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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of General Sessions

J. Cordell Maddox, Jr., Circuit Court Judge

Op. No. 5631 (S.C. Ct. App. filed Feb. 27, 2019)
Appellate Case No. 2019-000840

The State ..... Petitioner,

v.

Heather Elizabeth Sims ..... Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondent would re-state the questions presented as follows:

I. Did the court of appeals correctly find no evidence supporting Respondent's conviction for voluntary manslaughter in the shooting of her husband?

II. Did the court of appeals correctly deny the State's request to remand this case for a trial on *involuntary* manslaughter?

INTRODUCTION

Voluntary manslaughter is an unlawful killing done in a sudden heat of passion due to sufficient legal provocation. Precedent describes this mental state—heat of passion—as being "incapable of cool reflection" and having "what, according to human experience, may be called an uncontrollable impulse to kill." *State v. Byrd*, 323 S.C. 319, 322, 474 S.E.2d 430, 432 (1996) (quoting *State v. Davis*, 50 S.C. 405, 423-424, 27 S.E. 905, 911 (1897)).

The key issue here is whether any evidence supports an inference of heat of passion.

In August of 2013 Heather Sims shot her husband David in their home and killed him with a single shot. The State indicted her for murder.

Nobody presented evidence or argued that Heather shot her husband because she had an uncontrollable impulse to kill him. She said she shot her husband as he assaulted her with a knife. The State said there was no assault, no knife, and that the story was totally made up.

A jury convicted Heather of voluntary manslaughter, but the court of appeals reversed, explaining there was no evidence of heat of passion. That decision was right.

The court of appeals also denied the State's request to remand for a trial on *involuntary* manslaughter. That decision was right as well.

STATEMENT OF THE CASE

The decision of the court of appeals is lengthy and contains a detailed summary of this case's basic facts as well as everyone's arguments. (App.pp.1886-1911). As that decision explains, authorities in Conway responded to a 9-1-1 call from Heather at about 6 p.m. on August 11, 2013. (App.p.1887). Heather shot her husband David in the bathroom of their home and claimed she did so when he lunged at her with a knife. *Id.*

Heather said her husband had been trying to start an argument all day and that he came into the master bathroom of their home as Heather was preparing a bath for herself and for the couple's four month old son. (App.p.1367, line 8 - p.1381, line 11). Heather claimed David entered the bathroom under the pretense of fixing the toilet and that he was carrying pliers and a knife to use in that task. *Id.* Heather said David started an argument, that he took her phone from her by force, that he brandished the knife at her causing her to grab a pistol from a drawer, and that she shot David as he lunged at her with the knife. *Id.*

Heather was arrested roughly two weeks later. (App.p.7). In November of 2013 she was indicted for murder. *Id.*

The court of appeals correctly described the State's theory that Heather's story was a farce and that the killing was driven by financial gain. (App.p.1887). To support the alleged motive, the State pointed out that the couple was having marital difficulties and claimed that Heather, who was a nurse anesthetist and a high wage earner, plotted to kill David to avoid having to pay him alimony if he divorced her. (App.p.62, line 17 - p.63, line 6). The State additionally noted David bought a $750,000 life insurance policy shortly before the fatal encounter and that Heather was the beneficiary. (App.p.63, lines 7-16).

The State also believed Heather gave inconsistent and illogical descriptions of the fatal encounter to the 9-1-1 operator and to the officers who interrogated her at the hospital after the fatal encounter. (App.p.46, line 23 - p.47, line 25; App.p.52, line 7 - p.53, line 8).

The State further presented testimony that, in its view, suggested Heather manipulated the scene in the bathroom. Key among this was the State's belief that the knife in David's hand was "upside down" with the sharp side facing him when authorities arrived. (App.p.49, line 6 - p.50, line 7). The State also claimed the recording of the 9-1-1 call captured Heather's father telling her to wipe something at the scene. (App.p.549, line 23 - p.552, line 21).

