STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Spartanburg County

J. Derham Cole, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

HOLMES ANDREW SIMPSON-DAVIS,

APPELLANT

APPELLATE CASE NO 2017-001974

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# INITIAL BRIEF OF APPELLANT

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SUSAN B. HACKETT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

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## STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in failing to instruct the jury on voluntary manslaughter, a lesser-included offense of murder, where the undisputed evidence, including the deceased physically and verbally threatening Appellant, indicated Appellant acted in the sudden heat of passion based upon sufficient legal provocation?

## STATEMENT OF THE CASE

On March 25, 2015, a Spartanburg County grand jury indicted Appellant for murder, two counts of attempted murder, and two counts of possession of a weapon during a violent crime. R.*(indictments). The state, represented by J. Edward Hunter and Allison M. Mabbs, called the case to trial before the Honorable J. Derham Cole and a jury on September 5-8, 2017. Tr. 1. Christopher P. Thompson represented Appellant. Tr. 1. The jury found Appellant guilty as charged. Tr. 543, l. 23 – Tr. 544, l. 15. Judge Cole sentenced Appellant to life without the possibility of parole for murder, to thirty years imprisonment for each count of attempted murder, and to five years imprisonment for two counts of possession of a weapon during a violent crime. Tr. 549, l. 11 – Tr. 550, l. 10; R. *(sentence sheets). In light of the life sentence for murder, Judge Cole did not sent Appellant on one of the weapons convictions. Tr. 549, ll. 17-18; R. *(sentence sheet). He ordered one thirty-year sentence and one five-year sentence to be served consecutively to the other sentences. Tr. 549, l. 24 – Tr. 550, l. 2; R. *(sentence sheets).

On September 18, 2017, Appellant served his notice of appeal. This brief follows.

## STANDARD OF REVIEW

"In criminal cases, appellate courts sit to review only errors of law." State v. Sams, 410 S.C. 303, 307, 764 S.E.2d 511, 513 (2014); see also State v. Baccus, 367 S.C. 41, 625 S.E.2d 216 (2006); State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001). "An appellate court will not reverse the trial [court]'s decision absent an abuse of discretion." State v. Pittman, 373 S.C. 527, 570, 647 S.E.2d 144, 166 (2007). "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." Id. at 570, 647 S.E.2d at 166–67.

"The law to be charged to the jury is determined by the evidence presented at trial." State v. Hill, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993). "The trial court is required to charge a jury on a lesser-included offense if there is evidence from which it could be inferred that the defendant committed the lesser, rather than the greater, offense." Sams, 410 S.C. at 308, 764 S.E.2d at 513; see also State v. Drafts, 288 S.C. 30, 340 S.E.2d 784 (1986); Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005); State v. Gourdine, 322 S.C. 396, 472 S.E.2d 241 (1996). "The refusal to grant a requested jury charge that states a sound principle of law applicable to the case at hand is an error of law." Pittman, 373 S.C. at 570, 647 S.E.2d at 167. "In determining whether the evidence requires a charge on a lesser-included offense, the [appellate court] must view the facts in the light most favorable to the defendant." Sams, 410 S.C. at 308, 764 S.E.2d at 513 (citing State v. Cole, 338 S.C. 97, 525 S.E.2d 511 (2000)). "The charge request is properly rejected when there is no evidence tending to show the defendant was guilty of the lesser offense." Id. (citing State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996); State v. Cooney, 320 S.C. 107, 463 S.E.2d 597 (1995); State v. Gadsden, 314 S.C. 229, 442 S.E.2d 594 (1994)).

## STATEMENT OF FACTS

In the early morning hours of July 25, 2015, Angela Geter and her sister, Anitra, were sitting on the front porch of Anitra's house on Howard Street. Tr. 159, l. 23 – Tr. 160, l. 12; Tr. 181, ll. 1-8. The two women were "having fun" and were "wasted." Tr. 162, l. 24 – Tr. 163, l. 1; Tr. 166, ll. 4-7; Tr. 181, ll. 4-6. As a result of all that fun, Angela's memory was not very good. Tr. 162, l. 24 – Tr. 163, l. 1.

