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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO LEXINGTON COUNTY
Court of Common Pleas
The Honorable Brooks P. Goldsmith, PCR Judge

Appellate Case No. 2019–001694

CURTIS T. JOHNSON,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

SECOND SUPPLEMENTAL APPENDIX

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ALAN WILSON
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ATTORNEYS FOR RESPONDENT

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Robin B. Stilwell, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CURTIS T. JOHNSON,

APPELLANT

INITIAL ANDERS BRIEF OF APPELLANT

ROBERT M. PACHAK
Appellate Defender

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Division of Appellate Defense
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in refusing to grant a directed verdict to the charges against appellant because his actions were in self-defense and in defense of another?

STATEMENT OF THE CASE

Appellant was indicted for murder, two counts of assault and battery with intent to kill, and possession of a weapon by the Lexington County Grand Jury. He was tried along with his brother, Kerwin Parker. Trial was held September 14-18, 2009, before the Honorable Robin B. Stilwell and a jury. Appellant was found guilty of voluntary manslaughter and was sentenced to thirty (30) years imprisonment. He was found guilty of two counts of assault and battery of a high and aggravated nature and was sentenced to ten (10) years imprisonment on both charges. He was found guilty of possession of a weapon and was sentenced to five (5) years consecutive on that charge. Co-defendant Parker, was convicted of one count of assault and battery with intent to kill and possession of a weapon. Respective sentences of twenty (20) years and five (5) years were imposed. Appellant was represented by Elizabeth C. Fullwood, Esquire. Co-defendant Parker, was represented by Jack Duncan, Esquire. The State was represented by Donald Myers, Esquire and Colleen Dixon, Esquire. Because certain portions of the transcript were not able to be transcribed, a reconstruction hearing was held on October 3, 2011. The reconstruction hearing transcript will be included in the record on appeal.

This appeal follows.

ARGUMENT

The trial court erred in refusing to grant a directed verdict to the charges against appellant because his actions were in self-defense and in defense of another.

Appellant was tried in the shooting death of Isaac Wilson, the assault of A. J. Wilson, the vehicular assault of Walter Gadson, and for possession of a firearm. The State's theory of the case was that in the late night hours of November 19 and the early morning hours of November 20, 2006, there was a confrontation between appellant and Isaac Wilson and Wilson's roommate Walter Gadson in Richland County. This fight was over a woman that both appellant and Wilson had affections for. After the fight was over Wilson and Gadson went to their residence in Lexington County. Appellant and his older brother, Kerwin Parker, followed them to their apartment where there was a verbal altercation. That ended up with the car appellant was driving impacting Gadson and then gunshots being fired by appellant. (Tr. p. 71, line 3 – p. 74, line 3).

The defense's theory of the case was the appellant and his girlfriend had broken up but she was pregnant with his child so they were still friends. The girlfriend started dating Wilson and Wilson hated appellant. Wilson and Gadson got behind appellant at a stoplight, pulled him out of his car, punched him, and held a gun to him. Appellant went home and told his older brother and they decided they needed to go talk to Wilson and Gadson to straighten things out. (Tr. p. 75, line 17 – p. 77, line 19). When appellant and his brother got over to Wilson's apartment they were approached by men with guns which they pointed and one was cocked at Kerwin Parker. Appellant was scared and honked his horn. Walter Gadson pointed a shotgun at him. In order to save his life, appellant hit Gadson with his car. He then saw Isaac Wilson holding a shotgun at his brother while A.J. Wilson was beating

him. Appellant remembered his brother had a gun in the car. He got the gun and fired a warning shot but it did not help. Out of fear for his brother, appellant shot until the gun was empty. Appellant fought to defend his life and to defend his brother's life. (Tr. p. 77, line 20 – p. 79, line 6).

Appellant testified that they went over to Isaac Wilson's apartment to talk about the situation and find some peace about it. (Tr. p. 686, lines 1-9). When they got over there three men came running out with shotguns. He knew two of them – Isaac Wilson and Walter Gadson. (Tr. p. 687, line 25 – p. 688, line 6). They walked in a direction toward the vehicle appellant was in. Isaac Wilson said he was going to shoot them. Appellant said he was terrified and scared that he and his brother were going to lose their lives. (Tr. p. 690, line 13 – p. 692, line 18).

(At this point the remaining portion of appellant's testimony was missing. It will be supplemented with appellant's testimony from the reconstruction hearing held on October 3, 2011).

Appellant said his brother was trying to get back to the vehicle. His brother saw that Walter, Isaac, and A.J. had shotguns pointed toward him. (Tr. p. 21, lines 10-16). His brother asked for them to put the guns down. He said they just came to talk. (Tr. p. 22, line 23 – p. 23, line 8). His brother started walking to the truck. Walter Gadson cocked his shotgun and ran towards his brother. Appellant pressed the gas on his vehicle toward Gadson. When Gadson saw the vehicle coming, he turned his shotgun toward appellant and appellant drove toward Gadson trying to stop him from shooting his brother and himself. (Tr. p. 24, line 6 – p. 27, line 5). Then appellant saw A. J. holding his brother back and Isaac Wilson pointing his shotgun at his brother. Appellant said he needed to save his

brother's life and got his brother's gun out of the glove box. He shot a warning shot hoping they would get off of his brother but they did not. Appellant ran toward him and shot at A. J. five times and at Isaac two times to save his brother's life. (Tr. p. 30, line 16 – p. 33, line 3).

At the end of the State's case defense counsel moved for a directed verdict based on the sufficiency of the evidence. That motion was denied. (Tr. p. 627, line 24 - p. 629, line 23)[1] At the conclusion of all the testimony, defense counsel renewed the direct verdict motions recognizing that appellant's testimony established self-defense and defense of another as a matter of law. The trial court denied the motions. (Tr. p. 765, line 21 – p. 766, line 3). That ruling was in error.

Due process as guaranteed by the Fourteenth Amendment requires "that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof—defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." Jackson v. Virginia, 443 U.S. 307, 316, 99 S.Ct. 2781, 2787 (1979).

Our Court has held:

> [T]he trial judge is concerned with the existence or non-existence of evidence, not with its weight; and, although he should not refuse to grant the motion where the evidence merely raises a suspicion that the accused is guilty, it is his duty to submit the case to the jury if there be any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced. [Emphasis added].

[1] These page numbers reflect the original trial transcript page numbers.

