the failure to instruct on "voluntary manslaughter" was harmless error. The Court of Appeals, unlike Smith, 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' summary conclusion that the instructional error was not harmless.

#### a. Harmless error conclusively exists where the only potential evidence to support a voluntary manslaughter charge was in Mandy Smith'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 could not be the result of sudden heat of passion or sufficient legal provocation.

Though The State conceded that the trial court erred in refusing to charge voluntary manslaughter under the mistaken precedent of *State v. Knoten*,[1] such instructional error was harmless where there was very little probative evidence to support that charge and neither Smith nor the State pursued a theory that would support a voluntary manslaughter finding by the jury. To the contrary, Smith's theory was that she was uninvolved in the killing according to her testimony at trial and she completely repudiated the underlying statement as a completely false statement. No juror would have accepted a repudiated statement that given any credence in either the state or defense theory at trial.

**1. The Repudiated Statement of May 26, 2011.**

Smith's May 26th, 2011 written statement was introduced by the State during Newberry County Sheriff Captain Robert Dennis's testimony as he described Smith'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, Smith describes the night of Victim's murder as follows:[2]

> 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 was almost me. I stayed away from everyone for the next week or so to Hide my bruses and black eyes . . . . The gun used I had gotten from Tim shortly after the restraing 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

[1] This is assuming the instruction issue was adequately preserved. See Petition ,{**CHECK**} **infra, p. 11**-12 n. 5. p.

[2] 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).

> 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 written statement was read aloud to the jury. (R. p. 597, line 6–p. 598, line 12).**

Capt. Dennis did not testify that Smith stated that Victim hit her before she shot him. However, Capt. Dennis did testify that Smith 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, Smith

> 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).[3]

2. **The June 10, 2011 Statement.**

Capt. Dennis further testified that on **June 10, 2011**, he spoke with Smith 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–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

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

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)).

### 3. Smith's trial testimony was consistent with the June 10, 2011 statement and repudiated the May 26, 2011 false statement.

At trial, Smith's trial testimony was substantially similar to her June 10th statement that Wise was the shooter and explicitly that the killing did not occur as a suggested in the repudiated May statement. Mandy Smith 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. Smith 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—Smith 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 Smith, 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). Smith spent the night at her home on Wheeland School Road with Buford[4] 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).

Smith and Wise gave contradictory testimony about the circumstances under which Smith removed Victim's head. On May 19, 2011, after Smith had already spoken to the police twice, Smith and Wise returned to Victim's body, and Smith removed his head. (R. p. 885, line 5–p. 898, line 4). Smith 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 Smith out to the body to "help[] a friend" and that Smith "said [removing Victim's head] would make it difficult

[4] 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).

for anyone to identify it." (R. p. 411 line 21–p. 412, line 15). Smith left town the next day. (R. p. 899, line 6–p. 903, line 23).

**4. 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, "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 Smith 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 [Smith] 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).

### 5. Analysis on why certiorari should be granted.

#### A. *Knoten* error, but harmless where the failure to instruct did not contribute to the verdict because of the defense theory.

Assuming *arguendo* the correctness of the South Carolina Supreme Court's opinion in *State v. Knoten*, 347 S.C. 296, 555 S.E.2d 391 (2001), the State has conditionally conceded that the trial court erred in denying Smith's request to charge voluntary manslaughter as the charge was warranted based upon Smith's first statement to law enforcement that she later repudiated under any evidence in the record. In Smith'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 Smith told him in her first oral statement to police that "she thought she pretty much snapped [,]" were arguably sufficient to warrant a voluntary manslaughter charge.[5] Though Smith recanted her first statement and expressly denied that it was true at trial, under South Carolina precedent, she was still entitled to the voluntary manslaughter instruction despite the inconsistency with her defense theory at trial. *See Knoten*, 347 S.C. at 306, 555 S.E.2d at

[5] The State notes that it is arguable whether the instruction issue was properly preserved by Smith. 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 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). The State 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.

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). The State is constrained to concede under *Knoten* that it was error to deny Smith's request to charge voluntary manslaughter even though Smith's later statements unequivocally repudiated this lesser offense and the defense theory presented at trial.