Robert "Big Boy" Hull was at a nearby "liquor house," where there was a party. Tr. 164, ll. 16-23; Tr. 181, ll. 19-20; Tr. 185, ll. 1-6. His cousins, James "JJ" Hull Kilgore and Bruce Brewton, were at the liquor house as well – "drinking a little bit, having fun" and "getting wast[ed]." Tr. 191, ll. 11-23; Tr. 192, ll. 18-25; Tr. 193, ll. 3-7; Tr. 208, ll. 16-18; Tr. 364, ll. 4-11. "[A] fight broke out" at the liquor house between "Junior" and his stepfather. Tr. 193, ll. 10-15. Junior's mother got into an argument with Hull regarding the fight as well. Tr. 193, ll. 19-24. Junior was at the liquor house with Felshunti "Little Man" Clark and "Pee Wee." Tr. 194, ll. 10-21.

After the fight between Junior and his stepfather ended, Kilgore grabbed Junior and took him outside. Tr. 196, ll. 5-7. Clark and Pee Wee were outside as well. Tr. 196, ll. 7-10. According to Kilgore, "they walked up on" him "to ask [him] what [he] had going on." Tr. 196, ll. 10-11. Kilgore "pushed both of them up off of [him]." Tr. 196, l. 11. Another person broke up the scuffle. Tr. 196, ll. 11-12. Junior, Clark, and Pee Wee left, and Kilgore returned to the party inside. Tr. 196, ll. 13-14.[1]

[1] Appellant "was never at the liquor house." Tr. 195, ll. 2-4; Tr. 364, ll. 1-3.

Shortly thereafter, Brewton told Kilgore he was ready to go. Tr. 196, ll. 17-19; Tr. 365, ll. 1-10. Brewton, Kilgore, and two other men walked toward Brewton's car, which was parked across the street. Tr. 196, l. 22 – Tr. 197, l. 19. Brewton drove to Anitra's house because Hull, who had walked over, needed to "grab his stuff." Tr. 160, ll. 16-22; Tr. 181, ll. 18-19; Tr. 182, ll. 13-14; Tr. 198, ll. 1-5; Tr. 198, ll. 15-16; Tr. 365, ll. 21-24; Tr. 366, ll. 12-15. Brewton got out of the car to smoke. Tr. 198, ll. 17-20; Tr. 366, ll. 24-25.

Two men left the liquor house, and called for Kilgore. Tr. 160, l. 23 – Tr. 161, l. 6; Tr. 181, ll. 12-16. The men continued to walk down the street. Tr. 161, ll. 6-7; Tr. 181, l. 16. A short while later, the two men returned along with two to three other men. Tr. 161, ll. 9-10; Tr. 181, ll. 21-22. Again, the men called for Kilgore, who got out of Brewton's car and walked into the street to meet the men. Tr. 161, ll. 13-15; Tr. 181, ll. 22-24; Tr. 198, ll. 17-24. Kilgore and the men started arguing. Tr. 161, l. 15; Tr. 181, l. 24; Tr. 367, ll. 7-14. Kilgore claimed that Clark and Appellant were among the five men, and that Clark indicated he wanted to fight Kilgore "one-on-one." Tr. 198, l. 22 – Tr. 199, l. 5; Tr. 367, ll. 7-10; Tr. 368, ll. 17-20; Tr. 371, ll. 17-20. Kilgore indicated this was "no problem." Tr. 199, ll. 2-3.

When Kilgore approached Clark to fight, he saw Appellant with a gun. Tr. 199, ll. 11-17; Tr. 368, ll. 23-25. According to Kilgore and Brewton, Appellant said the fight was not going to happen. Tr. 199, ll. 11-17; Tr. 371, ll. 20-21. As Kilgore backed down from the fight, Brewton approached the men, purportedly to calm what he perceived to be rising tensions. Tr. 200, ll. 19-25; Tr. 371, l. 22 – Tr. 372, l. 5. Brewton explained to the group that he wanted to take his cousins home and that any dispute that had not been resolved by the next time the men saw each other could be resolved then. Tr. 372, ll. 1-5. After Brewton's intercession, everyone was "going to back off and going to go get in [Brewton's] car." Tr. 372, ll. 6-9.

