STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Beaufort County

Honorable Brooks P. Goldsmith, Circuit Court Judge

Opinion No. 5502 (S.C. Ct. App. Filed July 26, 2017)

2011-GS-07-121;
2014-GS-07-0359

THE STATE,

RESPONDENT,

V.

PRESTON RYAN OATES,

PETITIONER

APPELLATE CASE NO 2014-001404

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on September 1, 2017.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in affirming the lower court's denial of Petitioner's motion for immunity from prosecution pursuant to the Protection of Persons and Property Act?

2. Did the Court of Appeals err in affirming the lower court's refusal to direct a verdict of acquittal when the State failed to disprove that Petitioner acted in self-defense?

3. Did the Court of Appeals err in affirming the lower court's decision to charge the jury with the lesser included offense of voluntary manslaughter when there was no evidence of the element of sudden heat of passion required for voluntary manslaughter?

STATEMENT OF THE CASE

On February 17, 2011, the Beaufort County Grand Jury indicted Petitioner for voluntary manslaughter and possession of a weapon during the commission of a violent crime, indictments #2011-GS-07-120, 121. (R. p. 1108). On July 28, 2011, Petitioner filed a petition for immunity from prosecution pursuant to the Protection of Persons and Property Act, S.C. Code §16-11-410-450. [the Act]. (R. p. 1, Petition for Immunity). On November 17, 2011, the Honorable R. Markley Dennis, Jr. held an immunity hearing. Jared S. Newman and Donald Colonegi represented Petitioner at the immunity hearing. Isaac McDuffie Stone, III, and Sean Thorton represented the State. On March 1, 2012, Judge Dennis signed an order denying the Petitioner's motion for immunity. (R. p. 235). The order was filed with the Beaufort County Clerk of Court on March 6, 2012. (R. p. 235). On March 12, 2012, Petitioner filed a motion to reconsider. (R. p. 241). On March 13, 2012, Judge Dennis heard Petitioner's motion to reconsider. (R. pp. 253-283). In a written order signed March 13, 2012, Judge Dennis denied the motion to reconsider. (R. p. 284). A timely notice of intent to appeal was filed and briefs filed by both the Petitioner and the State. While the appeal from the denial of immunity was pending, the South Carolina Supreme Court decided State v. Issac, 392 S.C. 404, 709 S.E.2d 662 (2013) holding that the denial of immunity pursuant to the Act, S.C. Code §16-11-410, is not immediately appealable.

On February 20, 2014, the Beaufort County Grand Jury indicted Petitioner for murder, indictment #2014-GS-07-00359. (R. p. 1112). On June 16, 2014, Petitioner proceeded to jury trial for murder and possession of a weapon during the commission of a violent crime before the Honorable Brooks P. Goldsmith. Jared S. Newman and Donald Colonegi represented Petitioner at trial. Sean Thorton and Mary Concannon prosecuted the case. On June 19, 2014, the jury returned a verdict of guilty of the lesser included offense of voluntary manslaughter and possession of a

weapon during the commission of a violent crime. The State nolle prossed indictment #2011-GS-07-120 for voluntary manslaughter on June 19, 2014. (R. p. 1116). That same day Judge Goldsmith sentenced Petitioner to twenty six (26) years for voluntary manslaughter and five (5) years concurrent for the weapon charge. On June 27, 2014, Petitioner filed post-trial motions. That same day, on June 27, 2014, Petitioner filed a timely notice of intent to appeal.

On July 7, 2014, Judge Goldsmith heard arguments in regard to the post-trial motions. Judge Goldsmith granted Petitioner's motion to reduce sentence. In a written order signed July 7, 2014, Judge Goldsmith reduced the sentence from twenty six (26) to twenty four (24) years. (R. p. 1107, Order reducing sentence). The direct appeal was perfected and after hearing argument the South Carolina Court of Appeals affirmed the convictions and sentence. State v. Oates, No. 2014-001404, 2017 WL 3161126 (S.C. Ct. App. filed July 26, 2017). A timely petition for rehearing was filed and then denied on September 1, 2017. This petition for writ of certiorari follows.

STATEMENT OF FACTS

Petitioner owned PRO Tow, a tow truck company authorized by the Edgefield Subdivision Homeowners Association to tow vehicles that are improperly parked in the neighborhood. (R. p. 16, line 13 – p. 17, lines 1-20). The Edgefield Subdivision prohibits on street parking. (R. p. 17, line 21 – p. 18, lines 1-23). On the evening of December 24, 2010, Petitioner noticed a minivan improperly parked on the street in the neighborhood. Petitioner first placed a disabling boot on the minivan and then moved the tow truck in position to tow the minivan.

The minivan belonged to Carlos Olivera. Carlos Olivera and his family were visiting his brother Nelson Olivera who lived in the neighborhood. A neighbor, Steve Varedi, warned the Oliveras that the van was about to be towed. (R. p. 483, Court's Exhibit #4, Statement of Steve Varedi). A home surveillance camera from Varedi's home captured the incident on video and the video was introduced at trial as State's Exhibit #2. (R. p. 611, lines 16-17 – State's Exhibit #2, home surveillance CD transported to the Court). Carlos and Nelson Olivera approached Petitioner and they argued with Petitioner about towing the car. On the night of the incident Nelson Olivera told Investigator Angela Biens of the Beaufort County Sheriff's Department that "his brother pulled a gun out of his pants and demanded that the subject, that would be Mr. Oates, release his car. Nelson stated that the subject ran to his truck, closed the door and appeared very nervous." (R. p. 27, lines 1-6). Nelson Olivera provided a written statement on December 28, 2010, and stated:

> The guy was ignoring us when we were trying to bring him to a common sense and even other people driving by were saying its Christmas don't do that but the guy was walking away toward his truck cabin, then he said if you don't have the money go away and went inside his truck and show us my brother and I a semi auto pistol and said if you don't have the money go away.
>
> Shortly after that, my brother Carlos who have a permit to carry a conceal weapon, flex his shirt and shows that guy that he also have a pistol, then Carlos said you think that you going to scare me?

(R. p. 493, Court's Exhibit #9, Statement of Nelson Olivera).

Petitioner stated that after he booted the minivan he saw three men come running out of a house. (R. p. 292, lines 1-12; State's Exhibit #16, interview CD transported to the Court). Petitioner stated he got in the cab of his truck, locked the door and rolled down the window. (R. p. 292, lines 12-15; State's Exhibit #16, interview CD transported to the Court). Two of the men stepped up on the running board of the tow truck and one of these two men told the third man to go get his shotgun. (R. p. 292, lines 16-23; State's Exhibit #16, interview CD transported to the Court). Petitioner told officers that, as he was stalling for time, he heard a round being chambered. (R. p. 293, line 1 – p. 294, lines 1-23; State's Exhibit #16, interview CD transported to the Court). Petitioner also told the officers that one of the men grabbed his keys and a tool to attempt to remove the boot. (R. p. 299, lines 1-17; State's Exhibit #16, interview CD transported to the Court). The other man remained at the truck window and asked about paperwork in connection with the minivan. (R. p. 299, lines 18-23; State's Exhibit #16, interview CD transported to the Court). Petitioner assured the man that he had no paperwork on the minivan but at the same time discreetly got his gun out of his glove compartment. (R. p. 301, lines 1-11; State's Exhibit #16, interview CD transported to the Court).