### B. Forfeiture of any possibility of a voluntary manslaughter verdict by the conflicting defense theory at trial and Smith's own repudiation testimony conclusively supports harmless error.

Although the trial court erred under *Knoten* in refusing to charge voluntary manslaughter, such error is conclusively harmless in this case due to the defense's forfeiture of the any voluntary manslaughter potential by the defense theory at trial through Smith's own repudiation testimony. The Court of Appeals misapprehended the supportive record in summarily concluding otherwise. Precedent is that 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 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)). If there is such a case for a determination of harmless

error, this is such a case. The failure to instruct could not have contributed to the verdict. Mandy Smith is unable to show otherwise under a correct assessment of the record.

The Court of Appeals had to misapprehended the record or misapply the harmless error test to have concluded otherwise. The facts of this case, as more fully outlined in the Final Brief of Respondent, pages 3-14 Statement of Facts section, [App. p. 74-85] largely support a theory propounded by the State, that Smith and Wise acted in concert in killing Victim, but nothing to support that it was the result of heat of passion upon sufficient legal provocation by either Smith or Wise. However, depending on the weight that the jury gave the testimony of Wise and Smith, the jury also could have found that either of them acted *on their own* in shooting Victim, but nothing based upon sufficient legal provocation. Smith rejected such a nested concept by her unequivocal jettisoning of any potential for it by repudiation of the May 26, 2011 statement in her June 10, 2011 statement and her trial testimony. Of course, there was extremely little development of the information provided by Smith in her May 26th statement—the only evidence under which the jury could have found Smith guilty of voluntary manslaughter—because neither side nor witnesses to the crime – Wise or Smith - represented that the May 26th statement was the truth in their testimony or argument.

The State argued at trial that Smith'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 Elvis 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 limited purpose in the State's admission of the May statement. The false and repudiated Mat 26, 2011 statement was introduced not to prove the truth of her statements, but to show her consciousness of guilt as a false and misleading statement. "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). It is obvious that this was the limited purpose on the State's admission of the May 26, 2011 repudiated statement and the jury could only have interpreted its introduction as such in light of both the State's theory and the defense repudiation of that statement.

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). The defense theory of the case was consistent with Smith's trial testimony—that Wise acted entirely on his own in

shooting Victim and that Smith was merely an innocent witness who later confessed to the shooting under his threat, not the May 26, 2011 statement.

While the *Knoten* case is most similar to the instant case because it deals with evidence in a recanted statement that supports a lesser-included offense, this Court did not analyze in its opinion whether the error in *Knoten* was harmless. However, there are other cases by this Court 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.*

This case falls somewhere between *Middleton* and *Battle*. Though the evidence presented at trial may 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 Smith and the State. Both sides urged that the May statement was **false**. 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."

### C. Smith's consistent repudiation of the May 26th 2011 statement leads to one conclusion - harmless error.

The defense at trial was particularly forceful when denying the truth of the May 26th statement (which was the sole basis for a suggestion of manslaughter). Smith recanted her May 26th statement on June 10th and placed the entire blame for the 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 firmly stated that her June 10th statement was the truth. (R. p. 934, lines 11–14). Smith also testified that she only confessed to shooting Smith 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 an actual possibility – suggesting that Wise acted on his own.

Further, the jury's note during deliberations and their verdicts indicate that they likely did not believe that Smith 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 considered 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 should have been guilty of the possession charge under "hand of one, hand of all."

The jury's note and their "inconsistent" verdicts strongly indicate that the jury likely rejected the notion that the gun was in Smith's hand when Victim was shot. This would have

been a condition precedent if the May 36th statement was accepted by the jury. 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.

## II. 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 Smith'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).

### A. *Knoten* should be overruled because its application, as revealed in this case shows that a valid exception of forfeiture by the actual defense presented at trial is a sounder principle is revealed in this case and the precedent of Knoten could be seen to create an injustice in this case.