Another main piece of the State's case was an expert who opined the slashes on Heather's left arm and the stab wound in her abdomen were self-inflicted. (App.p.55, line 3 - p.56, line 14). The court of appeals discussed all of this. (App.pp.1887-1889).

The court of appeals correctly summarized Heather's defense. (App.pp.1889-1893). Heather directly refuted the State's motive, explaining she did not need David's life insurance money. (App.p.1421, line 21 - p.1423, line 18). She also disputed that her story of the fatal encounter had ever varied, explaining she had consistently done her best to recall what happened. (App.p.1395, line 20 - p.1396, line 5). She adamantly denied she ever intentionally moved anything in the bathroom. (App.p.1391, line 20 - p.1393, line 24; p.1445, lines 5-15; p.1792, lines 39-46; p.1798, lines 6-14; p.1810, lines 19-43).

Heather additionally presented expert testimony that the bullet's path through David's body was consistent with David leaning forward and reaching out with his right hand when he was shot. (App.p.1230, line 8 - p.1234, line 2). Heather also presented expert testimony

that David's "touch" DNA was on the handle of the knife in David's right hand and that no "touch" DNA suggested Heather touched the knife. (App.p.1100, lines 7-14).

Finally, Heather presented an expert who opined her wounds were classic defensive wounds. (App.p.1208, line 3 - p.1210, line 13). On this last point, Heather presented objective medical evidence demonstrating her abdominal stab wound was over an inch deep—33 millimeters—and nearly penetrated her abdominal cavity. (App.p.790, line 12 - p.792, line 3; p.795, lines 8-23; p.1823). This was particularly important because the State's expert claimed Heather's abdominal wound was only 3 millimeters deep and had been made "with the tip of the knife." (App.p.653, lines 8-20; p.679, line 18 - p.680, line 11).

The trial judge charged voluntary manslaughter and involuntary manslaughter. (App.p.1642, line 23 - p.1655, line 20). This was over Heather's repeated objection. (App.p.1495, lines 11-20; App.p.1548, line 6 - p.1549, line 10; p.1637, lines 5-10).

The State did not have a consistent position on manslaughter. It specifically objected to an involuntary manslaughter charge after the defense rested, (App.p.1547, line 16 - p.1548, line 16), but reversed positions after its closing argument. (App.p.1637, lines 12-16). The State did not ask for a voluntary manslaughter charge until after its closing argument. *Id.*

The jury found Heather "not guilty" of murder, "guilty" of voluntary manslaughter, and checked "not guilty" on the verdict form beside involuntary manslaughter. (App.p.9) see also (App.p.1685, line 21 - p.1686, line 4). Heather was sentenced to 25 years of prison, suspended to 10 years of prison and 5 years of probation. (App.p.1711, lines 13-15).

Heather was convicted and sentenced on November 20, 2015. Her post trial motions were not denied until June of 2016, nearly six months later. (App.pp.10-12).

Heather appealed to the court of appeals. There, as here, she argued the record did not contain any evidence supporting voluntary manslaughter. (App.p.1832).

The court of appeals conducted argument in December of 2018. (App.p.1886). This was roughly three years after Heather was convicted.

In February of 2019, the court of appeals issued a unanimous opinion reversing Heather's conviction. *Id.* As noted above, the court's opinion is lengthy and recounts everyone's arguments in detail.

The court of appeals agreed with Heather's argument that the State was asking the court to infer heat of passion based on nothing more than speculation. (App.p.1909) ("[W]e do not find any evidence to support [the State's] conclusions, only speculation."). The court also denied the State's request to remand the case for a trial on involuntary manslaughter, noting the jury acquitted Heather on that charge and that another trial would violate the Fifth Amendment's protection against double jeopardy. (App.p.1910).

ARGUMENTS

The decision of the court of appeals is correct. This Court should deny the petition.

First, there is no evidence of heat of passion. The State claimed premeditation. Heather claimed self-defense. Nobody tried to prove Heather had an uncontrollable impulse to do violence. There were two distinct theories of the case. There was no middle ground.