Nelson Olivera stated that after his brother showed the pistol, Petitioner gave Nelson the keys and a tool to remove the boot. (R. p. 493, Court's Exhibit #9, Statement of Nelson Olivera). Nelson Olivera, however, was unable to remove the boot. Petitioner told officers:

> And he [the man who remained at the truck window] looks at me and he goes, okay, you're gonna come get this shit off ...come get this shit off now. I said okay... No problem No problem. He unlocked the door of my truck and pulled the handle and opened it and as he opened it, he was stepping down off the running board .... so he was opening it with his left hand.

(R. p. 304, lines 1-7; State's Exhibit #16, interview CD transported to the Court). Petitioner then told officers that he saw the man reach for his pistol with his right hand. (R. p. 304, lines 9-15; State's Exhibit #16, interview CD transported to the Court). Petitioner played along as if he was going to exit the tow truck and unlock the boot. Petitioner told officers that he "evacked' out of his truck and said, "It's now or never. He's already in motion and he's in draw. Whether he's drawing it to intimidate me, to keep me to go do what he wants me to do, or if he knew I didn't have any paperwork on his vehicle and . . . ah, Bye, Bye, Preston . . .Regardless, he was in motion, he was in draw and I reacted. I know ...I remember the very first shot. I caught him on the left side. (R. p. 306, line 12 – p. 307, lines 1-7; State's Exhibit #16, interview CD transported to the Court). Carlos Olivera was fatally wounded by six gun shots. A Glock model 22, .40 caliber pistol with a fifteen round magazine with one in the chamber belonging to Carlos Olivera was found at the scene of the shooting. (R. p. 734, line 21 – p. 735, lines 1-13). Petitioner had a Glock model 27, .40 caliber pistol with an eight round magazine. (R. p. 736, lines 6-11).

After the shooting Petitioner remained at the scene and called 911. Petitioner told the 911 operator:

> I put the boot on the vehicle and I was pulling my truck around. He jumped on the driver's side window, told me to unlock the vehicle, "Unlock it now, unlock it now!" So I opened the door and I stepped out of my truck. When I stepped out of my truck, he pulled a handgun on me, stuck it in my face and said "unhook my vehicle or I will kill you." I pulled mine out and shot him -- I don't know how many times. I just shot him.

(R. p. 80, line 23 – p. 81, lines 1-8; State's Exhibit #1, CD of 911 tape transported to the Court).

On appeal Petitioner argued that he was entitled to immunity from prosecution pursuant to both sections (A) and (C) of S.C. Code §16-11-410-450. Petitioner alternatively argued that he was entitled to a directed verdict of acquittal because the facts established self-defense as a matter of law. Finally, Petitioner argued that the lower court

erred in charging voluntary manslaughter when there was no evidence of sudden heat of passion.

REASONS THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED

This Court should grant the petition for writ of certiorari to clarify when immunity from prosecution should be granted under both Sections (A) and (C) of S.C. Code §16-11-410-450. The petition should also be granted to clarify when self-defense is established as a matter of law entitling a defendant to a directed verdict of acquittal. Finally, this Court should grant the petition for writ of certiorari to once again clarify that a jury instruction on voluntary manslaughter is improper when there is no evidence of sudden heat of passion.

ARGUMENTS

1. The Court of Appeals erred in affirming the lower court's denial of Petitioner's motion for immunity from prosecution pursuant to the Protection of Persons and Property Act.

Petitioner was initially indicted for voluntary manslaughter and possession of a weapon during the commission of a violent crime, indictments #2011-GS-07-120, 121. (R. p. 1110). On July 28, 2011, Petitioner filed a petition for immunity from prosecution pursuant to the Protection of Persons and Property Act, S.C. Code §16-11-410-450. [the Act]. (R. p. 1, Petition for Immunity). On November 17, 2011, the Honorable R. Markley Dennis, Jr. held an immunity hearing. In a written order signed March 1, 2012, Judge Dennis denied Petitioner's motion for immunity from prosecution. The judge erred. Petitioner qualified for immunity pursuant to the Act.

S.C. Code §16-11-440 provides:

> (A) A person is presumed to have a reasonable fear of imminent peril of death or great bodily injury to himself or another person when using deadly force that is intended or likely to cause death or great bodily injury to another person if the person:
>
> > (1) against whom the deadly force is used is in the process of unlawfully and forcefully entering, or has unlawfully and forcibly entered a dwelling, residence, or occupied vehicle, **or if he removes or is attempting to remove another person against his will from the dwelling, residence, or occupied vehicle;** and
> >
> > (2) who uses deadly force knows or has reason to believe that an unlawful and forcible entry or unlawful and forcible act is occurring or has occurred.

(emphasis added).

In the order denying immunity the judge wrote:

> It is clear to the Court from the evidence presented that the case at hand is not covered by the{sic]this portion of the Act. The facts presented do not show that at the time of the shooting Carlos was unlawfully or forcibly entering or had entered, Oates' vehicle. Carlos was walking away from Oates' tow truck at the time Oates got out of the vehicle and shot Carlos. Statements from witnesses as well as the video of the incident support these findings

(R. p. 235, Order Denying Immunity R. p. 239). The judge erred.

While there may not have been evidence that Carlos Olivera was unlawfully or forcibly entering Oates' vehicle, as found by Judge Dennis, there is evidence that Carlos Olivera was attempting to remove Oates from his occupied vehicle. On the night of the incident Nelson Olivera told Investigator Angela Biens of the Beaufort County Sheriff's Department that "his brother pulled a gun out of his pants and demanded that the subject, that would be Mr. Oates, release his car. Nelson stated that the subject ran to his truck, closed the door and appeared very nervous." (R. p 27, lines 1-6; R. p. 500, Court's Exhibit #12, Supplemental Incident Report).

Investigator Biens testified that Nelson Olivera provided a written statement on the night of the incident indicating, "My brother pull his gun and toll (sic) him to release the car." (R. p. 34, lines 15-16). Nelson Olivera also stated in the written statement given the night of the incident, "The guy said $400, then when the guy saw my brother with the gun in hand, the guy handed the keys and said, 'Do it. Unlock the padlock.'" (R. p. 34, lines 20-23). Additionally, Nelson Olivera stated, "After that, my brother calmed down and put the gun in his waist. My brother turned around and the guy shot my brother." (R, p. 34, line 25 – p. 35 lines 1-3).

Nelson Olivera provided an additional written statement on December 28, 2010 and stated:

> The guy was ignoring us when we were trying to bring him to a common sense and even other people driving by were saying its Christmas don't do that but the guy was walking away toward his truck cabin, then he said if you don't have the money go away and went inside his truck and show us my brother and I a semi auto pistol and said if you don't have the money go away.
>
> Shortly after that, my brother Carlos who have a permit to carry a conceal weapon, flex his shirt and shows that guy that he also have a pistol, then Carlos said you think that you going to scare me?

(R. p. 493, Court's Exhibit #9, Statement of Nelson Olivera).

According to Nelson Olivera, after his brother showed the pistol, Petitioner gave Nelson the keys and a tool to remove the boot. (R. p. 493, Court's Exhibit #9, Statement of Nelson Olivera). When Nelson Olivera was unable to remove the boot, Petitioner told officers:

> And he [Carlos] looks at me and he goes, okay, you're gonna come get this shit off ...come get this shit off now. I said okay... No problem No problem. He unlocked the door of my truck and pulled the handle and opened it and as he opened it, he was stepping down off the running board ... so he was opening it with his left hand.