Meanwhile, Hull stepped on to the front porch of Anitra's house to change his shoes. Tr. 161, ll. 15-16. Although the dispute between Kilgore and the men had been resolved, Hull also approached the men in the roadway. Tr. 201, l. 22 – Tr. 202, l. 1; Tr. 223, ll. 14-25; Tr. 329, ll. 3-19; Tr. 372, ll. 15-17. Hull walked down the steps and called out to the men to ask what they were going to do – "[f]ight or shoot?" Tr. 161, ll. 17-18; Tr. 165, ll. 11-13. As Brewton put it, Hull "got mouthy." Tr. 329, ll. 8-9. At this point, Hull was in Clark's face. Tr. 202, ll. 7-9; Tr. 204, ll. 20-22. Additionally, Hull was "face-to-face" with Appellant. Tr. 373, l. 4. Hull repeatedly bumped into Appellant. Tr. 373, ll. 4-6; Tr. 374, ll. 1-3. Hull cursed the men and told them they were not the only ones with guns. Tr. 390, l. 23 – Tr. 391, l. 1. Hull threatened to get his gun. Tr. 391, l. 1; Tr. 391, ll. 6-8.

After Hull's threat to get his gun, a gunshot rang out, and Hull fell to the ground. Tr. 161, ll. 18-19; Tr. 373, l. 6; Tr. 391, ll. 1-2. Kilgore and Brewton claimed Appellant shot Hull. Tr. 202, ll. 2-6. Kilgore and Brewton ran away. Tr. 205, ll. 5-9; Tr. 375, ll. 22-25. Kilgore claimed he heard multiple shots as he ran away. Tr. 205, ll. 11-12. Brewton told a slightly different story. He claimed Appellant shot Hull twice "and just started repeatedly shooting." Tr. 374, ll. 3-4.

According to Kilgore, Brewton, and a man standing on a nearby porch, at least two men had weapons during the altercation. Tr. 121, ll. 4-10; Tr. 201, ll. 5-8; Tr. 369, ll. 1-6; Defendant's Exhibit #1. The man standing on the porch explained that two men were running forward and shooting backwards. Tr. 121, ll. 11-19. The men were looking in the direction in which they were running, but shooting backwards. Tr. 122, ll. 3-20. In other words, the men were not aiming and shooting at anything or anyone in particular. Tr. 122, ll. 3-20.

Kilgore was shot in the foot. Tr. 206, ll. 19-20. He did not know who shot him because he claimed he was shot as he ran away. Tr. 207, ll. 10-11. According to Kilgore, "there [were] two guns going off" when he was shot. Tr. 207, l. 13. While running away, Brewton was shot once in the calf muscle and another bullet grazed the bottom of his ankle. Tr. 376, ll. 12-16.

Brewton claimed that when the "first wave of shooting stopped," he "was about to get up and get in [his] truck," but he did not because the men returned "shooting some more." Tr. 377, ll. 22-24. Eventually, the shooting stopped and one of the men who had been in Brewton's car earlier appeared. Tr. 378, ll. 7-10. Brewton told the man that he was not waiting on an ambulance because he was losing blood. Tr. 378, ll. 11-12. He and the man got into the car to go to the ambulance. Tr. 378, ll. 11-12. While backing out of Anitra's driveway, they saw Kilgore who asked for a ride as well. Tr. 378, ll. 13-17. Kilgore was calling an ambulance when Brewton stopped to pick him up. Tr. 205, ll. 13-14; Tr. 378, ll. 18-19.[2]

Kilgore, Brewton, and the driver left Hull behind as they went to the hospital. Tr. 226, ll. 17-23. Brewton did not check on Hull or attempt to render aid. Tr. 393, ll. 7-9; Tr. 395, ll. 16-18. Hull ultimately died at the scene. Tr. 96, l. 19 – Tr. 97, l. 6; Tr. 412, ll. 15-17. According to the pathologist, Hull died from "traumatic injury to the cervical spinal cord, secondary to a gunshot wound to the head in the lower face." Tr. 412, ll. 3-9. Testing of the gunshot residue kit performed on Hull revealed the presence of "particles of gunshot primer residue." Tr. 432, ll. 8-12.