The State wants to infer heat of passion from speculation that Heather might not have been in immediate danger when she shot her husband or that she might have shot him because she was mad. This is wrong. Inferences require more than speculation.

Second, the Court need not even consider the State's argument for certiorari on whether Heather may be tried for involuntary manslaughter. The State's argument to this Court is barred because it did not appear until the State's petition for rehearing.

Even so, the court of appeals correctly denied the State's request to remand for a trial on involuntary manslaughter. There is no evidence of involuntary manslaughter in the record, and even if there was such evidence, the jury found Heather "not guilty." Precedent explains an acquittal is binding absent a limited exception that does not apply here.

I. The court of appeals correctly found no evidence supporting Heather's conviction for voluntary manslaughter.

The court of appeals correctly found no evidence supporting Heather's conviction for voluntary manslaughter. Nobody offered evidence Heather shot her husband because she was mad and she had an uncontrollable impulse to kill him. The trial court's explanations for charging voluntary manslaughter did not even make sense. The State's attempt to justify the verdict during post-trial motions was incorrect as a matter of law.

The State's arguments for certiorari rest on incorrect readings of the opinion and of the record. The court of appeals applied the right standard and considered all the evidence as well as everyone's arguments. This Court should deny the petition for review.

a. Nobody offered evidence of heat of passion or a valid theory of voluntary manslaughter.

Heather's story supports nothing but self defense. At trial, she testified David threatened to physically harm her while brandishing a weapon. Heather said:

> I kept backing up, and as I was backing up around the vanity to get back into the bedroom, he said again, I would like to knock your f'ing teeth out of your head, and he lunged at me, and when he did, my hand went up and I shot, and

> I shot out of a reaction. I didn't think, nor did I ever want to do that, but it was a reaction because I was scared.

(App.p.1380, line 24 - p.1381, line 5). Nothing in this narrative supports the view that Heather shot because she had an uncontrollable impulse to do violence.

Heather gave the same story to the detectives who interviewed her for an hour and forty minutes while she was in the hospital after the shooting. (App.pp.1771 & 1817). She told them David was threatening her with a knife in her face, (App.p.1777, lines 1-8), that he was swinging the knife, (App.p.1780, lines 42-46), that he threatened to knock her teeth out, (App.p.1784, lines 18-19), and that she shot him as he lunged at her and as she was backing away. (App.p.1780, lines 42-46). There is no uncontrollable impulse there, either.

The State's argument at trial was that none of this happened. (App.p.1511, lines 24-25; p.1617, lines 9-25). The State imagined David told Heather he was leaving her and that Heather responded by trapping an unsuspecting David in the bathroom where she shot him in cold blood. (App.p.1618, line 23 - p.1619, line 13; p.1622, lines 10-15).

The State claimed the gun had not been in the bathroom drawer, but had actually been in the bedside table across the master bedroom and that every step Heather took to get the gun from the bedside table was evidence of premeditation. (App.p.1618, line 23 - p.1620, line 14). And, as noted above, the State claimed Heather's slash wounds, stab wounds, and the bruises on her arms had been self-inflicted. (App.p.1610, line 22 - p.1611, line 20).

None of *that* supports voluntary manslaughter. There is no evidence David was leaving Heather, but even if that had happened, that is not legal provocation. And if Heather had to leave the bathroom to get a gun, *the State* said that showed malice, not heat of passion.

The trial judge said it was charging voluntary manslaughter because it believed Heather testified "she pulled the weapon up and it just kind of went off." (App.p.1548, lines 10-12). Then, the trial court said it was charging voluntary and involuntary manslaughter even though both parties disagreed with that decision. (App.p.1548, lines 6-24).

There are at least two reasons why the trial court's explanation does not make sense. First, Heather did not testify that the gun "just kind of went off." She said she shot her husband "as a reaction" when he charged her and that she shot because she was scared. (App.p.1381, lines 1-5). Heather did not describe having an uncontrollable urge to kill.