(R. p. 304, lines 1-7; State's Exhibit #16, interview CD transported to the Court). Petitioner then told officers that he saw the man reach for his pistol with his right hand. (R. p. 304, lines 9-15; State's Exhibit #16, interview CD to be transported to the Court).

Nelson Olivera obtained the keys and tool from Petitioner after Carlos Olivera either brandished or pointed a pistol at Petitioner. When Nelson Olivera was unable to remove the boot with the keys and tool, the next step was for Carlos Olivera to force Petitioner out of his truck and force him to remove the boot. At the time Carlos Olivera was shot by Petitioner, Carlos was attempting to remove Petitioner against his will from his vehicle in order to remove the boot. Pursuant to the statute it does not matter that Carlos Olivera may have been walking away from Petitioner when he was shot because Carlos Olivera was still in the process of attempting to remove Petitioner from his tow truck and force him to remove the boot when Petitioner shot him. Petitioner is entitled to the presumption of having a reasonable fear of imminent peril or death or great bodily injury to himself when he used deadly force and shot Olivera provided by S.C. Code §16-11-440(A).

In addressing Section (A) of the Act in the order denying immunity from prosecution, the judge failed to address the fact that the Act provides that a person is presumed to have a reasonable fear of imminent peril or death or great bodily injury when using deadly force against another person if the person against whom the deadly force is used **removes or is attempting to remove**

another person against his will from an occupied vehicle. Instead, the judge relied solely on the portion of the statute providing the presumption of reasonable fear if the person against whom the deadly force is used is in the process of unlawfully and forcibly entering or has unlawfully and forcibly entered an occupied vehicle. The fact that Carlos Olivera, armed with a gun in his waistband, was walking back to his minivan to check and see if his brother had been unable to remove the boot, does not indicate that Carlos Olivera had not attempted or succeeded in forcing Petitioner from the cab of his tow truck in order to force him to remove the boot.

During the motion to reconsider the denial of immunity the judge stated, "Now, arguably he gave him the key voluntarily without threat of being – without any threat of being armed or anything else." (March 13, 2012 pretrial hearing R. p. 267, lines 21-23). The judge's statement is unsupported by the record and ignores the statements of the deceased's brother, Nelson Olivera, who confirmed that the deceased pulled a gun during the argument with Petitioner. The only witness to testify that Petitioner "gave the keys and tool to the Olivera brothers was Claudia Olivera, Nelson Olivera's wife. In her written statement she said, "I looked and my husband was coming with the key, and I said, he gave you the keys? My husband said, yes, he is going to give us back the car; and I said, thank God." (R. p. 497, Court's Exhibit #10 from Pre-trial Hearing). Petitioner surrendered the keys only after Carlos Olivera flexed his shirt, displayed his weapon and asked, "Think that you going to scare me?" (R. p. 493, Court's Exhibit #9 from pre-trial hearing, R. p. 494). The judge erred in failing to address in his written order the portion of the statute that provides that a person is presumed to have reasonable fear when using deadly force to another person if the person against whom the deadly force is used removes or is attempting to remove another person against his will from an occupied vehicle. Petitioner was entitled to the presumption of S.C. Code §16-11-440(A). The record does not support a finding that Petitioner voluntarily gave

the key and tool to the Olivera brothers. The judge erred in refusing to address the portion of the statute dealing with a person who is removing or attempting to remove another person against his will from an occupied vehicle.

The South Carolina Court of Appeals found that the lower court adequately addressed the issue writing:

> However, the circuit court adequately addressed the language highlighted by Petitioner. In its order denying Petitioner's motion for immunity, the circuit court addressed the last phrase in subsection (A) in the "Facts" section of the order. In the order's recitation of the facts, the circuit court stated, "[Petitioner] alleges that [Victim] was forcing him from the car at gunpoint. However, there are at least three other witnesses to the incident who state that the argument between the two men had subsided and that everyone present was calm at the time [Petitioner] shot [Victim]."[6]
>
> Admittedly, the circuit court did not address the last phrase in subsection (A) in its legal analysis. Nonetheless, because the circuit court addressed Victim's alleged attempt to force Petitioner from his truck in the fact section of the order and implicitly found this version of the incident incredible, the failure to address this precise question in the order's legal analysis does not constitute reversible error.

State v. Oates, No. 2014-001404, 2017 WL 3161126, at *5 (S.C. Ct. App. July 26, 2017)

In footnote #6 the Court of Appeals wrote:

> In the hearing on Petitioner's motion for reconsideration, the circuit court commented on its review of Petitioner's two interviews with law enforcement, stating, "[T]here was much of his logic that ... I did not believe. I don't concur. I didn't agree with it. I didn't think that it was logical." The circuit court also stated, "In this particular case, I believed the version of facts testified [to] by the other witnesses, corroborated by scientific evidence of the gunshot wounds[, a]nd the witnesses' testimony of how it all happened, uh,—just simply it doesn't—it's more consistent with the other witnesses than it is his version."

State v. Oates, No. 2014-001404, 2017 WL 3161126, at *5 (S.C. Ct. App. July 26, 2017)

The lower court did not adequately address the issue. The lower court avoided ruling on the issue of whether the deceased was attempting to force or had forced Petitioner from the cab of his tow truck. Contrary to the finding by the Court of Appeals, the lower court did not find

that Petitioner's version of the incident was incredible. Instead, the lower court noted that other witnesses testified that the argument had subsided and everyone was calm. Even if, at the time of the shooting, the argument between Petitioner and the deceased had subsided and everyone was calm[1], the Olivera brothers were still attempting to remove Petitioner, against his will, from his tow truck in order to force him to remove the boot from the minivan. The testimony from other witnesses did not contradict the fact that the Olivera brothers were intent on preventing the minivan from being towed. In order to prevent the minivan from being towed they needed Petitioner to leave the safety of the cab of his tow truck and remove the boot.

Judge Dennis additionally found that Petitioner was not entitled to immunity pursuant to S.C. Code §16-11-440(C). Section (C) of the Act provides:

> A person who is not engaged in an unlawful activity and who is attacked in another place where he has a right to be, including, but not limited to, his place of business, has no duty to retreat and has the right to stand his ground and meet force with force, including deadly force, if he reasonably believes it is necessary to prevent death or great bodily injury to himself or another person or to prevent the commission of a violent crime as defined in Section 16-1-60.

In addressing Section (C) of the Act in the order denying immunity from prosecution, the judge wrote:

> Assuming that there was an 'attack' previously, there was no such event at the time of the shooting. In short, there was no force to be met. Carlos was walking away from Oates when he was shot five times in the back and once in the side. Other evidence presented supports the Court's finding that the argument had ended at the time Oates fired the fatal shots. The Court will not interpret the language of the statute to mean that a person may shoot and kill another when a perceived attack has ended.

(R. p. 235, Order Denying Immunity R. p. 240). The record does not support the judge's conclusion that the attack had ended.

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1 As noted by the Court of Appeals later in the opinion when addressing the jury charge on voluntary manslaughter, this is contradicted by the testimony of neighbors Elizabeth and Edwin Sorto.