State v. Littlejohn, 228 S.C. 324, 89 S.E.2d 924, 926 (1955); State v. Edwards, 298 S.C. 272, 379 S.E.2d 888 (1989), cert. denied, 493 U.S. 895, 110 S.Ct. 246 (1989).

In applying this standard, our Court has held that evidence which is "sufficient to raise a strong suspicion of the guilt of the accused" is not sufficient to constitute "any evidence form which the guilt of the accused may be fairly and logically deduced." State v. Totherow, 263 S.C. 275, 210 S.E.2d 228, 230 (1974). See, also, State v. Turner, 117 S.C. 470, 109 S.E. 119, 120 (1921). The motion for a directed verdict should be granted, therefore, "where evidence merely raises a suspicion of guilt, or is such to permit the jury to merely conjecture or to speculate as to the accused's guilt." State v. Brown, 267 S.C. 311, 227 S.E.2d 674, 677 (1976), citing State v. Matarazzo, 262 S.C. 662, 207 S.E.2d 93, cert. denied, 420 U.S. 945 (1974). "If the evidence is consistent with both innocence and guilt it cannot support a conviction." United States v. Varoz, 740 F.2d 772, 775 (10th Cir. 1984); United States v. Ortiz, 445 F.2d 1100, 1103 (10th Cir. 1971). Guilt is only to be found when there is a "rationally supportable state of near certitude." Evans-Smith v. Taylor, 19 F.3d 899, 906 (4th Cir. 1994).

In this case appellant established both self-defense and defense of another as a matter of law. The State had the duty to disprove these defenses. This they have not done. There is no "rationally supportable state of near certitudes" that appellant was not acting in self-defense or defense of another.

CONCLUSION

A directed verdict should be granted to the charges against appellant.

Respectfully submitted,

Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

This 5th day of January, 2012.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Robin B. Stilwell, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CURTIS T. JOHNSON,

APPELLANT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Curtis T. Johnson states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.

2. He has reviewed the record of appellant's trial before Judge Robin B. Stilwell, which was held on October 21, 2009, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, he asks the Court to relieve him as counsel for Curtis T. Johnson.

Respectfully submitted,

Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

This 5th day of January, 2012.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Robin B. Stilwell, Circuit Court Judge

THE STATE,

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V.

CURTIS T. JOHNSON,

APPELLANT

DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

(1) True–billed indictment(s);
(2) September 14-18, 2009 trial transcript
(3) October 21, 2009 sentencing transcript
(4) October 3, 2011 reconstruction hearing transcript

I certify that this designation contains no matter which is irrelevant to this appeal.

January 5th, 2012

Robert M. Pachak
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

Attorney for Appellant

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Robin B. Stilwell, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CURTIS T. JOHNSON,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and on Curtis T. Johnson, #337543 at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210; this 5th day of January, 2012.

Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 5th day of January, 2012.

(L.S.)
Notary Public for South Carolina

My Commission Expires: June 21, 2020 .

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable Robin B. Stilwell, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KERWIN S. PARKER AND
CURTIS T. JOHNSON,

APPELLANTS.

MOTION TO REMAND
FOR
RECONSTRUCTION OF RECORD

Appellant Curtis T. Johnson was convicted of voluntary manslaughter, two counts of assault and battery of a high and aggravated nature, and possession of a weapon after a jury trial held before the Honorable Robin B. Stillwell on September 14-18, 2009, in Lexington County.

The undersigned appellant counsel has been appointed to perfect this appeal. In reviewing the transcript of this trial, the court reporter who transcribed the transcript of record, Pamela E. Green, typed a note at the bottom of page 692 stating that "The remaining portion of Defendant Johnson's testimony is missing." I have learned that there was an equipment malfunction and there

is no backup. The court reporter who reported this trial, Priscilla Nay, had confirmed that there was an equipment malfunction and that there is no backup.

Appellant has contacted me in writing and has challenged many remaining portions of the transcript as far as accuracy is concerned. I have sent his challenge on to Pricilla Nay to get her response.

As far as the missing portion of appellant's testimony, appellant counsel would ask that this case be remanded to the Lexington County Public Defender, Elizabeth C. Fullwood, Judge Stillwell, and solicitors Donald V. Myers and Colleen E. Dixon to see if the record can be reconstructed.

Appellant counsel would also ask that the time limits for the appeal be held in abeyance pending resolution of this matter.

Respectfully submitted,

Robert M. Pachak
Appellate Defender

Attorney for Petitioner

This 4th day of February, 2011

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable Robin B. Stilwell, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KERWIN S. PARKER AND
CURTIS T. JOHNSON,

APPELLANTS.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Motion to Remand for Reconstruction of Record in the above referenced case has been served upon opposing counsel, Salley W. Elliott, Esquire and Curtis T. Johnson, #337543 at Broad River Correctional Institution this 4th day of February, 2011.

Robert M. Pachak
Appellate Defender

Attorney for Petitioner

SUBSCRIBED AND SWORN TO before me
this 4th day of February, 2011.

(L.S.)
Notary Public for South Carolina
My Commission Expires: June 21, 2020

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County
The Honorable Robin B. Stilwell, Circuit Court Judge

THE STATE,

Respondent,

vs.

KERWIN S. PARKER AND
CURTIS T. JOHNSON,

Appellants.

RETURN TO MOTION FOR REMAND FOR RECONSTRUCTION OF RECORD

Respondent, by and through undersigned counsel, would respectfully show unto this Court:

1. Appellants were indicted for murder, two counts of assault and battery with intent to kill and possession of a firearm or knife during the commission of a violent crime. Appellants were convicted of voluntary manslaughter, two counts of assault and battery of a high and aggravated nature and possession of a weapon after a jury trial held before the Honorable Robin B. Stilwell on September 14-18, 2009.

2. Appellants filed and served Notices of Appeal and the appeals are currently pending before this Court.

3. In the motion to remand for reconstruction of the record, counsel for appellants asserts that a portion of appellant Johnson's testimony is missing beginning on transcript page 692. He asserts that the trial transcript contains a note verifying that fact. He also states that in

communication with the court reporter he has learned there was an equipment malfunction and that no backup tape exists for the equipment. He also asserts that Appellants are challenging the accuracy of other portions of the transcript.

4. Respondent has no information respecting communications between the court reporter and counsel for appellants which challenges to the accuracy of the transcript. Respondent has no information concerning communications with the court reporter and any equipment malfunction. As to the missing portions of the Appellant Johnson's testimony, Respondent confirms that page 692 contains a note indicting the remaining portion of Johnson's direct examination testimony is missing. Page 693 of the transcript begins with cross-examination of Johnson by the prosecutor.