Second, one wonders why the court would ever insist on charging lesser-included offenses if the court perceives both parties as telling the court they do not want the charges.

The State's attempt to justify voluntary manslaughter during post-trial motions was incorrect as a matter of law. There, the State argued that the law required a voluntary manslaughter charge whenever there was evidence of threatening words and an "overt act" by the decedent. (App.p.1744, line 11 - p.1745, line 21). The State also claimed, shockingly, that a jury could infer heat of passion when a husband and wife are in a heated argument "and one of them reaches out to harm the other." (App.p.1745, lines 14-20).

Both of these contentions seem obviously wrong.

If the decedent spoke threatening words and engaged in threatening acts, that makes a good case for self defense, not manslaughter.

The State's theory of manslaughter and domestic violence is downright disturbing. It is always possible to speculate that a someone who strikes a fatal blow while defending themself against an act of domestic violence might be mad as well as scared.

The State conceded on multiple occasions that it never argued in support of the manslaughter charge. (App.p.1741, lines 18-19; p.1745, lines 4-5). As with the trial court giving a charge nobody requested, one wonders why the State would ever insist on charges for a lesser included offence that the State adamantly believes does not apply.

This case is like *State v. Drayton*, where the parties had distinct "theories of the case." There, the State said the defendant robbed a service station at gunpoint and was guilty of armed robbery. This Court affirmed the trial court's decision to deny a jury charge on the lesser offense of "robbery," explaining the defendant's story was that he never threatened the service station's cashier or revealed the gun; in other words, the defendant's version was that he was "innocent of *any* robbery charge." 293 S.C. 417, 428, 361 S.E.2d 329, 335 (1987). The same is true here. Under the State's version, the verdict could be nothing but murder. Under Heather's version, the verdict could be nothing but self defense.

b. The State's arguments for certiorari rest on incorrect readings of the opinion, precedent, and the record.

The State says the court of appeals applied the wrong standard of review, that the court's opinion is contrary to precedent, and that there are inconsistencies in Heather's testimony from which a jury could infer evidence of voluntary manslaughter.

i. The court used the right standard.

The State's main argument for certiorari is based on its belief that the court of appeals applied the wrong standard of review. Respectfully, this argument misreads the opinion.

The court of appeals said the evidence at trial determines the law to be charged. (App.p.1896) (citing *State v. Gilland*, 402 S.C. 389, 400, 741 S.E.2d 521, 527 (Ct. App.

2012)). The court also said the circuit court must charge a lesser-included offense if there is "any evidence" the defendant committed the lesser offense rather than the greater offense. *Id.* (citing *State v. White*, 361 S.C. 407, 412, 605 S.E.2d 540, 542 (2004)). The court explained the "totality of the evidence" controls whether there is a rational inference the defendant committed the lesser offense. *Id.* (citing *State v. Geiger*, 370 S.C. 600, 607, 635 S.E.2d 669, 673 (Ct. App. 2006)). The court of appeals correctly said a trial court should refuse to give a lesser-included charge when there is no evidence the defendant committed the lesser offense. *Id.* The court also said a contention that the jury might accept part of the State's evidence and reject part of the State's evidence will not support a lesser charge. *Id.*

The court of appeals examined Heather's version of events (App.pp.1903-1904) and the State's version of events. (App.pp.1904-1910). The court correctly explained Heather's testimony does not contain any evidence of heat of passion. (App.p.1904). The court also discussed and rejected the State's argument that heat of passion could be inferred from the evidence of an altercation prior to the shooting. (App.pp.1908-1910).

The State's argument focuses on two instances where the court of appeals said the facts are viewed in the light most favorable to the defendant when deciding whether to give a charge on a lesser included offense. (App.pp.1896 & 1903). The State says this is wrong and that the facts should be viewed in its favor because Heather opposed the lesser charge.