At the time of the shooting the Olivera brothers still had keys and a tool belonging to Petitioner. The minivan belonging to Carlos Olivera was still demobilized by the boot. Carlos Olivera was not simply walking away from Petitioner when he was shot. As discussed above, at the time Carlos Olivera was shot, he was attempting to force Petitioner out of his tow truck in order to force Petitioner to unlock the boot and release the minivan. Even if Petitioner was not forced from his tow truck, he would still be entitled to immunity pursuant to §16-11-440(C) because at the time of the shooting Petitioner was in a place where he had a right to be, as found by Judge Dennis in his order (R. p. 235, Order Denying Immunity p. 3), and Petitioner had no duty to retreat and had the right to stand his ground and meet force with force, including deadly force because he reasonably believed that it was necessary to prevent death or great bodily injury.

The confrontation between the Olivera brothers and Petitioner had not ended at the time of the shooting. Carlos Olivera intended to force Petitioner to unlock the boot and had already made his intentions clear by either brandishing or pointing a firearm at Petitioner. The record does not support the judge's finding that the argument had ended at the time of the shooting. While there is testimony that Claudia Olivera and Dhyan Olivera, wives of the Olivera brothers who were present at the time of the shooting, indicated that the arguing ended after Carlos Olivera obtained the keys from Petitioner (R. p 143, line 20 – p. 144, lines 1-25), this does not support a finding that conflict had been resolved. While Nelson Olivera told Investigator Bien that his brother calmed down and put the gun back in his waist band after Petitioner handed over the keys, this also does not support a finding that the conflict had been resolved. The arguing had stopped momentarily because the Olivera brothers got what they wanted, the keys to unlock the boot. Petitioner handed over the keys, at gun point, in order to prevent being shot in the cab of his tow truck. At the time of the shooting Petitioner knew Carlos Olivera was still armed. This is not a

situation where Carlos Olivera had given up on trying to convince Petitioner not to tow his minivan and was walking back to his brother's house to either call the police or prepare to pay the tow fine. Carlos Olivera was determined to prevent his van from being towed and threatened Petitioner with a gun. Petitioner stood his ground and met force with force, as provided by the statute. The judge erred in refusing to grant Petitioner immunity from prosecution pursuant to §16-11-440(C).

In affirming the lower court's denial of immunity pursuant to §16-11-44-(C) the South Carolina Court of Appeals wrote:

> While these arguments are compelling, this court cannot "reweigh the evidence or second-guess the [circuit] court's assessment of witness credibility." Douglas, 411 S.C. at 316, 768 S.E.2d at 238. A review of the order denying immunity indicates the circuit court was not convinced of the reasonableness of Petitioner's asserted belief that deadly force was necessary to prevent death or great bodily injury. *See id.* at 320 n.7, 768 S.E.2d at 239 n.7 ("[T]he standard for evaluating whether an accused had a reasonable belief that deadly force was necessary to prevent great bodily harm to himself is objective, rather than subjective."). Even if the uncontroverted facts show Victim was still intent on preventing his minivan from being towed when he had his back turned to Petitioner, this is not necessarily inconsistent with the circuit court's perception that the aggression had abated at that precise moment. Such a finding supports the circuit court's conclusion that it was unreasonable for Petitioner to believe deadly force was necessary at that particular point in time.

State v. Oates, No. 2014-001404, 2017 WL 3161126, at *6 (S.C. Ct. App. July 26, 2017).

The lower court's finding that Petitioner's actions and fear were not reasonable was based on a finding that, at the time of the shooting, the argument had ended. The trial court's finding that the argument had ended, however, is not supported by the record. Based on the evidence and testimony presented, the argument may have momentarily subsided but it had not ended. Because the conflict between Petitioner and the deceased was ongoing, Petitioner reasonably believed that his actions were necessary to prevent death or great bodily injury. The fact that the deceased was intent on preventing his minivan from being towed is inconsistent with the trial judge's finding that

the conflict had ended. Petitioner's actions were reasonable in light of the overwhelming evidence supporting the fact that the conflict had not ended. This Court does not have to re-weigh the evidence or second guess the lower court's assessment of witness credibility in order to hold that lower court's finding that the conflict at ended is not supported by the record. The record establishes that Petitioner is entitled to immunity pursuant to subsection (C). The lower court's ruling constitutes an abuse of discretion requiring reversal by this Court.

The appellate court reviews the trial court's pretrial determination of immunity for an abuse of discretion. State v. Curry, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013); State v. Douglas, 411 S.C. 307, 316, 768 S.E.2d 232, 237 (Ct. App. 2014). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." State v. Pittman, 373 S.C. 527, 570, 647 S.E.2d 144, 166–67 (2007). The lower court committed an error of law in failing to find that Petitioner was entitled to immunity pursuant to S.C. Code §16-11-440(A) when there was evidence that Carlos Olivera was attempting to remove Oates from his occupied vehicle. Additionally, the lower court abused its discretion in failing to find that Petitioner was entitled to immunity pursuant to S.C. Code §16-11-440(C) when the record fails to support the lower court's finding that the conflict had resolved at the time of the shooting.

In State v. Douglas, 411 S.C. 307, 318, 768 S.E.2d 232, 238 (Ct. App. 2014) the South Carolina Court of Appeals wrote:

> Our supreme court has recently emphasized that immunity under the Act "is predicated on an accused demonstrating the elements of self-defense to the satisfaction of the trial court by the preponderance of the evidence," save the duty to retreat. Curry, 406 S.C. at 371–72, 752 S.E.2d at 266–67. "[A] valid case of self-defense must exist, and the trial court must necessarily consider the elements of self-defense in determining a defendant's entitlement to the Act's immunity." Id. at 371, 752 S.E.2d at 266.

There are four elements required by law to establish a case of self-defense: First, the defendant must be without fault in bringing on the difficulty. Second, the defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger. Third, if his defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief. If the defendant actually was in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life. Fourth, the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance. State v. Davis, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984). The fourth element—the duty to retreat— is excused under the Protection of Persons and Property Act. State v. Curry, 406 S.C. 364, 371, 752 S.E.2d 263, 266 (2013). As discussed in issue two, Petitioner in this case can also meet the fourth element.

Petitioner demonstrated the first three elements of self-defense. Petitioner was without fault in bringing on the difficulty. As noted by the lower court in the order denying immunity, Petitioner, a tow truck operator working in the Edgefield neighborhood in Beaufort County, located an illegally parked car belonging to Carlos Olivera. Petitioner placed a boot on the vehicle in preparation to tow. The Olivera brothers confronted Petitioner and an argument ensued. By his own brother's statement, Carlos Olivera brandished a weapon. Petitioner was without fault in bringing on the difficulty.

Petitioner actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, and was actually in such imminent danger. Petitioner was outnumbered,

Carlos Olivera had brandished a pistol and there was talk of another person going to get a shotgun. Petitioner's fear was reasonable under the circumstances. Petitioner acted in self-defense. The lower court abused its discretion in refusing to find that Petitioner was entitled to immunity from prosecution pursuant to Section (A) and Section (C) of the Act.

2. The Court of Appeals erred in affirming the lower court's refusal to direct a verdict of acquittal when the State failed to disprove that Petitioner acted in self-defense.

At the time of the immunity hearing held on November 17, 2011, Petitioner had been indicted for voluntary manslaughter and possession of a weapon during the commission of a violent crime, indictments #2011-GS-07-120, 121. (R. p. 1108). On February 20, 2014, the Beaufort County Grand Jury indicted Petitioner for murder, indictment #2014-GS-07-00359. (R. p. 1112). On June 16, 2014, Petitioner proceeded to jury trial for murder and possession of a weapon during the commission of a violent crime before the Honorable Brooks P. Goldsmith. At the close of the State's case, Petitioner moved to dismiss the murder charge because the State failed to disprove that the Petitioner acted in self- defense. (R. pp. 891-896). The judge denied the motion stating, "And I think this is for the jury, and for those reasons, deny the motion." The trial judge erred.