5. Based upon the missing portions of the transcript, Respondent has no objection to a remand to the Lexington County Court of General Sessions for the Lexington County Public Defender Elizabeth C. Fullwood, the Honorable Robin B. Stilwell and Solicitors Donald V. Myers and Colleen E. Dixon to reconstruct the record. Respondent also joins in Appellants' motion to hold the time limits for the appeal in abeyance pending resolution of the remand.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

BY: Salley W Elliott
Salley W. Elliott
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

February 14, 2011

ATTORNEYS FOR RESPONDENT

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County
The Honorable Robin B. Stilwell, Circuit Court Judge

THE STATE,

Respondent,

vs.

KERWIN S. PARKER AND
CURTIS T. JOHNSON,

Appellant.

PROOF OF SERVICE

I, Angela Bennett, certify that I have served the Return to Motion to Remand for Reconstruction of the Record on Appellant by depositing a copy of the same in the United States mail, postage prepaid, addressed to Robert M. Pachak, S.C. Commission on Indigent Defense, Division of Appellate Defense, Post Office Box 11589, Columbia, South Carolina 29211-1589.

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

This 14th day of February, 2011.

ANGELA BENNETT
Administrative Assistant
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

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The South Carolina Court of Appeals

The State, Respondent,

v.

Curtis T. Johnson, Appellant.

Judge Robin B. Stillwell
Lexington County
Trial Court Case No. 2007-GS-32-01473
2007-GS-32-01474
2007-GS-32-01475
2007-GS-32-01476

ORDER

Appellant has filed a Motion for Remand to Reconstruct the Record.[1] In his motion, Appellant challenges the accuracy of the transcript of the proceedings below and notes that a portion of the transcript is missing. Respondent filed a return, consenting to the motion. After careful review, we hold this appeal in abeyance and remand this action to the circuit court for a reconstruction hearing. Appellant shall provide this Court with a status report in thirty days, and every thirty days thereafter, until resolution of the remand.

IT IS SO ORDERED.

J. J.

Columbia, South Carolina

FILED
3/10/11

[1] In a separate appeal, Appellant's co-defendant, Kerwin S. Parker, has also filed a Motion for Remand to Reconstruct the Record. We grant Parker's motion by separate order.

cc: Appellate Defender Robert M. Pachak
Curtis Johnson, # 337543
Assistant Deputy Attorney General Salley W. Elliott

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Robin B. Stilwell, Circuit Court Judge

THE STATE,

RESPONDENT,

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CURTIS T. JOHNSON,

APPELLANT

FINAL ANDERS BRIEF OF APPELLANT

ROBERT M. PACHAK
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
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ATTORNEY FOR APPELLANT

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This appeal follows.

ARGUMENT

The trial court erred in refusing to grant a directed verdict to the charges against appellant because his actions were in self-defense and in defense of another.

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him. Appellant remembered his brother had a gun in the car. He got the gun and fired a warning shot but it did not help. Out of fear for his brother, appellant shot until the gun was empty. Appellant fought to defend his life and to defend his brother's life. (ROA p. 77, line 20 – p. 79, line 6).

Appellant testified that they went over to Isaac Wilson's apartment to talk about the situation and find some peace about it. (ROA p. 686, lines 1-9). When they got over there three men came running out with shotguns. He knew two of them – Isaac Wilson and Walter Gadson. (ROA p. 687, line 25 – p. 688, line 6). They walked in a direction toward the vehicle appellant was in. Isaac Wilson said he was going to shoot them. Appellant said he was terrified and scared that he and his brother were going to lose their lives. (ROA p. 690, line 13 – p. 692, line 18).

(At this point the remaining portion of appellant's testimony was missing. It will be supplemented with appellant's testimony from the reconstruction hearing held on October 3, 2011).

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brother's life and got his brother's gun out of the glove box. He shot a warning shot hoping they would get off of his brother but they did not. Appellant ran toward him and shot at A. J. five times and at Isaac two times to save his brother's life. (ROA p. 30, line 16 – p. 33, line 3).

At the end of the State's case defense counsel moved for a directed verdict based on the sufficiency of the evidence. That motion was denied. (ROA p. 627, line 24 - p. 629, line 23)[1] At the conclusion of all the testimony, defense counsel renewed the direct verdict motions recognizing that appellant's testimony established self-defense and defense of another as a matter of law. The trial court denied the motions. (ROA p. 765, line 21 – p. 766, line 3). That ruling was in error.

Due process as guaranteed by the Fourteenth Amendment requires "that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof—defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." Jackson v. Virginia, 443 U.S. 307, 316, 99 S.Ct. 2781, 2787 (1979).

Our Court has held:

> [T]he trial judge is concerned with the existence or non-existence of evidence, not with its weight; and, although he should not refuse to grant the motion where the evidence merely raises a suspicion that the accused is guilty, it is his duty to submit the case to the jury if there be any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced. [Emphasis added].

[1] These page numbers reflect the original trial transcript page numbers.

State v. Littlejohn, 228 S.C. 324, 89 S.E.2d 924, 926 (1955); State v. Edwards, 298 S.C. 272, 379 S.E.2d 888 (1989), cert. denied, 493 U.S. 895, 110 S.Ct. 246 (1989).

In applying this standard, our Court has held that evidence which is "sufficient to raise a strong suspicion of the guilt of the accused" is not sufficient to constitute "any evidence form which the guilt of the accused may be fairly and logically deduced." State v. Totherow, 263 S.C. 275, 210 S.E.2d 228, 230 (1974). See, also, State v. Turner, 117 S.C. 470, 109 S.E. 119, 120 (1921). The motion for a directed verdict should be granted, therefore, "where evidence merely raises a suspicion of guilt, or is such to permit the jury to merely conjecture or to speculate as to the accused's guilt." State v. Brown, 267 S.C. 311, 227 S.E.2d 674, 677 (1976), citing State v. Matarazzo, 262 S.C. 662, 207 S.E.2d 93, cert. denied, 420 U.S. 945 (1974). "If the evidence is consistent with both innocence and guilt it cannot support a conviction." United States v. Varoz, 740 F.2d 772, 775 (10th Cir. 1984); United States v. Ortiz, 445 F.2d 1100, 1103 (10th Cir. 1971). Guilt is only to be found when there is a "rationally supportable state of near certitude." Evans-Smith v. Taylor, 19 F.3d 899, 906 (4th Cir. 1994).