First, it is hard to see how the State's argument makes sense. In a case where the competing claims are murder and self-defense, the facts would presumably support murder when viewed in the State's favor. The facts would presumably support self-defense when viewed in the light most favorable to the defendant.

The language at issue appears to have originated in *State v. Gadsen*, which says "[i]n determining whether the evidence required a charge of voluntary manslaughter, we view the facts in a light most favorable to the defendant." 314 S.C. 229, 233, 442 S.E.2d 594, 597 (1994). All this language means is that the court views the evidence in the light that mitigates the crime from the greater offense if there is any evidence supporting the lesser crime rather than the greater crime. This is not a summary judgment hearing where the scales are weighted in a party's favor depending on which party makes the motion.

Second, and as noted previously, the court of appeals did not perform a one-sided analysis. It extensively summarized the State's case and Heather's case. It specifically discussed the State's contention that evidence of a heated argument justified voluntary manslaughter. (App.pp.1908-1910). It specifically mentioned the State's argument that Heather had given an inconsistent description of the fatal encounter to a friend as well as the State's speculation that David might have "disengaged" from the assault—an assault he started—before Heather shot him. *Id.* There is no evidence David disengaged, but none of this would be in the opinion if the court of appeals was loading the scales in Heather's favor.

ii. The court followed precedent.

The court of appeals extensively discussed this Court's precedent, focusing particularly on three cases—*State v. Starnes*, *State v. Niles*, and *Cook v. State*.

The court of appeals noted this Court's admonition in *Starnes* that trial courts have struggled with the "the difficult interplay" between murder and voluntary manslaughter when the defendant claims self-defense. (App.p.1897). The court accurately recounted the reasoning and holding in that case, which was that a voluntary manslaughter charge had been

properly denied because the defendant's testimony that he fired the fatal shots out of fear was not evidence that he was out of control or under an uncontrollable impulse to do violence. (App.p.1899) (citing *Starnes*, 358 S.C. 590, 599, 698 S.E.2d 604, 609 (2010)).

The court of appeals correctly described why voluntary manslaughter had been properly denied in *Niles*, a case where a defendant claimed someone shot at him, that he returned fire, and that he shot without looking and was not trying to hit anyone. (App.pp.1900-1901). There, as here, the testimony was that the defendant lacked any criminal intent to harm. (App.p.1901) (citing *Niles*, 412 S.C. 515, 772 S.E.2d 877 (2015)).

And the court of appeals accurately described *Cook*, a case where there was evidence the defendant was trying to leave an altercation, the aggressor was nevertheless pursuing the defendant, and the defendant said "before I knew it, I fired a shot." (App.pp.1901-1902) (citing *Cook*, 415 S.C. 551, 784 S.E.2d 665 (2015)). The court of appeals noted this Court's rejection of the argument that heat of passion could be inferred from the fact that the defendant was in fear, that the defendant shot twice, and from the defendant's statement that he fired "before he knew it." (App.p.1902).

The court of appeals correctly reviewed these cases and noted that the only possible conclusions from the evidence here were that Heather shot her husband intentionally and that "she either shot him with malice aforethought or in self-defense." (App.pp.1903-1904).

The court of appeals discussed and distinguished *State v. Lowry* and *State v. Knoten*. (App.pp.1904-1906). On appeal, the State argued this case was like those cases.

As the court of appeals correctly explained, both of those cases had evidence of active pursuit—a defendant who actively pursued the decedent after the two had been in a heated

confrontation. The court of appeals accurately explained there was no evidence this altercation stopped before the shooting and no evidence Heather pursued David before firing the fatal (and only) shot. (App.p.1906). Heather's testimony supports nothing but self-defense. The State's theory—that David told Heather he was leaving her and that she shot him after leaving the bathroom to get a gun—supports nothing but murder.

iii. The testimony is consistent.

The State says the court of appeals ignored the State's imagined inconsistencies between Heather's trial testimony and the statements she gave to the 9-1-1 operator and the police officers who interrogated her in the hospital.