*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process. See *Vasquez v. Hillery,* 474 U.S. 254, 265–266, 106 S.Ct. 617, 624–625, 88 L.Ed.2d 598 (1986). Adhering to precedent "is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right." *Burnet v. Coronado Oil & Gas Co.,* 285 U.S. 393, 406, 52 S.Ct.

443, 447, 76 L.Ed. 815 (1932) (Brandeis, J., dissenting). Nevertheless, when governing decisions are unworkable or are badly reasoned, "this Court has never felt constrained to follow precedent." *Smith v. Allwright,* 321 U.S. 649, 665, 64 S.Ct. 757, 765, 88 L.Ed. 987 (1944). *828 *Stare decisis* is not an inexorable command; rather, it "is a principle of policy and not a mechanical formula of adherence to the latest decision." *Helvering v. Hallock,* 309 U.S. 106, 119, 60 S.Ct. 444, 451, 84 L.Ed. 604 (1940). See Payne v. Tennessee, 501 U.S. 808, 827-28, 111 S. Ct. 2597, 2609-10, 115 L. Ed. 2d 720 (1991)

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. *Knoten* is unworkable as it fails to recognize the legal waiver of the lesser-included offense instruction by the completely inconsistent defense. This *Knoten* exception has created an undeserved windfall and unintended loophole by which a defendant could potentially escape liability altogether despite a contradictory defense by a jury's compromise finding the defendant guilty of a lesser-included offense based known to be false and repudiated by the theory, including the defendant's own testimony. Simply put when the disavowed 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 required solely upon that renounced statement and theory. The unsettling precedent of *Knoten* suggests that this may be unwisely necessary even when exclusively based upon a statement known to be false by both parties. The *Knoten* precedent further impedes the administration of justice by requiring instructions based upon the false evidence, which neither side is relying upon as the truth.

In *Knoten*, the Court rejected the State's argument that because the criminal defendant recanted the statement and it was not consistent with his defense, the repudiated statement should not be considered in determining whether a defense request for a lesser offense should be charged. The Court applied the general standard that in determining issues to be charged, all the testimony, both for the state and the defense must be considered. The Court specifically rejected a concept that a criminal defendant's assertion of that another had confessed to him about committing the crimes and that his statements were false and the product of the alleged perpetrator's threats to kill his family waived his right to use the repudiated statements to create a lesser offense. The Court similarly relied upon another case, State v. Moore, 245 S.C. 416, 140 S.E.2d 779 (1965) which reversed a conviction for assault and battery of a high and aggravated nature on the refusal of a jury charge of a lesser offense of simple assault and battery based upon some evidence that the victim only received slight injuries when under the defense theory he claimed to be elsewhere and could not have been guilty of even assault and battery.

In Knoten, the State had relied upon State v. Weaver, 265 S.E.2d 130, 217 S.E.2d 31 (1975) where the Court had found no error in denying a defense request to instruct concerning the use of unreasonable force when the defendant at trial had denied he had resisted arrest. The Knoten court distinguished Weaver because Weaver had not given a pretrial statement rto support the lesser offense involved concerning the use of force.

However, the persuasiveness of *Weaver* arises from the fact that the defendant testified positively that he did not resist arrest which led to no duty to instruct the jury that if they found that patrolman used unreasonable force to making the arrest, then the defendant had a right to lawfully resist. The point of *Weaver* is the defense theory presented at trial in contrast to the state theory, not whether a statement repudiated by both sides was introduced. Simply put, the lesser

instructions were inconsistent with any theory that was presented by either the state or the defense.