In this case appellant established both self-defense and defense of another as a matter of law. The State had the duty to disprove these defenses. This they have not done. There is no "rationally supportable state of near certitudes" that appellant was not acting in self-defense or defense of another.

CONCLUSION

A directed verdict should be granted to the charges against appellant.

Respectfully submitted,

Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

This 4th day of June, 2012.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Robin B. Stilwell, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CURTIS T. JOHNSON,

APPELLANT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Curtis T. Johnson states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.

2. He has reviewed the record of appellant's trial before Judge Robin B. Stilwell, which was held on October 21, 2009, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, he asks the Court to relieve him as counsel for Curtis T. Johnson.

Respectfully submitted,

Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

This 4th day of June, 2012.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

June 4, 2012

Robert M. Pachak
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Robin B. Stilwell, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CURTIS T. JOHNSON,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Anders Brief of Appellant in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Final Anders Brief of Appellant and Record on Appeal has been served on Curtis T. Johnson, #337543 at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210; this 4th day of June, 2012.

Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 4th day of June, 2012.

(L.S.)
Notary Public for South Carolina

My Commission Expires: June 21, 2020.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM LEXINGTON COUNTY

ROBIN B. STILWELL, CIRCUIT COURT JUDGE

CURTIS T. JOHNSON,

APPELLANT

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PRO SE BRIEF OF APPELLANT

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Pro Se Appellant

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Whether the trial court erred in instructing the jury on a charge of mutual combat, since the instruction was highly prejudicial to Appellant's defense and the instruction denied Appellant his right to a fair trial.

STATEMENT OF THE CASE

Appellant was indicted for murder, two counts of assault and battery with the intent to kill, and possession of a weapon during the commission of a violent crime by the Lexington County Grand Jury. He was tried along with his brother, Kerwin S. Parker. Trial was held September 14-18, 2009, before the Honorable Robin B. Stilwell and a jury. Appellant was found guilty of voluntary manslaughter, two (2) counts of assault and battery of a high and aggravated nature, and possession of a weapon during the commission of a violent crime, receiving a sentence of thirty five (35) years total. Appellant was represented by Elizabeth C. Fullwood, Esquire, while codefendant Parker was represented by Jack Duncan, Esquire. The State was represented by Donald Myers, Esquire, and Colleen Dixon, Esquire. Because certain portions of the transcript were not able to transcribed, a reconstruction hearing was held on October 3, 2011. The reconstruction hearing transcript will be included in the record on appeal.

This appeal follows.

I.

Appellant objects to Pachak's petiton to be relieved as counsel of record, and that the granting of Pachak's petition would deny Appellant his right to the effective assistance of appellate counsel on his first appeal of right.

FACTS

Robert M. Pachak, Esquire was appointed to represent Appellant on direct appeal. On June 4, 2012 Pachak filed a no merit appeal pursuant to Anders v. California, 386 U.S. 738, 87 S. Ct. 1396 (1967) claiming the appeal is without legal merit sufficient to warrant a new trial while subsequently motioning this court to be relieved of counsel.

Appellant objects to Pachak's petition to be relieved as appellate counsel on the grounds there are meritorious and substantive issues available and unbriefed that were properly preserved for appellate review during trial.

Appellant asserts he has a right to the effective assistance of appellate counsel on his first appeal as a matter of right. Pachak should not be relieved as counsel and this court should order Pachak to brief the substantive issues Appellant has raised in his Pro-se Anders brief.

Appellant believes Pachak's petition to be relieved of counsel should be denied and Pachak should be ordered to redraft Appellant's brief to contain the underlying substantive issues.

ARGUMENT

Accordingly the Sixth Amendment as applied to the States through the Fourteenth Amendment, guarantees a criminal defendant the right to counsel on his first appeal as of right. See Douglas v. California, 372 U.S. 353,356, 83 S. Ct. 814 (1963). It also, guarantees his the effective assistance of counsel on appeal. Lucy v. Evitts, 469 U.S. 396, 105 S. Ct. 830 (1985).

In Jones v. Barnes, 463 U.S. 745,103 S. Ct. 3308, 3311, the Court held that since Anders v. California, 386 U.S. 738, 87 S. Ct. 1396 (1967) the court has held that since Anders bars counsel from abandoning a non-frivolous appeal, it also bars counsel from abandoning a non-frivolous issue on appeal.

Under Anders v. California. 386 U.S. 738, 87 S. Ct. 1396 (1967), the Court held that an appointed attorney must advocate his client's cause vigorously and may not with draw from a non-frivolous appeal -- appointed counsel must present on appeal [all] non-frivolous arguments requested by his client.

In the instant matter Pachak has abandoned substantive meritorious issues, that in granting Pachak's petition to be relieved as counsel will result in a denial of effective assistance of counsel on appeal and a denial of due process.

The underlying substantive claims that Pachak has abandoned are raised pro-se herein the instant pro-se Anders brief.

RELEVANT FACTS

On November 19, 2006, Appellant went to the home of his ex-girlfriend Rebekah F. Fleming, whom at the time was pregnant with his child, to talk/renew their relationship, and to get his hair done. (R. p. 658, line 25-p. 662, line 13) After some time Appellant and Fleming got into a disagreement about their children. Fleming gets on the phone, calls her sister Amy Fleming and the police. Appellant subsequently goes to the room of Harvey Fleming, Fleming father, to tell him the problem. Amy and an officer arrives; Amy leaves, and the situation was discussed between the officer, Fleming's father, and appellant. After the discussion Appellant went home. (R. p. 662, line14 - p.666, line 20)

As Appellant drives home, he was followed by Isaac Wilson and Walter Gadson. At a stop light, Wilson and Gadson get out of their vehicle, hold a gun on Appellant and assault him. Appellant manages to get away and drives home. (R. p.666, line 21 - p.677, line 9)

Appellant proceeds to tell his mother, stepfather and his older brother Kerwin S. Parker what has occurred. Appellant and Parker decide to go talk with Wilson and Gadson to work things out and come to a peaceful solution. (R. p. 677, line 10-p. 679, line 4)