During his call for help, Kilgore repeatedly told the 911 operator that he did not know who shot Hull. Tr. 205, ll. 15-22; Tr. 224, ll. 22-24. In fact, Kilgore even told the police later

[2] Anitra Geter also called 911 from inside the house just before she heard gunshots. Tr. 182, ll. 1-2; Tr. 182, ll. 24-25; Tr. 183, ll. 10-16.

when he was interviewed that he did not know the identity of the shooter. Tr. 205, l. 23 – Tr. 206, l. 1; Tr. 225, ll. 2-4. Incredulously, Kilgore claimed that when he realized Hull was dead, he decided to tell the police that Appellant was the person who shot Hull. Tr. 206, ll. 2-13; Tr. 207, ll. 11-12; Tr. 225, ll. 11-13. This was not the only lie Kilgore would tell police. Initially, Kilgore did not tell the police about a fourth person in the car on the drive from the liquor house to pick up Hull. Tr. 208, ll. 23-25. Kilgore claimed he simply "forgot to mention" the fourth person because he "disappeared so fast." Tr. 208, l. 23 – Tr. 209, l. 1. Similarly, and mysteriously, Brewton also "forgot" to tell the police about this fourth person who was in the car with them. Tr. 365, ll. 16-20.

Kilgore denied ever telling the police that Clark was the shooter. Tr. 210, ll. 17-9. Kilgore denied telling the police that when Hull approached the men, he advised them that they were not the only ones with guns. Tr. 211, ll. 14-18.

Kilgore and Brewton claimed that the two of them and Hull were unarmed. Tr. 201, ll. 12-19; Tr. 373, ll. 7-16. Kilgore denied telling the police that he fired a gun. Tr. 211, ll. 19-23. Despite listening to his recorded interview with police, Kilgore claimed he did not tell the police that he shot first, but insisted that he told the police he was in shock. Tr. 219, l. 4 – Tr. 220, l. 10; see also Tr. 294, ll. 6-22 (officer testifying that Kilgore said he was in shock).

Brewton claimed he was "reluctant" to speak to the police while he was in the hospital because "people going to go and mess with [his] family while [he was] down." Tr. 379, ll. 9-17. He could not "really do nothing to defend nobody" from his hospital bed. Tr. 379, ll. 17-18. As a result, he told the police that he did not know who shot him or Hull. Tr. 380, ll. 2-5. However, despite these alleged concerns, Brewton did tell the police that Clark was involved. Tr. 382, ll. 5-12. In fact, according to police, "one of the victims" said "one of the shooters" "went by the

street name of Little Man." Tr. 283, ll. 5-12. Felshunti Clark is Little Man. Tr. 283, ll. 13-21. However, a few days later, Brewton claimed he told the police "the truth." Tr. 379, ll. 19-24. Prior to speaking to police for the second time, Brewton learned of Appellant's name from Kilgore. Tr. 382, l. 16 – Tr. 383, l. 2.

## ARGUMENT

The trial judge erred in failing to instruct the jury on voluntary manslaughter, a lesser-included offense of murder, where the undisputed evidence, including the deceased physically and verbally threatening Appellant, indicated Appellant acted in the sudden heat of passion based upon sufficient legal provocation.