Other jurisdictions have applied similar logic regarding statements repudiated by both sides as lacking a basis for an instruction on lesser offenses. *See Bignall v. State,* 887 S.W.2d 21, 23 (Tex.Crim.App.1994*); Roach v. State*, No. 11-07-00216-CR, 2009 WL 399206, at *1 (Tex. App. Feb. 19, 2009) (In his confession in Roach, appellant stated that he knew his accomplice had a gun when he robbed Luby's. Appellant subsequently recanted, claiming that his confession was not true, that he had lied, and that he had nothing to do with the Luby's robbery.) A defendant's own testimony that he committed no offense is not adequate to raise the issue of a lesser included offense. *Lofton v. State*, 45 S.W.3d 649, 652 (Tex.Crim.App.2001); *State v. Harris*, 293 Kan. 798, 269 P.3d 820 (2012) (defendant was not entitled to jury instruction on attempted voluntary manslaughter as a lesser included offense of attempted first-degree murder; defendant diminished credibility of his recorded statements to police, that he shot victim because he thought he was reaching for a gun, by testifying at trial that they were a lie, and surviving victim's testimony further disputed accuracy of what defendant said in recorded interview). See Raymond v. State, 170 Ga.App. 676, 677(2), 318 S.E.2d 71 (1984). (when defendant asserts a legal presence at the scene without an unlawful intent, issue of criminal trespass is not raised); *Anderson v. State*, 264 Ga. App. 362, 365, 590 S.E.2d 729, 733 (2003); *Willis v. State*, 316 Ga. App. 258, 267, 728 S.E.2d 857, 866-67 (2012) (Willis also asserts that the trial court erred in failing to give his requested charge on the lesser offense of reckless conduct. Willis notes that he told the Jones County officers that he shot at a house and a tree instead of shooting at Jackson. He argues that this evidence does not support a finding of aggravated assault with regard to Jackson. But at trial Willis specifically repudiated his statement to the Jones County officers. He

said that he lied and just told Pitts what he wanted to hear. Willis's defense at trial, as he testified, was that his brother shot Jackson and that all the witnesses who identified him as the shooter were lying. "A request to charge must be apt, a correct statement of law, and precisely adjusted to some theory in the case." (Citation and footnote omitted.) Here, the State asserted that Willis shot at Jackson intentionally and Willis asserted that he did not shoot at all. Thus, a reckless conduct charge was not supported by any theory of the case. Accordingly, the trial court was not required to charge the jury on reckless conduct as to charges from September 27, 2008.). *Glover v. State,* 292 Ga.App. 22, 29–30(5)(a), 663 S.E.2d 772 (2008). See also, *Lawson v. State*, 199 Ga. App. 789, 790, 406 S.E.2d 130, 131 (1991) ("The appellant contends that the evidence, in the form of his prior statements, required a jury instruction on involuntary manslaughter in the commission of the misdemeanor offense of pointing a gun at another. See OCGA §§ 16-5-3(a); 16-11-102. However, Smith's testimony at trial was clearly inconsistent with such a charge, since he repudiated these prior statements and denied any involvement in the shooting. Furthermore, his pretrial statement that the rifle "just went off" as he was pointing it at the victim must be viewed in the context of his further statement that he had just finished telling the victim that he was "going to help him die." "[I]f the pointing of the firearm placed the victim in reasonable apprehension of immediate violent injury, the felony of aggravated assault has occurred." *Rhodes v. State,* 257 Ga. 368, 370, 359 S.E.2d 670 (1987). Under the circumstances, the trial court properly refused to charge on involuntary manslaughter as a lesser included offense. See generally *Wigfall v. State,* 257 Ga. 585(3), 361 S.E.2d 376 (1987). Compare *Kerbo v. State,* 230 Ga. 241, 196 S.E.2d 424 (1973); *Motes v. State,* 192 Ga.App. 302(2), 384 S.E.2d 463 (1989)").

Respondent respectfully request that the precedent of *State v. Knoten* be reconsidered and overruled in for the administration of justice and true verdicts.

## CONCLUSION

For all of the foregoing reasons, the Petition for Writ of Certiorari be granted and the judgment, conviction, and sentence of the trial court should be affirmed.

Further, in the opinion, because the Court of Appeals reversed and remanded 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 Smith's remaining issues when its determination of a prior issue is dispositive). If certiorari be granted, the three remaining issues also need to be addressed by the appropriate appellate court.

Respectfully submitted,

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May 23, 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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THE STATE,

Petitioner,

V.

MANDY LENORE SMITH,

Respondent,

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 Petition for Writ of Certiorari and Appendix 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
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I further certify that all parties required by Rule to be served have been served.

This 23rd day of May, 2016.

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