They arrive at Wilson's apartment and Appellant parks his vehicle in the parking lot. Parker walks to Wilson's apartment, using the public sidewalk that leads from the parking lot to Wilson's apartment, to talk to Wilson and Gadson about them all getting together to talk and make peace out of the situation. (R. p. 681, line 19 - p. 687, line 23) While Parker was walking, Wilson, Gadson, and Wilson's cousin A. J. Wilson came out of the back of Wilson's apartment patio with three (3) shotguns. They all left Wilson's patio walking to the parking lot pointing their shotguns at the vehicle Appellant was in. Appellant didn't move in the vehicle because he didn't know what was going to happen. While approaching, Wilson stated

that they were going to shoot Appellant and Parker. (R. p. 687, line 24 - p. 692, line 10) (R. p.701, line 15 - p. 703, line 4) Appellant got terrified and scared that his brother and he were going to lose their lives. Appellant started the vehicle and honked the horn trying to get Parker to come back to the vehicle. (R. p. 692, lines 11-23) Parker tries to come back down the sidewalk to the vehicle. When Wilson, Gadson, and A. J. Wilson see Parker, they all point their shotguns at him. (R. p. 937, line 9 - p. 938 line 10) When Parker sees the weapons pointed at him, he stopped moving towards the vehicle and crouches down with his hands up in the air. Parker asked the three men to please put their weapons down and that he and Appellant just came to talk. Wilson replied with profanity, and said they were not going to talk about anything. Parker responded that they didn't come over to harm anyone, they just came to talk, but since they can't talk, Appellant and he were going to leave. Parker then told the men that he was going to stand up, go to the vehicle, and he and Appellant were going to leave. (R. p. 938 line 11 - p. 940, line 4)

As Parker was withdrawing to the vehicle, Gadson made an unprovoked attack by cocking his shotgun and ran with it to the public sidewalk aimed at Parker. Appellant, seeing his brother about to lose his life, acted to rescue his brother by driving the vehicle at Gadson, to stop Gadson from shooting Parker. Gadson sees that Appellant tries to stop him and then points his shotgun at the vehicle. Appellant keeps driving at Gadson to now stop Gadson from shooting him. Gadson moves out of the way and Appellant drives past Gadson, crashing the vehicle. (R. p. 940, line 6,- p. 943, line 18) (R. p. 729, line,15 - p. 731, line 14) After crashing the vehicle, Appellant saw Parker struggling to escape from A. J., who was holding Parker, while Wilson was pointing his shotgun at Parker. Appellant saw that he needed to save his brother's life again. Appellant tries to get out of the vehicle to help his brother, but he was

trapped inside the wrecked vehicle. (R. p. 943, line 19 - p. 947 line 4) Appellant looks again, sees Parker being held now on the ground by A..J., and Wilson is aiming his shotgun at Parker's face. (R. p. 947. lines 6-11) To save his brother's life, Appellant got his brother's gun out of the glove box. Appellant fired a warning shot in hopes that they would get off of his brother, because at the time, Appellant could not get out of the crashed vehicle. (R. p. 947, line 13 - p. 948, line 2);(R. p. 733, line 6 - p. 735, line 2) A. J. and Wilson did not stop, they continued to threaten Parker's life. Appellant then squeezed out of the driver's door of the crashed vehicle. He ran towards where A. J. and Wilson were attacking his brother, and shot A. J. five times and shot Wilson two times, to save his brother's life. (R. p. 948 line 3- p. 949, line 20)

Appellant and Parker's intention was to go over to Wilson's apartment to talk over the situation and make peace out it. They did not intend to shoot or harm anyone. Appellant acted in defense of another and self-defense, to save his brother's life, and his own. (R. p. 949, line 21- p.957, line 17) The reconstruction hearing court and the State agreed that the Appellant's testimony was consistent with the testimony he gave at the trial. (R. p. 957, line 18, - p. 959, line 11)

ARGUMENT

II

There is insufficient evidence that can reasonably conclude that appellant acted in the element of sudden heat of passion to support a valid voluntary manslaughter conviction, when the element of sudden heat of passion was not established and proven beyond a reasonable doubt, as a matter of law, by the state.

Due process of law requires the state to establish each element of each offense by Proof beyond a reasonable doubt. In re winship, 397 U. S. 358 (1970) The existence of each element of the offense must be established beyond a reasonable doubt. "We explicitly hold that the due process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he has been charged". In re winship, 397 U. S. 358, 364 (1970) Due process as guaranteed by the Fourteenth Amendment requires "that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof-defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense. Jackson v. Virginia, 443 U. S. 307, 316, 99 s. ct. 2781, 2787 (1979). The guilt of the accused, of course, must be proven beyond a reasonable doubt. The reason for this rule is that all presumptions of law, independent of evidence, are in favor of innocence, and every person is presumed to be innocent until he is proved to be guilty. State v. Hyder, 242 S. C. 372, 379, 131 S. E. 2d 96, 100 (1963). Appellant's claim arises out of the Due Process clauses of the Fifth (5) and Fourteenth (14) Amendments, which protect an accused against conviction unless the state supplies proof beyond a reasonable doubt of each element necessary to constitute the crime with which

the accused is charged. In re winship 397 U.S. 358, 364 (1970); similar protections are provided in the South Carolina State Constitution; see S.C. const. art.1, section 3. This principle prohibits the use of evidentiary presumptions in a jury charge that have the effect of relieving the state of its burden of proof beyond a reasonable doubt as to every essential element of the crime. Sandstrom v. Montana, 442 U.S. 510 (1979).

At trial, trial counsel for appellant moved for directed verdicts of not guilty on all indictments. The trial court denied those motions. (R. p. 627, line 22 - p.630, line 2) Later, trial counsel renewed those motions made at the close the State's case and added the additional ground that, Self-defense and Defense of another was established as a matter of law. Trial court denied those motions also. (R. p. 765, line 20 - p. 766, line 6) During closing arguments, trial counsel for Appellant and Parker reiterated that this case was a case of Defense of another and Self-defense. (R. p. 784, line 12 - p. 800, line 16; p. 972, lines 4 - 8; p.800, line 16 - p.803, line 19) The trial court charged voluntary manslaughter to the jury as:

"Now, ladies and gentlemen, if you find that the state has failed to prove murder beyond a reasonable doubt, you may consider whether the state has proved, beyond a reasonable doubt, that the defendant committed voluntary manslaughter. Voluntary manslaughter, the state must prove, beyond a reasonable doubt, that the defendant took the life of another in the sudden heat of passion based on sufficient legal provocation. Both heat of passion and sufficient legal provocation must be present at the time of the killing to constitute voluntary manslaughter.