The court of appeals did not ignore anything. On the second page of the opinion, the court of appeals specifically mentioned "the State presented evidence to show [Heather] gave inconsistent accounts of what happened." (App.p.1887).

The reason the court of appeals did not dwell on the State's argument is that there are no actual inconsistencies between Heather's statements. The full transcript of the hospital interrogation is in the Appendix. (App.pp.1771-1817). Heather's trial testimony about the fatal encounter is in the Appendix as well. (App.p.1375, line 24 - p.1381, line 25). The recording of the 9-1-1 call is on file with the Court.

Heather consistently reported that she shot David as she was backing away from him. (App.p.1380, line 17 - p.1381, line 6) (trial testimony); (App.p.1778, line 24 - p.1779, line 28; p.1784, lines 18-24; p.1788, lines 29-37) (police interrogation). She was specifically asked at trial about telling the 9-1-1 operator David had come at her with a wrench and that the knife was on the floor where David had dropped it. (App.p.1397, lines 2-25; p.1448, line

5 - p.1449, line 20). She consistently explained David had been armed with a knife, that she did not know what happened to the knife after David fell on the floor, and that if the knife had moved after the shooting it was only moved inadvertently while Heather was checking for David's pulse and doing CPR. (App.p.1402, lines 5-20) (trial); (App.p.1792, lines 31-37; p.1801, line 24 - p. 1802, line 3; p.1805, lines 18-28; p.1810, lines 6-45) (police statement).

At trial, one of the police officers who interrogated Heather at the hospital agreed the officers asked her multiple compound questions. (App.p.460, line 19 - p.462, line 11). He also admitted the gist of Heather's statement to the police at the hospital was that David had come at her with a knife. (App.p.471, lines 12-16).

The State says the court of appeals ignored the differences between Heather's testimony and the testimony of Allyson Brown, a friend who said Heather had given her a different description of the fatal encounter shortly after it occurred. In Brown's telling, Heather said David bit her finger to get her phone from her, that Heather then realized she had also been stabbed, that Heather got the gun from the bathroom drawer after realizing she had been stabbed, and that Heather shot David after he threatened to knock her teeth out and lunged at her with the knife. (App.p.942, line 9 - p.943, line 5).

The court of appeals specifically mentioned Brown's testimony and accurately concluded that it was largely similar to Heather's testimony. (App.pp.1909-1910). While the accounts are somewhat different, nothing in Brown's testimony supports heat of passion. Nothing in Brown's testimony supports an uncontrollable urge to do violence.

In the end, that is the answer to all of the State's arguments. There is no evidence of an uncontrollable urge to kill. This case was murder or self-defense.

II. The court of appeals correctly denied the State's request to remand this case for a trial on *involuntary* manslaughter.

The State says this Court should reverse the court of appeals and remand for a trial on involuntary manslaughter because even though the jury checked "not guilty" beside involuntary manslaughter, the jury was instructed that it could only consider involuntary manslaughter if it found Heather not guilty of voluntary manslaughter. (Petition, p.19). Jurors are presumed to follow their instructions. For that reason, the State says the court must presume the jury did not actually find Heather not guilty of involuntary manslaughter.

First, the Court need not even reach this argument. The first time it appeared was in the State's petition for rehearing. (App.pp.1920-1921). The only involuntary manslaughter argument in the State's brief to the court of appeals was that Heather's testimony could supposedly be read as suggesting she did not mean to shoot David and shot him unintentionally. (App.pp.1868-1869). At no point in the State's brief did the State argue the jury's checkmark by involuntary manslaughter was a nullity.

Precedent explains a party may not raise an issue for the first time in a petition for rehearing. *Herron v. Century BMW*, 395 S.C. 461, 469-470, 719 S.E.2d 640, 644-645 (2011); *Kennedy v. S.C. Ret. Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001); *State v. Primus*, 349 S.C. 576, 583, 564 S.E.2d 103, 107 (2002) (overruled on other grounds by *State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005)). *Primus* is especially instructive since there, as here, this Court specifically noted the State's argument had not been presented to the court of appeals until the petition for rehearing. 349 S.C. at 583, 564 S.E.2d at 107.