**Relevant facts**

During the charge conference, defense counsel requested the judge instruct the jury on the lesser-included offense of voluntary manslaughter concerning the murder indictment. Tr. 453, ll. 19-25. Specifically, defense counsel argued Hull "re-engag[ed] the situation" and that Appellant's conduct was "without malice." Tr. 453, ll. 19-23. Hull approached the group very rapidly, and there was no malice involved. Tr. 453, ll. 23-25. Defense counsel noted the testimony "that there was physical contact between the parties." Tr. 454, ll. 8-9. As defense counsel explained, there was sufficient legal provocation and heat of passion based upon the fight and the interactions between the parties. Tr. 454, ll. 10-12.

The state objected to instructing the jury regarding voluntary manslaughter because "[w]ords alone are not enough for sufficient legal provocation." Tr. 454, ll. 1-6. According to the state, the only evidence in the record as to provocation were "words." Tr. 454, ll. 5-6.

Judge Cole denied the request, finding that "even if the evidence would give rise to a reasonable inference of heat of passion," there was no "evidence to support a sufficient legal provocation." Tr. 454, ll. 13-16. He was "not certain" "there was any evidence of heat of passion," "[b]ut giving [the defense] the benefit of the doubt on that issue," he still found there was "not sufficient legal provocation." Tr. 454, ll. 17-18. Thus, Judge Cole denied the request for the jury instruction on voluntary manslaughter. Tr. 454, ll. 19-20.

**Discussion**

A jury charge to a lesser-included offense is required when the evidence warrants such an instruction. State v. Geiger, 370 S.C. 600, 606, 635 S.E.2d 669, 673 (Ct. App. 2006). South Carolina law mandates a jury instruction on a lesser-included offense when there is any evidence from which it could be inferred that the lesser, rather than the greater, offense was committed. State v. Watson, 349 S.C. 372, 375, 563 S.E.2d 336, 337 (2002); see also State v. Gourdine, 322 S.C. 396, 398, 472 S.E.2d 241, 241 (1996). In other words, the evidence must allow "a rational inference" that the defendant committed the lesser offense. Geiger, 370 S.C. at 607, 635 S.E.2d at 673. In determining whether such a rational inference exists the court must examine the totality of evidence. Id. As this Court explained in State v. Patterson, 337 S.C. 215, 233, 522 S.E.2d 845, 854 (Ct. App. 1999), "[i]n order to justify a charge of a lesser included offense, the evidence must be capable of sustaining either the greater or the lesser offense, depending on the jury's view of the facts." A trial court commits reversible error if it fails to give a requested charge on an issue raised by the evidence. Frasier v. State, 306 S.C. 158, 162, 410 S.E.2d 572, 574 (1991) (citing State v. Lee, 298 S.C. 362, 364, 380 S.E.2d 834, 835 (1989)).

An appellate court views the evidence in the light most favorable to the defendant in determining whether the evidence required a charge of voluntary manslaughter. State v. Gadsden, 314 S.C. 229, 442 S.E.2d 594 (1994). Only when the record contained no evidence to support voluntary manslaughter should the trial court decline to charge the jury concerning the lesser-included offense. State v. Cooley, 342 S.C. 63, 67-68, 536 S.E.2d 666, 668-669 (2000). "To warrant the court in eliminating the offense of manslaughter it should very clearly appear that there is no evidence whatsoever tending to reduce the crime from murder to manslaughter." State v. Wharton, 381 S.C. 209, 214, 672 S.E.2d 786, 788 (2009); see also Casey v. State, 305

S.C. 445, 447, 409 S.E.2d 391, 392 (1991) (holding that in murder cases, trial courts should charge manslaughter unless "there is *no evidence whatsoever* tending to reduce the crime from murder to manslaughter") (emphasis in original).