In State v. Dickey, 394 S.C. 491, 499, 716 S.E.2d 97, 101 (2011) the South Carolina Supreme Court wrote:

> A defendant is entitled to a directed verdict when the state fails to produce evidence of the offense charged." State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). "If there is any direct or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the appellate court must find the case was properly submitted to the jury." *Id.* at 292–93, 25 S.E.2d at 648. However, when a defendant claims self-defense, the State is required to disprove the elements of self-defense beyond a reasonable doubt. Wiggins, 330 S.C. at 544–45, 500 S.E.2d at 492–93.

In Dickey the Court found that the State failed to meet its burden of disproving self- defense. As in Dickey, the State in the present case failed to disprove self-defense.

In opposition to Petitioner's motion for a directed verdict of acquittal of murder based on the fact that the State failed to disprove self-defense, the State argued that Petitioner "advanced on Carlos Olivera as he was walking away, and shot him." (R. p. 897, lines 8-9). If Petitioner shot Carlos Olivera as he was walking away, it was after Carlos Olivera brandished a weapon and demanded that Petitioner exit the cabin of his tow truck and unlock the boot demobilizing Olivera's minivan. Under the specific facts of this case, shooting as the deceased was walking away, while still armed and waiting for Petitioner to do as the deceased instructed, does not disprove self-defense.

At trial Nelson Olivera testified, "When I was talking to the tow truck driver I was standing on the board, in the step. And he got the window up and I told him, you know, roll the window down. Which he did it. And I almost beg him again, you know, let my brother go. At that moment my brother standing behind, and my brother say, he yelled, not yelled, but he say, Release my car. And my brother, at that moment he – I noted that he have a pistol." (R. p. 622, lines 11-18). Nelson Olivera also testified that he noticed that his brother had a gun after hearing a ratchet like noise. (R. p. 635, line 15 – p. 636, lines 1-4). This is consistent with Petitioner's statement to Detective John Adams that as he was sitting in the cab of his tow truck talking to the Olivera brothers, he heard a round being chambered. (R. pp. 292-294; State's Exhibit #16 CD to be transported to the Court).

Nelson Olivera also testified that his brother stated, "Nobody gonna take my car." (R. p. 635, line 20-21). Nelson Olivera testified, "Yeah. That noise caught my attention. And my brother said, nobody's going to take my car. So, I turned real quick to him and I say, No Carlos, don't do that. Put that away. Which he listen to me, he did it real quick." (R,. p. 636, lines 1-4). The State's witness establishes that the deceased brandished a pistol, chambered a round and stated, "Nobody's going to take my car." While Nelson Olivera testified that the Carlos Olivera put the

gun away, Nelson Olivera confirmed that it was after Carlos brandished the gun when Petitioner relinquished the keys to Nelson. (R. p. 623, line 18 – p. 624, lines 1-15). Nelson Olivera also testified that, after getting the keys from Petitioner, he was unable to unlock the boot on his brother's minivan. (R, p. 625, line 1 – p. 626, lines 1-4).

Detective John Adams with the Beaufort County Sheriff's Department interviewed Petitioner the night of the shooting. The interview was video recorded, introduced as State's exhibit #16 at trial and played for the jury. (R. p. 713, lines 7-19). A transcript of the audio portion was transcribed and introduced in evidence during the immunity hearing. (R. p. 285; State's Exhibit #16 CD to be transported to the Court). When Nelson Olivera was unable to remove the boot, Petitioner told officers:

> And he [Carlos] looks at me and he goes, okay, you're gonna come get this shit off ...come get this shit off now. I said okay... No problem No problem. He unlocked the door of my truck and pulled the handle and opened it and as he opened it, he was stepping down off the running board ... so he was opening it with his left hand.

(R. p. 304, lines 1-7; State's Exhibit #16 CD to be transported to the Court). Petitioner then told officers that he saw the man reach for his pistol with his right hand. (R. p. 304, lines 9-15; State's Exhibit #16 CD transported to the Court). Petitioner played along as if he was going to exit the tow truck and unlock the boot. Petitioner told officers that he "evacked' out of his truck and said, "It's now or never. He's already in motion and he's in draw. Whether he's drawing it to intimidate me, to keep me to go do what he wants me to do, or if he knew I didn't have any paperwork on his vehicle and . . . ah, Bye, Bye, Preston . . .Regardless, he was in motion, he was in draw and I reacted. I know ...I remember the very first shot. I caught him on the left side. (R. p. 306, line 12 – p. 307, lines 1-7; State's Exhibit #16 CD transported to the Court).

As discussed in issue one, there are four elements required by law to establish a case of self-defense. First, the defendant must be without fault in bringing on the difficulty. Second, the

defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger. Third, if his defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief. If the defendant actually was in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life. Fourth, the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance. State v. Davis, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984).

Petitioner was without fault in bringing on the difficulty. Petitioner actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, and was actually in such imminent danger. Petitioner and the Olivera brothers were involved in a heated argument. Petitioner was outnumbered, Carlos Olivera had brandished a pistol and there was talk of another person going to get a shotgun. (R. p. 285, Transcript of 12/24/10 Oates interview, p. 292, lines 16-23; State's Exhibit #16, interview CD transported to Court). Petitioner's fear was reasonable under the circumstances. "[W]ords accompanied by hostile acts may, depending on the circumstances, establish a plea of self-defense." State v. Fuller, 297 S.C. 440, 444, 377 S.E.2d 328, 331 (1989) (quoting State v. Harvey, 220 S.C. 506, 68 S.E.2d 409 (1951)).

As to the duty to retreat, "A defendant is not required to retreat if he has "no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in [the] particular instance." Wiggins, 330 S.C. at 545, 500 S.E.2d at 493. If, after relinquishing the keys to Nelson Olivera, Petitioner had driven off in his tow truck with the minivan still demobilized by the boot, he risked being shot and killed by Carlos Olivera who

he knew was armed, or by others who may have retrieved a shotgun. Carlos Olivera told Petitioner he would kill him if he did not unhook the minivan. (Nov. 17, 2011, R. p. 80, line 23 – p. 81, lines 1-8; State's Exhibit #1, CD of 911 tape transported to the Court). The State failed to disprove that Petitioner had no other probable means of avoiding the danger. The trial judge erred in refusing to direct a verdict of acquittal for murder when the State failed to disprove that Petitioner acted in self- defense.