Sudden heat of passion may, for a time affect a person's self-control and temporarily

disturb a person's reason. The sudden heat of passion must be the type that would make an ordinary person unable to cooly reflect on his actions, and would produce an uncontrollable impulse to do action. Sufficient legal provocation must be the type that would make a person of ordinary reason and cause become enraged and to lose control temporarily. The provocation needed from voluntary manslaughter must come of some act of or related to the victim. Words alone, however vulgar or insulting, are not enough to be legal provocation. Where death is caused by the use of a deadly weapon, the words must be accompanied by some threatening or overt act which could have produced the heat of passion. If the heat of passion cooled or there was or there was enough time between the provocation of the killing of heat of position, if any, or time for the person to cool, the killing would not be voluntary manslaughter. In deciding whether a reasonable person would have had time to cool off, you should consider all the circumstances surrounding the killing. You may consider the nature of the provocation, the defendant's mental and physical state, and the circumstances and relationships between the parties." (R. p. 853,line 13 - p. 854, line 21) After the jury verdict trial counsel for appellant moved for a new trial on the grounds of all the objections made and exceptions taken during the course of the trial. Once again the trial court denied those motions. (R. p. 878, lines 2 - 12)

In this case, the evidence is insufficient to sustain a valid conviction of voluntary manslaughter because the element of sudden heat of passion was not established beyond a reasonable doubt. " Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation." State v. Pittman, 373 S.C. at 572,647 S.E. 2d. at 167 "Heat of passion alone will not suffice to reduce murder to voluntary manslaughter." Id. "Both heat of passion and sufficient legal provocation must be present at the time of the killing." Id. "The sudden heat of passion, upon sufficient legal provocation, which 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. "Conversely, a defendant is not entitled to voluntary manslaughter merely because he was legally provoked." see State v. Pittman373 S.C. 527, 576, 647 S.E. 2d 144,170(2007) (holding although sufficient legal provocation arguably existed, there was no evidence the defendant was in a heat of passion).

Appellant testified that Parker and he went to go talk to Wilson and Gadson to work things out and come to a peaceful solution. (R. p. 677, line 10 - p. 679, line 4) They arrived at Wilson's apartment in hopes to make peace with the other individuals .(R. p. 681, line 19 - p.687, line 23) Gadson, Wilson and A.J.came out of Wilson's apartment with three (3) shot guns; appellant didn't make a move in the vehicle because he didn't know what was going to happen next. Wilson stated that they were going to shoot Appellant and Parker. (R. p. 687, line 24 - p. 692, line 10); (R. p. 701, line 15 -p. 702, line 25) Appellant was scared that his brother and he were going to lose their lives, therefore, started the vehicle and honked the horn trying to get Parker to come back to the vehicle. (R. p.692, lines 11-23) Parker tries to come back to the vehicle but stops when confronted by three men with three shot guns. (R. p. 937, line 9 - p. 938, line 10) Parker told the three men that Appellant and he just came to talk but since they couldn't talk Appellant and he were going to leave. (R. p. 938, line 11 - p. 940, line 4) (R. p. 960, line 13 - p. 961, line 8) At this point appellant was in fear but the appellant remained calm and in control of his faculties. This fear did not sway appellant's reason, and render the mind of the appellant incapable of cool reflection, nor did this fear cause the appellant to lose

control and have an uncontrollable impulse to do violence. At this point appellant was thinking of only getting his brother back to their vehicle so that they could go home once appellant saw that they couldn't talk peacefully with the other men. (R. p. 960, line 13 - p. 961, line 8)

As Parker was withdrawing to the vehicle to leave, an unprovoked attack came from the other party. That's when appellant acted only in saving his brother's life and his own. (R. p. 940, line 6 - p. 943, line 18) (R. p. 729, line 15 - p. 731, line 14) After stopping that first unprovoked attack appellant had crashed his vehicle. After crashing his vehicle appellant saw that his brother life was in danger again and tries to get out of the wrecked vehicle without a weapon to save his brother. (R. p. 946, line 6 - p. 947, line 11) Appellant saw that he was stuck inside the vehicle. To save his brother's life appellant got his brother's gun out of the glove box and shot a warning shot in hope that the other men would stop threatening his brother's life. (R. p. 947 line 13 - p. 948, line 2); (R. p. 733, line 6 - p. 735, line 2) At this point appellant was acting to save his brother's life and his. Appellant was still in fear, but appellant was not acting to under fear that produced an uncontrollable impulse to do violence. Appellant was in full control of himself by only reacting to stop an unprovoked attack that came from the other men. After crashing the vehicle appellant reasoned to get out of the vehicle without a weapon to save his brother. Next, the appellant even shot a warning shot; warning the men to stop their life threatening actions on his brother. Appellant's giving of this warning shows that Appellant mind state was of reasoning and cool reflection, because he wanted to first warn and try to get the men to leave his brother alone before he acted any further. When the other men didn't stop and continued to threaten Parker's life, appellant managed to get out of the vehicle and stop the men from killing his brother. (R. p. 948, line 3 - p. 949, line 20)

Appellant and Parker's intention was to go over to Wilson's apartment to talk over the

situation and make peace out of it. They did not intend to shoot or harm anybody. Appellant Acted in Defense of another and Self-defense to save his brother's life and his. (R. p.678, line 3 - p. 679, line 4) (R. p. 685, line 24 - p. 686, line 9) (R. p. 696, line 15 - p. 699, line 24) (R. p. 705, lines 5-7) (R. p. 906, line 23 - p. 907, line 23) (R. p. 938, line 23 - p. 959, line 11) Appellant tried his best to avoid the situation, but the other men left the appellant with no choice but to act to save his brother's life and his own. Appellant did not shoot the victims impulsively. Appellant gave a warning to the other men to stop their violent threats towards his brother, indicating appellant's ability to reason, have a cool reflection and control of himself. Despite being afraid, evidence reflected only that appellant remained in full control of his faculties to prelude voluntary manslaughter. The state even objected to the voluntary manslaughter saying that appellant was in cool reflection. (R. p. 767, line 4 - p.768, line 17)

Further more, there was insufficient evidence presented supporting that appellant acted in sudden heat of passion. The evidence shows that appellant deliberately and intentionally shot the other men and supports a finding that either appellant shot with malice or in Defense of another and self-defense. In State v. Starnes, 388 S.C. 590, 698 S.E. 2d 604 (2010), the South Carolina Supreme Court clarified the law with respect to whether fear can constitute sudden heat of passion. It clarified the law concerning "how a defendant's fear following an attack or a threatening acts relates to voluntary manslaughter." Id. at 597, 698 S.E. 2d at 608. Specifically, the court stated: " 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 man-slaughter charge, the defendant's fear must manifest itself in an uncontrollable impulse to do violence. A person may act in a deliberate, controlled manner, not withstanding the fact that he is afraid or in fear. Conversely, a person can be acting under an uncontrollable impulse to violence and be incapable of cool reflection as a result of fear. The latter situation constitutes sudden heat of passion, but the former does not. Evidence that fear caused a person to kill another in a sudden heat of passion will mitigate a homicide from murder to manslaughter-it will not justify it. This is the distinction between voluntary manslaughter and self-defense."