Manslaughter is defined by Section 16-3-50 of the South Carolina Code as "the unlawful killing of another without malice, express or implied." S.C. Code Ann § 16-3-50. Voluntary manslaughter is the unlawful killing of another in sudden heat of passion upon sufficient legal provocation. State v. Kornahrens, 290 S.C. 281, 350 S.E.2d 180 (1986); see also State v. Wharton, 381 S.C. 209, 214, 672 S.E.2d 786, 788 (2009). The South Carolina Supreme Court made it clear that both of these elements must be present in order to warrant a voluntary manslaughter charge. State v. Starnes, 388 S.C. 590, 596, 698 S.E.2d 604, 608 (2010); see also State v. Smith, 391 S.C. 408, 413, 706 S.E.2d 12, 15 (2011). Thus, "[w]hether a voluntary manslaughter charge is warranted turns on the facts." Starnes, 388 S.C. at 597, 698 S.E.2d at 608; see also, State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001) ("The law to be charged must be determined from the evidence presented at trial.").

Quoting a trial judge's jury instruction, the Supreme Court explained voluntary manslaughter as follows:

> The law recognizes the frailties of human nature, and appreciates the fact that there may be occasions in one's life when he may lose control of himself temporarily, be swept off his feet, to act upon the spur of the moment rather from premeditation or design. And, if under those circumstances one slays his fellow man, the law will not excuse him entirely, but will not visit upon him the extreme penalty it would have if the act had been accompanied by malice. ... [T]he provocation which the law recognizes as being one sufficient to reduce the homicide from murder to manslaughter must be such as to involve some indignity to throw a man in sudden heat and passion. ... So, also by way of illustration, if he should meet another on the street and that one should pull his nose, or spit in his face, and on the spur of the moment he should slay him, he would be guilty, not of murder, but of manslaughter. ... [W]ords, however opprobrious, could never be sufficient to reduce a homicide from murder to manslaughter.

State v. Cleland, 148 S.C. 86, 86, 145 S.E. 628, 629 (1928) overruled on other grounds by State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009).

"Sudden heat of passion upon sufficient legal provocation" mitigating felonious killing to manslaughter "must be such as would naturally disturb the sway of reason, and render the mind of an ordinary person incapable of cool reflection, and produce what, according to human experience, may be called an uncontrollable impulse to do violence." State v. Wiggins, 330 S.C. 538, 549, 500 S.E.2d 489, 495 (1998) (citing State v. Lowry, 315 S.C. 396, 399, 434 S.E.2d 272, 274 (1993)) (quotations omitted). "In determining whether an 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).

"[F]ear resulting from an attack can constitute a basis for voluntary manslaughter." Starnes, 388 S.C. at 598, 698 S.E.2d at 609. While fear of an attack, by itself, is not enough to satisfy the heat of passion element, Starnes reaffirmed "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." Id. One's mind may be rendered incapable of cool reflection by "exasperation, rage, anger, sudden resentment, or terror." State v. Franklin, 310 S.C. 122, 125, 425 S.E.2d 758, 760 (Ct. App. 1992).

"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." Cooley, 342 S.C. at 67, 536 S.E.2d at 668. "A legal provocation is some act which, either alone or in connection with words or circumstances is calculated to throw one into a passion." State v. Gadsden, 314 S.C.

229, 232, 442 S.E.2d 594, 596 (1994). "[I]n 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." State v. Starnes, 388 S.C. 590, 598, 698 S.E.2d 604, 609 (2010). "[A]n overt, threatening act or a physical encounter may constitute sufficient legal provocation." Pittman, 373 S.C. 527, 573, 647 S.E.2d 144, 168 (2007) (citing State v. Gardner, 219 S.C. 97, 105, 64 S.E.2d 130, 134 (1951)). However, evidence of a struggle during an armed robbery is not sufficient legal provocation. State v. Tyson, 283 S.C. 375, 379, 323 S.E.2d 770, 772 (1984); see also State v. Shuler, 344 S.C. 604, 632, 545 S.E.2d 805, 819 (2001).