The Court of Appeals found that, based on the testimony of the State's witnesses, the jury could have concluded that Petitioner's belief that his life was in danger was unreasonable and could have inferred from the evidence that Petitioner could have avoided the danger. The Court of Appeals wrote:

> Several witness accounts of the entire incident omitted any reference to an extended heated argument. According to Nelson, when he and Victim first approached Petitioner, Victim ratcheted his gun and stated, "Nobody's going to take my car," but when Nelson told Victim to put his gun away, Victim placed the gun back into his waistband and never pulled it back out. Nelson expressly stated there was "no arguing, ... no fighting, ... no bad words" and Victim never talked to, threatened, or "attempt[ed] to do anything to [Petitioner]."
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> When asked if she heard any of the conversation between Victim and Petitioner, Victim's widow replied, "No. [Victim] ... used to talk very soft[ly]." She also testified Victim was directing the traffic that was partially blocked by his minivan and the tow truck when Petitioner shot him, and Nelson's wife gave similar testimony. The testimony of Nelson, Nelson's wife, Nelson's neighbors, Victim's widow, and Dr. Riemer established that most of the six shots fired by Petitioner hit Victim in his back. Based on all of this testimony, the jury could have concluded that Petitioner's belief that his life was in danger was unreasonable.
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> Further, Dr. Riemer testified that an exit wound from Victim's chest was "shored," indicating that Victim was pressed against a hard object when the bullet exited his body. This is consistent with the testimony of Nelson's wife and Victim's widow that Petitioner continued shooting Victim even after he fell onto the street. The jury could have concluded that Petitioner's recklessness rose to the level of malice. Moreover, the jury could have inferred from the evidence that Petitioner could have avoided the danger by continuing to cooperate with Victim and then driving away and calling 911 to report the incident.

State v. Oates, No. 2014-001404, 2017 WL 3161126, at *9 (S.C. Ct. App. July 26, 2017) (n# 9 omitted).

The testimony from the State witnesses does not render Petitioner's fear as unreasonable in light of the uncontroverted evidence that the deceased brandished a pistol, chambered a round and stated, "Nobody's going to take my car." While Nelson Olivera testified that the Carlos Olivera put the gun away, Nelson Olivera confirmed that it was only after Petitioner relinquished the keys to Nelson. (R. p. 623, line 18 – p. 624, lines 1-15). Nelson Olivera also testified that, after getting the keys from Petitioner, he was unable to unlock the boot on his brother's minivan. (R, p. 625, line 1 – p. 626, lines 1-4).

In regard to Petitioner's ability to avoid the danger, in State v. Frazier, 401 S.C. 224, 234, 736 S.E.2d 301, 306 (Ct. App. 2013), the court wrote:

> Once the right to fire in self-defense arises, a person is not required to wait until his adversary is on equal terms in order to defend himself. State v. Starnes, 340 S.C. 312, 322, 531 S.E.2d 907, 913 (2000). Thus, assuming Frazier satisfied the other elements of self-defense, he was not required to risk serious injury by running toward Stalk's apartment or waiting for his alleged assailants to flank or shoot through the Explorer. See also id. (providing one "doesn't have to wait until his assailant gets the drop on him, he has the right to act under the law of self-preservation and prevent his assailant [from] getting the drop on him" (internal quotation marks omitted)); State v. Jackson, 227 S.C. 271, 279, 87 S.E.2d 681, 685 (1955) ("[I]t is one's duty to avoid taking human life where it is possible to prevent it even to the extent of retreating from his adversary unless by doing so the danger of being killed or suffering serious bodily harm is increased or it is reasonably apparent that such danger would be increased.").

Petitioner was not required to wait until Carlos Olivera "got the drop" on him. While the Court of Appeals found that the jury could have inferred from the evidence that Petitioner could have avoided the danger by continuing to cooperate with Victim and then driving away and calling 911 to report the incident, the law does not require Petitioner to place himself in greater danger by leaving the shelter of the cab of his tow truck to continue and cooperate with

an individual who is armed. As in State v. Dickey, 394 S.C. 491, 716 S.E.2d 97 (2011), Petitioner was entitled to a directed verdict on the issue of self-defense because the uncontroverted facts establish self-defense as a matter of law.

3. The Court of Appeals erred in affirming the lower court's decision to charge the jury with the lesser included offense of voluntary manslaughter when there was no evidence of the element of sudden heat of passion required for voluntary manslaughter.

At the close of the case the State requested a charge on the lesser included offense of voluntary manslaughter. (R. p. 904, lines 7-9). The State argued that Petitioner's statements that he was scared, freaking out, nervous and that it happened in a snap and was panic fire collectively constitute sudden heat of passion. (R. p. 914, lines 5- p .915, lines 1-25). Petitioner objected citing State v. Starnes, 388 S.C. 590, 698 S.E.2d 604 (2010). (R. pp. 916 – 924). The judge overruled the objection and charged the jury with the lesser included offense of voluntary manslaughter. ((June 2014, R. p. 924, lines 12-16; p. 1006, line 4 – p. 1007, lines 1-20). Petitioner renewed the objection at the close of the charge. (R. p. 1014, lines 19-21). The judge erred.

"Voluntary manslaughter is the unlawful killing of a human being in the sudden heat of passion upon sufficient legal provocation. State v. Cole, 338 S.C. 97, 525 S.E.2d 511 (2000). Both heat of passion and sufficient legal provocation must be present at the time of the killing. Id. The provocation must be such as to render the mind of an ordinary person incapable of cool reflection and produce an uncontrollable impulse to do violence. See id." State v. Cooley, 342 S.C. 63, 67, 536 S.E.2d 666, 668 (2000).

In Cook v. State, 415 S.C. 551, 556–57, 784 S.E.2d 665, 668 (2015), the Court wrote:

> "Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation." State v. Walker, 324 S.C. 257, 260,

478 S.E.2d 280, 281 (1996). "Both heat of passion and sufficient legal provocation must be present at the time of the killing." Id. At trial, Cook conceded that there was sufficient legal provocation. Therefore, the narrow issue on appeal is whether Cook was acting in the sudden heat of passion when he killed Victim.

"Whether or not the facts constitute a sudden heat of passion is an appropriate question for the court." State v. Niles, 412 S.C. 515, 522, 772 S.E.2d 877, 880 (2015). This Court has defined the sudden heat of passion as that which:
upon sufficient legal provocation, ... mitigates a felonious killing to manslaughter, while it need not dethrone reason entirely, or shut out knowledge and volition, must be such as would naturally disturb the sway of reason, and render the mind of an ordinary person incapable of cool reflection, and produce what, according to human experience, may be called an uncontrollable impulse to do violence.
Id. (citing State v. Walker, 324 S.C. 257, 260, 478 S.E.2d 280, 281 (1996)).

In State v. Starnes, 388 S.C. 590, 598–99, 698 S.E.2d 604, 609 (2010) the Court wrote:

We also have held that fear resulting from an attack can constitute a basis for voluntary manslaughter. See State v. Wiggins, 330 S.C. 538, 549, 500 S.E.2d 489, 495 (1998) ("[F]ear can constitute a basis for voluntary manslaughter."). Yet the presence of fear does not end the inquiry regarding the propriety of a voluntary manslaughter instruction. We have consistently held that sudden heat of passion upon sufficient legal provocation is defined as an act or event that "must be such as would naturally disturb the sway of reason, and render the mind of an ordinary person incapable of cool reflection, and produce what, according to human experience, may be called an uncontrollable impulse to do violence." Pittman, 373 S.C. at 572, 647 S.E.2d at 167. While the act or event "need not dethrone the reason entirely, or shut out knowledge and volition," it must cause a person to lose control. Id.

We reaffirm the principle that a person's fear immediately following an attack or threatening act may cause the person to act in a sudden heat of passion. However, the mere fact that a person is afraid is not sufficient, by itself, to entitle a defendant to a voluntary manslaughter charge. Consistent with our law on voluntary manslaughter, in order to constitute "sudden heat of passion upon sufficient legal provocation," the fear must be the result of sufficient legal provocation **and** cause the defendant to lose control and create an uncontrollable impulse to do violence. Succinctly stated, to warrant a voluntary manslaughter charge, the defendant's fear must manifest itself in an uncontrollable impulse to do violence.