Turning to the facts of this case, sufficient evidence shows beyond a reasonable doubt that appellant was acting in a deliberate, controlled manner, not withstanding the fact that he was afraid or in fear. There was insufficient evidence presented at the trial from which the jury could have found that appellant acted in the element of sudden heat of passion beyond a reasonable doubt at the time of the shooting that would support the voluntary manslaughter conviction. The evidence shows that appellant deliberately and intentionally shot the other men and supports a finding that either appellant shot with malice or in defense of another and self-defense.

After reviewing the evidence, no rational trier of fact could have found the essential element of heat of passion and convicted appellant of voluntary manslaughter. As such appellant cannot, as a matter of law, be guilty of voluntary manslaughter, State v. Pittman, 373 S.C. 527, 576, 647 S.E. 2d 144, 170 (2007); State v. Starnes, 388 S.C. 590,698 S.E. 2d 604 (2010); State v. Smith, op. no. 3916 (S.C. Ct. App. filed Jan. 10, 2005; withdrawn, substituted

and Refiled Feb. 10, 2005)

This jury verdict of voluntary manslaughter is not a valid conviction, when the State did not establish, and prove the element of sudden heat of passion beyond a reasonable doubt. This invalid voluntary manslaughter conviction is in violation of appellant's Federal and State Constitutional Rights.

ARGUMENT

III

The trial court erred in instructing the jury on a charge of mutual combat, since the instruction was highly prejudicial to Appellant's defense and the instruction denied Appellant his right to a fair trial.

During the charge conference at trial, the State claimed and requested mutual combat because of the following elements; brass knuckles, a contested pipe, a pistol and that Appellant along with Parker, went to Wilson's apartment. (R. p. 769, lines 19 -25) The trial court said it would charge voluntary manslaughter, self-defense, and mutual combat. (R. p. 770, lines 18-22) The trial court also charged defense of another. (R. p. 862, line 10 - p. 865, line 2)

Trial counsel for appellant objected to the mutual combat charge, citing State v. Taylor, 589 S.E. 2d 1. (2003) (R. p.771, line 6 - p. 772, line 24) The trial court made it's ruling to give the mutual combat charge. (R. p. 772, line 25 - p. 773, line 4) The trial court charged the jury over the Appellant's objection to mutual combat as follows:

"Now, if the defendant voluntarily participated in mutual combat for the purpose other than protection, the killing of the victim would not be self-defense. This is true if, during the combat, the defendant feared death or serious bodily injury. However, if, before the killing is committed, the defendant withdraws and tried to, in good faith to

avoid further conflict either by word or act makes that fact known to the victim, he would be without fault in bringing on the difficulty. For mutual combat there must be a mutual intent and willingness to fight. This intent may be shown by acts and conduct of the parties and circumstances surrounding the conduct. In addition, it must be shown the parties were armed with a deadly weapon. A finding that the defendant was engaged in mutual conduct does not preclude the the jury from convicting the defendant of manslaughter as opposed to murder. When two persons mutually engage in combat, and one kills another, and at the time of the killing it may be maliciously done, it is an murder if it be done in sudden heat and passion upon sufficient provocation without premeditation or malice." (R. p. 859, line 15 - p. 860, line 10)

The trial court erred in ruling to charge mutual combat, and appellant was prejudiced by the charge.

In general, the trial judge is required to charge only the current and correct law of South Carolina, Cohens v. Atkins, 333 S.C. 345, 509 S.E. 2d, 286(Ct. App. (1998), and the law to be charged to the jury is determined by the evidence at trial. State v. Hill, 315 S.C. 260, 262: 433 S.E. 2d 848,849(1993) A trial judge has a duty to give a requested instruction that correctly states the law applicable to the issues and which is supported by the evidence. State v. Peer, 320 S.C. 546, 466 S.E. 2d 375(Ct. App. 1996) To warrant reversal, a trial judge's charge must be erroneous and prejudicial. Ellison v. Parts Distributors, Inc., 302 S.C. 299, 395 S.E. 2d 740 (Ct. App. 1990) In criminal cases, the Appellate court only review's errors of law, and is clearly bound by the trial court's factual findings, unless the findings are clearly erroneous. State v. Baccus, 367 S.C. 41, 48; 625 S.E. 2d 216,220(2006) In reviewing jury charges for error, the Appellate court must consider the trial judge's jury charge as a whole, in light of the evidence and issues presented at trial. State v. Adkins, 353 S.C. 312, 577 S.E. 2d. 460(Ct. App.2003)

The law to be charged must be determined from the evidence presented at trial. State v. Knoten, 347 S. C. 296, 302; 555 S. E. 2d 391, 394(2001) Only the law applicable to the case should be charged to the jury. State v. Blurton, 352 S. C. 203, 208; 573 S. E. 2d 802, 804 (2002) If a jury instruction is provided to the jury that does not fit the facts of the case, it may confuse the jury. Id.

To warrant a charge of mutual combat, mutual combat requires mutual intent and willingness to fight, if a defendant is found to have been involved in mutual combat , the "no fault" element of self-defense can not be established. State v. Taylor, 356 S. C. 227; 589 S. E. 2d 1(2003) Case law does establish that there must be "mutual intent and willingness to fight" to constitute mutual combat. State v. Graham, 260 S. C. 449, 450; 196 S. E. 2d 495 (1973) Mutual intent is manifested by the acts and conduct of the parties and the circumstances attending and leading up to the combat. Id. Whether or not mutual combat exists is significant because the plea of self-defense is not available to one who kills another in mutual combat. Id. Citing State v. Jones, 113 S. C. 134; 101 S. E. 647 (1919) In order to claim self-defense, the defendant must be without fault in bringing on the difficulty. State v. Davis, 282 S. C. 45, 46; 317 S. E. 2d 452, 453(1984) If the defendant is engaged in mutual combat, self-defense is unavailable unless the defendant withdraws from the conflict before the killing occurs. State v. Graham, 260 S. C. 451; 196 S. E. 2d 495-496. Defendant is not considered by the law to be bringing on the difficulty if, following a joining in mutual combat, some initial aggressive or wrongful conduct directed toward the victim, the defendant abandons that mutual combat conduct and withdraws from the situation in a manner that conveys this withdrawal to the victim. In this case, defendant's right to self-defense is said to "revive", and he is entitled to the

right of self-defense as if his initial conduct had not occurred. Thus, he is entitled to use force if the victim attacks him after the defendant has withdrawn from the situation. See, e. g. State v. Graham, 260 S. C. 449; 196 S. E. 2d 495(1973); Annot.; withdrawal, after provocation of conflict, reviving right of self-defense, 55 A. L. R. 3D 1000.