Second, there is no evidence supporting an involuntary manslaughter charge. Involuntary manslaughter is an unintentional killing without malice while engaged in either

(a) an unlawful activity not naturally tending to cause great bodily harm *or* (b) a lawful activity with reckless disregard for the safety of others. *Sullivan v. State*, 407 S.C. 241, 244, 754 S.E.2d 885, 887 (Ct. App. 2014).

It is hard to see what evidence could possibly constitute "an unlawful activity" by Heather. She obviously had the right to arm herself after being assaulted and to shoot if David was lunging at her with a knife. If there was no assault and Heather did not have the right to arm herself, that supports murder, not involuntary manslaughter.

It is equally hard to see what could possibly qualify as a "lawful activity" Heather did "with reckless disregard for the safety of others." She obviously had the right to shoot as her husband lunged at her with a knife. Even if it is possible to read Heather's statement as suggesting she did not mean to shoot and that she shot as a reflex or out of instinct, that would not matter. She plainly would have the right to shoot if David was lunging at her. That could only be self defense.

Third, the decision of the court of appeals is sound constitutionally. While the jury should not have marked anything next to involuntary manslaughter, the jury *did* mark that Heather was not guilty of that offense. (App.p.9). The verdict was read into the record as a not guilty verdict without objection from anyone. (App.p.1685, line 21 - p.1686, line 9).

It does not matter that the acquittal was the result of the jury's error in being confused about its instructions. See (App.p.1672, line 23 - p.1673, line 23; p.1678, lines 15-19) (the relevant instructions about moving from a greater to a lesser offense). An acquittal is generally binding even though it is the result of an error of law. *Horry Cty. v. Parbel*, 378 S.C. 253, 263, 662 S.E.2d 466, 471 (Ct. App. 2008) (overruled on other grounds by *State v.*

Oxner, 391 S.C. 132, 705 S.E.2d 51 (2011)); *State v. Tillinghast*, 375 S.C. 201, 203, 652 S.E.2d 400, 401 (2007); *Ball v. United States*, 163 U.S. 662, 670-671 (1896).

There is an exception to the rule that an acquittal is binding. It requires the acquittal to have been procured by fraud or collusion. *Parbel*, 378 S.C. at 262, 662 S.E.2d at 471 (citing *State v. Holliday*, 255 S.C. 142, 145, 177 S.E.2d 541, 542 (1970)). There is no such claim here. Indeed, the defense consistently maintained involuntary manslaughter should not be on the verdict form at all.

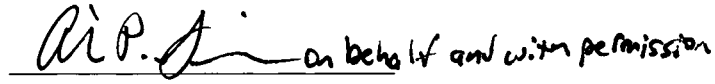
Oddly, the State felt the same way. The State specifically opposed an involuntary manslaughter instruction before reversing its position after a closing argument during which the State argued for nothing but murder. (App.p.1547, lines 16-25; p.1637, lines 5-16).

As with voluntary manslaughter, there is no evidence of involuntary manslaughter. The only way to support either charge is to disregard each party's case and start making things up. That is not permissible. Inferences are based on evidence, not imagination.

CONCLUSION

For the foregoing reasons this Court should deny the petition.

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
JUN 19 2019
S.C. SUPREME COURT

APPEAL FROM HORRY COUNTY
Court of General Sessions

J. Cordell Maddox, Jr., Circuit Court Judge

Op. No. 5631 (S.C. Ct. App. filed Feb. 27, 2019)
Appellate Case No. 2019-000840

The State ..... Petitioner,

v.

Heather Elizabeth Sims ..... Respondent.

PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel with a copy of the *Return to Petition for Writ of Certiorari* by mailing copies of the same by United States Mail with first class postage prepaid to the following addresses:

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June 19, 2019