In both Cook and Starnes this Court concluded there was no evidence of sudden heat of passion, affirming the trial judge's refusal to charge the jury with voluntary manslaughter in

Starnes and reversing the voluntary manslaughter conviction in Cook. In Cook, as in the present case, the State requested the lesser included voluntary manslaughter charge and the defense objected. The Court in Cook noted:

> "[D]ue process requires that a lesser included offense instruction be given *only* when the evidence warrants such an instruction." Hopper v. Evans, 456 U.S. 605, 611, 102 S.Ct. 2049, 72 L.Ed.2d 367 (1982). "The jury's discretion is thus channeled so that it may convict a defendant of any crime fairly supported by the evidence." *Id.* Here, the evidence presented at trial indicates Cook either shot Victim with malice or in self-defense. Unfortunately, however, as this Court has previously articulated:
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> > due to the error in granting the solicitor's request for a voluntary manslaughter charge, [Cook] will not have to face a jury of his peers on the charge of murder again. This is a cautionary tale for solicitors as to the pitfalls of requesting a potential "compromise" charge which is unsupported by the evidence. State v. Cooley, 342 S.C. 63, 70, 536 S.E.2d 666, 670 (2000).

Cook v. State, 415 S.C. 551, 559, 784 S.E.2d 665, 669 (2015).

As in Cook and Starnes, there is no evidence that Petitioner acted in the sudden heat of passion. There is no evidence that Petitioner was acting under an uncontrollable impulse to do violence and incapable of cool reflection as a result of fear. Petitioner's statements that he was scared, freaking out, nervous and that it happened in a snap and was panic fire do not constitute evidence that Petitioner was acting under an uncontrollable impulse to do violence and incapable of cool reflection as a result of fear. Based on the facts of this case, Petitioner either shot in self -defense or he acted with malice.

In Petitioner's statement to police he said:

> ...From training, I ...you know... assess your situation, learn your distances, learn your ...I got attacked at knife point when I was in Istanbul back in October so I've been through anti ... classes, all that stuff ...so I'm stalling to regain my composure, get my surroundings ...I was looking at his line of sight, my line of sight, how many people, look around at my mirrors, just stalling, buying time. So I had my keys and the actual lock tool that holds the boot onto the vehicle. And I've

> got my hand...I'm kind of fumbling, and I drop my keys and I said oh I'm sorry ...just...un momento, por favor...un momento por favor...one moment please... and pick the keys back up and I drop them again and I was...I'm sorry, I'm sorry, I'm scared...I'm sorry...I'm scared...I'm sorry, just one minute. I kept kind of freaking out a little bit fumbling my keys around.

(R. p. 298, line 16 – p. 299, lines 1-8). Petitioner then told officers that one of the men grabbed the keys that had no relation to the boot. Petitioner admitted that he had been using the keys as a distraction. (R. p. 299, lines 10-15). Petitioner's acts of stalling to regain his composure and using the keys as a distraction, prior to the shooting, support that he made a calculated decision to shoot in self-defense. These actions support that Petitioner was not acting under an uncontrollable impulse to do violence, incapable of cool reflection as a result of fear.

Petitioner additionally told officers:

> Yeah, I've been in this business a long time. So now I'm really nervous. I knew I had my Glock in the glove box. His friend was on the way to retrieve a shotgun and I heard a pistol ratchet already, so I figured It'd be ... since it was my right to retreed [sic]...I really couldn't retreed, [sic] I had a guy standing on my truck, so said you know, let me step back into conservation mode. So I said, no, no, no, paperwork...and I pulled my metal ledger out which I keep all my tow tickets in. So I pulled it up and flip it open and I say see look and I just ...and I open up my glove box where my Glock was. And I knew I had my insurance paperwork and just some whatever random
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> So by doing that, I was able to pick up both my holstered weapon and my papers in one and sit it right on my lap. And I said see look, this Acura, this Mazda, this Ford, this ...no...none of your car, I have not towed it yet...If I tow it, then yes, paperwork. But no like tavaho...don't like to work...(makes a sound)...like that...just trying to relax him, trying to stall and buy time again.

(R. p. 300, line 15 – p. 301, lines 1-11). Petitioner then described how he kept the gun hidden but managed to unholster it. (R. p. 302, line 7 – p. 303, lines 1-23). Petitioner described how one of the men opened the door to the truck and demanded that Petitioner take the boot off the van as the man pulled his weapon. (R. p. 304, lines 2-15). Petitioner told officers, "And I was backing out, and I looked and my line of sight was through him straight down to the ground. It's now or never.

He's already in motion and he's in draw. Whether he's drawing it to intimidate me, to keep me to go do what he wants me to do, or, if he knew I didn't have any paperwork on his vehicle and ...ah, bye, bye Preston...regardless, he was in motion, he was in draw and I reacted. I know...I remember the very first shot. I caught him on the left side." (R. p. 306, line 22 – p. 307, lines 1-7). These are either the actions of a man acting in self-defense or with malice. These are not the actions of a man acting under an uncontrollable impulse to do violence, incapable of cool reflection as a result of fear.

In a later interview Petitioner told officers, "And when his elbow come up like that, I saw the gun come out of his pants, that's when I said, I'm gonna die... " (R. p. 400, lines 8-14). He also told officers, " At an angle, yeah ...cause I remember he had the gun in his right hand and I don't know why I thought this, but I said okay...if he's got the gun in his right hand, disable his right hand." (R. p. 402, lines 13-16). Petitioner made a calculated decision to try and disable the armed man. This is not an action of sudden heat of passion. Petitioner described the fourth shot as panic fire. (R. p. 412, lines 15-18). Petitioner told officers, "When we made eye contact and his body was turning toward me, it was fight or flight, I just closed my eyes and squeezed the trigger." (R. p. 412, lines 20-22). These statements do not support sudden heat of passion. Instead, the statements reflect a decision to shoot in self-defense. There was no evidence presented that Petitioner was overcome by a sudden heat of passion as would produce an uncontrollable impulse to do violence. See State v. Niles, 412 S.C. 515, 525, 772 S.E.2d 877, 882 (2015). The trial judge erred in charging the jury with voluntary manslaughter.

In affirming the trial judge's decision to charge voluntary manslaughter the South Carolina Court of Appeals wrote, "In the present case, however, the jury could have reasonably inferred from the evidence that when Petitioner shot Victim six times, he was acting under 'an

uncontrollable impulse to do violence' even if the jury could have drawn an equally reasonable inference that Petitioner acted in a 'deliberate, controlled manner.' *Id.*" State v. Oates, No. 2014-001404, 2017 WL 3161126, at *12 (S.C. Ct. App. July 26, 2017). The Court of Appeals decision places undue emphasis on the number of shots fired. As Petitioner was justified in firing the first shot in self-defense, he was justified in continuing to shoot until it is apparent that the danger to life and body has ceased. See Douglas v. State, 332 S.C. 67, 504 S.E.2d 307 (1998); State v. Hendrix, 270 S.C. 653, 244 S.E.2d 503 (1978) (quoting 40 C.J.S. Homicide § 131(b)(1944)). Petitioner told investigators that he stopped firing once the deceased was unarmed.