The South Carolina Supreme Court reversed a murder conviction and remanded for a new trial where a trial judge refused to charge the jury on voluntary manslaughter where the evidence required such an instruction. State v. Lowry, 315 S.C. 396, 399, 434 S.E.2d 272, 274 (1993). Lowry and the deceased were "arguing and 'bumped chests'" during an altercation near a grocery store. Id. at 398, 434 S.E.2d at 273. Lowry aimed his pistol at the deceased and pulled the trigger; however, the pistol was not loaded. Id. Lowry's friend broke up the fight, and the deceased entered the grocery store. Id. Lowry then loaded his pistol, fired a single shot, and entered the grocery store as well. Id. The men "began arguing and shouting at each other again." Id.

The state's witnesses claimed the deceased told Lowry he was unarmed and refused to "take it outside" as Lowry suggested. Id. The deceased also spread his arms away from his body purportedly to show he was unarmed. Id. However, Lowry's witnesses claimed the deceased denigrated Lowry by saying, "You think you are a big man because you got a gun." Id. Then, the deceased "moved toward Lowry in a menacing fashion with his arms and hands outstretched

toward Lowry as if to grab him." Id. All witnesses agreed that after the deceased raised his arms, Lowry shot him in the chest. Id. The witnesses agreed that after the deceased fell, Lowry cursed him and shot him in the head. Id.

The Court held the trial judge erred by refusing to instruct the jury regarding voluntary manslaughter. Id. at 399, 434 S.E.2d at 274. The Court explained there was "testimony which, if believed, tend[ed] to show that the decedent and Lowry were in a heated argument and that the decedent was about to initiate a physical encounter when the shooting occurred." Id. Because it did not "very clearly appear that there [was] no evidence whatsoever tending to reduce the crime from murder to manslaughter," the judge erred in failing to so instruct the jury. Id.

The Supreme Court concluded a trial judge correctly instructed a jury on voluntary manslaughter where "there [was] evidence in the record which [tended] to show [Wiggins] acted in sudden heat of passion upon sufficient legal provocation" because it was undisputed Wiggins was in a "heated argument" with the deceased and the deceased's sister and the deceased "physically threatened him." State v. Wiggins, 330 S.C. 538, 549, 500 S.E.2d 489, 496 (1998).

Like the evidence in State v. Gilliam, 296 S.C. 395, 373 S.E.2d 596 (1988), the evidence at Appellant's trial supported a charge of voluntary manslaughter. Believing that his former girlfriend's lover wanted to see him, Gilliam went to the lover's place of business. Gilliam, 296 S.C. at 396, 373 S.E.2d at 597. The two men argued and the lover "made threatening statements" to Gilliam. Id. Appellant claimed the lover "took a gun from his pocket and shot at" Gilliam. Id. Gilliam then shot back at the lover, killing him. Id. After confirming that self-defense and voluntary manslaughter are not mutually exclusive, the Court held that "the jury may fail to find all the elements of self-defense but could find sufficient legal provocation and heat of passion to conclude the defendant was guilty of voluntary manslaughter." Id. at 397, 373

S.E.2d at 597. According to the Court, Gilliam's "testimony that the victim threatened him and then fired at him would support a finding of sufficient legal provocation and heat of passion." Id.

The state argued, and the judge appeared to agree, that Appellant was not entitled to a jury charge on voluntary manslaughter because "words alone, however opprobrious, are not sufficient to constitute a legal provocation." See State v. Byrd, 323 S.C. 319, 322, 474 S.E.2d 430, 432 (1996); see also Cook v. State, 415 S.C. 551, 559, 784 S.E.2d 665, 669 (2015) (noting that the altercation between the deceased and the defendant was only verbal). What the state and the judge failed to consider was the ample evidence in the record that Hull's conduct was not limited to mere words. Instead, Hull physically confronted Appellant and threatened to get a gun and use it against Appellant. See Lowry, 315 S.C. at 399, 434 S.E.2d at 274 (explaining that "when death is caused by the use of a deadly weapon, the opprobrious words must be accompanied by the appearance of an assault – by some overt, threatening act – which could have produced the heat of passion"). Further, there was evidence in the record to show that Hull or someone with him likely had a gun at the time of the encounter and used that gun.