In addition to the number of shots fired the Court of Appeals also noted, as evidence of sudden heat of passion, the testimony of Elizabeth and Edwin Sorto that prior to the shooting there was yelling and the guys were getting very argumentative going back and forth.[2] The Court of Appeals discussed testimony that Petitioner was very nervous, freaking out and really scared as well as Petitioner's account of his reaction when the deceased ordered him to exit his tow truck. The Court of Appeals then wrote, "The jury could have reasonably inferred from all of this evidence that when Petitioner shot Victim six times, he was "incapable of cool reflection" and was acting under an "uncontrollable impulse to do violence" such that there was sufficient evidence of Petitioner's sudden heat of passion." State v. Oates, No. 2014-001404, 2017 WL 3161126, at *13 (S.C. Ct. App. July 26, 2017).

Petitioner's fear does not rise to the level of heat of passion required in order to charge voluntary manslaughter. In Starnes, the Court found no error in the trial judge refusing to charge voluntary manslaughter although Starnes testified that prior to the shooting one of the decedents

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[2] This testimony is in contradiction to the testimony from Nelson Olivera that at the time of the shooting his brother had calmed down.

came up behind him in the restroom of a bar, grabbed his throat, put a metal object to the back of his head, and began yelling about money which Starnes allegedly stole from him. Starnes also testified that later the decedent remarked to one of the bar's employees that she "better call the police because he was going to take [Starnes] up on Platt Springs Road and blow his F'in brains out." Additionally Starnes testified that before he fired the fatal shot, the decedent pointed a gun at him. Starnes testified that he was scared and frightened. The Court held, "While this testimony is evidence that Petitioner was in fear, there is no evidence Petitioner [Starnes] was out of control as a result of his fear or was acting under an uncontrollable impulse to do violence. The only evidence in the record is that Petitioner deliberately and intentionally shot Jared and Bill and that he either shot the men with malice aforethought or in self-defense." State v. Starnes, 388 S.C. 590, 599, 698 S.E.2d 604, 609 (2010).

As in Starnes, while there is testimony that Petitioner in the present case was in fear, there is no evidence that Petitioner was out of control as a result of his fear or was acting under an uncontrollable impulse to do violence. In State v. Smith, 391 S.C. 408, 413, 706 S.E.2d 12, 15 (2011), the South Carolina Supreme wrote:

> In determining whether the act which caused death was impelled by heat of passion or by malice, all the surrounding circumstances and conditions are to be taken into consideration, including previous relations and conditions connected with the tragedy, as well as those existing at the time of the killing. State v. Norris, 253 S.C. 31, 35 168 S.E.2d 564, 566 (1969); State v. Gardner, 219 S.C. 97, 105, 64 S.E.2d 130, 134 (1951). "To warrant the court in eliminating the offense of manslaughter it should clearly appear that there is no evidence whatsoever tending to reduce the crime from murder to manslaughter." Pittman, 373 S.C. at 572, 647 S.E.2d at 168.

Taking into consideration all of the surrounding circumstances and conditions, there is no evidence tending to reduce the charge from murder to manslaughter.

In State v. Niles, 412 S.C. 515, 522-523, 772 S.E.2d 877, 880-881 the South Carolina Supreme Court wrote:

> Niles's own testimony does not establish that he was overtaken by a sudden heat of passion such that he had an *uncontrollable impulse to do violence.* Rather, Niles testified that he did not want to hurt the victim; that he shot with his eyes closed; that he was merely attempting to stop the victim from shooting; and that when he shot his gun, he was thinking of Hammond rather than of perpetrating violence upon the victim. See Cole, 338 S.C. at 102, 525 S.E.2d at 513 ("[T]here was no evidence presented that Petitioner was overcome by a sudden heat of passion as would produce an 'uncontrollable impulse to do violence.' On the contrary, by Petitioner's own testimony, he shot at the men to scare them away. Petitioner's testimony appears designed to support a charge of self[-]defense, not heat of passion."). As in Cole, the focus of Niles's testimony at trial was on who was the aggressor—Niles or the victim—apparently to support Niles's theory of self-defense.
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> In State v. Childers, we explained:
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> > Voluntary manslaughter, by definition, requires a criminal intent to do harm to another. But according to the defendant's story, he had no criminal intent whatsoever. If, as he suggests, the defendant returned fire in a panic for his life, surely the defense of self-defense would be appropriate. Notably, this was charged by the trial court.... Without any evidence supporting the view that the defendant fired the fatal shots while under an "uncontrollable impulse to do violence," the trial court properly declined to charge the law of voluntary manslaughter to the jury. 373 S.C. 367, 375–76, 645 S.E.2d 233, 237 (2007).
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> Because Niles, by his own testimony, lacked the intent to harm the victim, we cannot see how a voluntary manslaughter charge would have been appropriate under these facts. (footnote omitted).

Petitioner's testimony, as Niles' testimony, goes to self-defense not voluntary manslaughter. Petitioner assessed his situation and made the decision to defend himself from the Olivera brothers. There is no evidence that Petitioner fired the fatal shots while under an uncontrollable impulse to do violence. The trial court erred in charging the jury with the law of voluntary manslaughter

The Court of Appeals additionally relied on Petitioner's behavior after the shooting as evidence of sudden heat of passion. Petitioner's behavior after shooting in self-defense is not evidence of sudden heat of passion but rather reasonable fear. Petitioner was outnumbered and

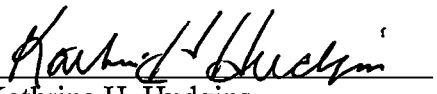
feared that the deceased's family members would retaliate against him for the shooting. Additionally, Petitioner was concerned about preserving the crime scene and the gun brandished by the deceased, as evidenced by the 911 call made by Petitioner. This behavior is not evidence of sudden heat of passion. Petitioner's actions were deliberate and he either acted in self-defense or with malice. The trial judge erred in charging the lesser included offense of voluntary manslaughter.

In the present case the judge erred in charging the jury with the lesser included offense of voluntary manslaughter when there was no evidence that Petitioner was acting under an uncontrollable impulse to do violence and incapable of cool reflection as a result of fear. Petitioner's statements that he was scared, freaking out, nervous and that it happened in a snap and was panic fire do not constitute evidence that Petitioner was acting under an uncontrollable impulse to do violence and incapable of cool reflection as a result of fear. Based on the facts of this case, Petitioner either shot in self-defense or he acted with malice. This factual determination was to be made by the jury. The error in charging the jury with voluntary manslaughter requires reversal.

CONCLUSION

Based on the above arguments this Court should find that Petitioner was immune from prosecution pursuant to the Protection of Persons and Property Act. Alternatively, this Court should reverse the convictions as Petitioner acted in self-defense, as a matter of law. Additionally, this Court should reverse the convictions because the jury was improperly instructed on voluntary manslaughter when there was no evidence of sudden heat of passion.

Respectfully Submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 2nd day of October, 2017.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Beaufort County
Honorable Brooks P. Goldsmith, Circuit Court Judge

Opinion No. 5502 (S.C. Ct. App. filed 7/26/2017)
2011-GS-07-121;
2014-GS-07-0359

THE STATE,

RESPONDENT,

V.

PRESTON RYAN OATES,

PETITIONER

CERTIFICATE OF SERVICE

I certify that a copy of the Petition for Writ of Certiorari and a copy of the Appendix in this case has been served on Mark Farthing, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Preston R. Oates, #360469, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 2nd day of October, 2017.

Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO BEFORE
ME this 2nd day of October, 2017.

(L.S)
Notary Public for South Carolina
My Commission Expires: July 5, 2027.