The undisputed evidence was that Kilgore was arguing with several men in the roadway near Anitra Geter's home and not far from the liquor house. In fact, Kilgore agreed to fight one of the men. The undisputed evidence showed that the argument between Kilgore and the men was calming when Hull approached the group. Hull yelled out, asking if the men wanted to "fight or shoot." Hull yelled in the faces of the men, one of whom was Appellant. Hull aggressively and repeatedly bumped into Appellant's chest. During this physical altercation, Hull warned that the men were not the only ones with guns and threatened to get his gun. It was only *after* these confrontations – both verbal and physical – that Appellant allegedly shot Hull.

Additionally, there was evidence that Kilgore actually fired the first shot. Although it was disputed, when Kilgore spoke to the police, he indicated he shot first. Defendant's #1; Tr. 215, l. 24 – Tr. 216, l. 5. When Judge Cole listened to the audio recording of Kilgore's statement, Judge Cole explained, "Well, it sounded like to me what I heard was earlier, he said, I shot. I could have shot. And then he said, I shot first. That's what it sounded like to me. Now, maybe I missed it." Tr. 215, l. 24 – Tr. 216, l. 5. Judge Cole indicated it would be for the jury to decide what Kilgore actually told the police regarding the shooting.

Further, there was evidence that Hull actually shot a gun. According to the forensic testing conducted on the gunshot residue kit administered on Hull, there was gunshot primer residue on Hull's hands. Although the state elicited testimony that Hull may have had the residue on his hands because he was shot, the expert also admitted that Hull may have had the residue on his hands because he handled a gun.

Finally, the physical evidence at the scene supported a conclusion that at least three guns were used, only two of which were attributed to Appellant and his companion. Importantly, the police collected fifteen shell casings at the intersection of Howard and Wayland Streets. Tr. 134, l. 22 – Tr. 135, l. 6; R. *(State's Exhibit #57). The police collected four others in the middle of Howard Street. Tr. 134, l. 22 – Tr. 135, l. 10; R. *(State's Exhibit #57). All were 9-millimeter calibers. Tr. 134, ll. 11-15. Thus, there was at least one gun that could shoot 9-millimter caliber ammunition used during the altercation.

The police found six .45 auto caliber shell casings along the roadway as well. Tr. 146, l. 23 – Tr. 147, l. 2. Testing showed these six were fired by the same gun. Tr. 173, ll. 2-9. Testing also showed that the bullet portion of the projectile removed from Hull's body during the autopsy was "consistent with being .45 auto caliber in nature" and was fired by the same firearm

that fired the others. Tr. 174, ll. 13-18; Tr. 411, ll. 12-24. Therefore, there was at least one gun at the scene that could fire .45 auto caliber ammunition.

The police even found a bullet in the yard, which was either a .40 Smith and Wesson or a 10-millimeter automatic. Tr. 155, ll. 11-14; Tr. 174, l. 24 – Tr. 175, l. 1. Thus, the police found three different calibers of projectiles at the scene of the shooting – .45 automatic, 9-millimeter, and 10-millimeter. Tr. 178, l. 5 – Tr. 179, l. 3. One conclusion to draw from the physical evidence was that at least three guns were present and used during the altercation.

The evidence presented supported a jury instruction for voluntary manslaughter. The verbal and physical altercation between Hull and Appellant demonstrated that Appellant acted in the sudden heat of passion based on sufficient legal provocation. Hull was aggressive verbally and physically. He taunted Appellant and threatened him. He repeatedly bumped Appellant in the chest. Although the dispute between Appellant's friend, Clark, and Hull's cousin, Kilgore, was dissipating, Hull re-initiated and re-instigated the disagreement. Appellant's shooting of Hull was voluntary manslaughter, as the evidence showed. The trial judge erred by failing to instruct the jury on the lesser-included offense of voluntary manslaughter.

## CONCLUSION

Appellant respectfully requests this Court reverse his convictions for murder and the companion charge of possession of a weapon during a violent crime and remand for a new trial.

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 11th day of July, 2018.