The doctrine has most often been applied in situations where the defendant and decedent bear a grudge against each other before the fight in which one of them is killed occurs. State v. Porter, 269 S. C. 618; 239 S. E. 2d 641(1977) (Holding mutual combat precluded a plea of self-defense where appellant returned to injured party's property at least twice with a gun, despite prior verbal warnings not to return and accompanying gunshots); Graham, 260 S. C. 451, 196 S. E. 2d 496 (Finding mutual combat charge proper where appellant and deceased had quarreled prior to the killing, each knew that the other was armed with a pistol, and each fired his gun at the other); State v. Mathis, 174 S.C. 344; 177 S. E. 318(1934) (Finding mutual combat charge proper based on the testimony that appellant and deceased were on the lookout for each other, that each was armed in anticipation of meeting the other, and that each drew and fired his pistol at the other) South Carolina has not explicitly required that the fight arise out of a pre-existing dispute.

Mutual combat acts as a bar to self-defense and defense of another because it requires mutual agreement to fight on equal terms for purposes other than protection. This is inherently inconsistent with the concept of self-defense and defense of another and directly conflicts with the "no fault" finding necessary to establish self-defense and defense of another. As such, it is only logical that the evidence of agreement to fight be

plain, like the evidence of mutual combat present in the Porter, Graham, and Mathis cases. To charge mutual combat, when there is no evidence to support it effectively cancels the self-defense and defense of another defenses.

In appellant's case, there is insufficient evidence of mutual combat. The State claims mutual combat from the elements of brass knuckles, a contested pipe, a pistol and that appellant and Parker went to Wilson's apartment. These elements are insufficient evidence for warranting a charge on mutual combat because of the following reason:

First, the element of brass knuckles is insufficient evidence because appellant did not arm himself with them or intend to use them. Appellant testified that he used the brass knuckles earlier that day as a tool to help him fix his car. He placed the brass knuckles in his pants pocket with numerous other items and forgot that he had them in his pocket. (R. p. 679, line 15 - p. 681, line 18) The other party never knew about the brass knuckles and other items in appellant's pocket. The brass knuckles and many other items were discovered in appellant's pockets only after he was arrested. (R. p. 375, line 21 - p.377 line 10); (R. P. 379, line 1-p. 380, line 14)

Second, the contested metal pipe is insufficient evidence because it was found on Wilson's patio never tested for finger prints or DNA or confirmed who was in possession of it. Appellant testified that he nor Parker left home armed with the pipe. (R. p. 465, line 20 - p. 466 line 6); (R. p. 679 lines 5 - 14) When they were traveling to Wilson's apartment, appellant did not see a metal pipe in their vehicle. (R. p. 682, lines 2-7) Appellant also testified that Parker was not armed with a metal pipe when he left their vehicle to go talk to the other men. (R. p. 687, lines 16-20)

Third, the pistol is insufficient evidence because the pistol was in the glove box of

their vehicle before appellant and Parker left their home. The pistol was never intentionally placed inside the vehicle. Appellant testified that his brother and he did not leave their home armed with a pistol. (R. p. 679, lines 5-14.) When going to Wilson's apartment, appellant did not visibly see a pistol in their vehicle.(the pistol was in the glove box) (R. p. 682, lines 2-7) The appellant testified that Parker was not armed with the pistol when he left their vehicle to go talk to the other men.(R. p. 687, lines 16-20) The pistol was taken out of the glove box and used only after appellant crashed the vehicle and saw his brother's life in danger.(R. p. 946, line 6 - p. 949, line 3)

Fourth, the State's claim of mutual combat because appellant and Parker went to Wilson's apartment is insufficient evidence for the mutual combat charge. Appellant testified that he didn't associate with nor was a friend to Gadson. Appellant testified that he did not have any bad feelings toward Gadson or Wilson, and that he wasn't an acquaintance of Wilson. Appellant also testified that he never saw A. J. before.(R. p. 658, lines 3-24) Appellant repeatedly testified that Parker's and his intentions for going over to Wilson's apartment was to talk and make peace; they did not intend to go harm anyone or for anyone to get hurt. Once appellant and Parker got to Wilson's apartment and saw they couldn't talk to the three men, who confronted them with shotguns, Parker and appellant withdrew from the situation and tried to go home. This withdrawal was communicated to all three men by word and action. (R. p. 678, line 3 - p. 679, line 4; p. 685, line 24- p. 686, line 9; p. 696, line 15 - p. 699, line 24; p.705, lines 5-7) (R. p. 938, line 23 -p. 939, line 8; p. 952, line 22 - p. 953, line 19) (R. p. 906, line 23 - p. 907, line 23)

At the reconstruction hearing, appellant testified more that his brother and he just wanted to go home, once they saw that they couldn't make peace with the three men. The trial court, the State, both appellant's and Parker's lawyers all agreed that appellant testified to this at trial. (R. p. 960, line13 - p. 961, line 8)

Steve Collins, one of the chief investigating officers, testified that it's not in his report or appellants' statement that appellant or Parker knew before they went over to Wilson's apartment that it would be a fight. (R. p.756, line 8 - p 757, line 2)

For the foregoing reasons, the elements that the State claims as evidence for the charge of mutual combat is insufficient. There is no evidence that appellant and Parker were willing to engage in an armed encounter with the other party. There is insufficient evidence that there was an agreement to engage in armed combat on equal terms or mutual willingness to fight.

In their determination of mutual willingness to fight, the South Carolina cases discussed emphasize that each party knew the other was armed. Here, appellant and Parker did not know that they would be confronted by men armed with shotguns. There is no evidence that Wilson, Gadson and A. J. knew that the appellant had a firearm in the glove box of the vehicle he was in. A firearm was only used by appellant when, after his warning shot, continuing threats of deadly force came from the life threatening actions of Wilson and A. J. towards Parker; which occurred after an unprovoked attack from Gadson as appellant and Parker were trying to avoid any difficulty by withdrawing and leaving.

In determining whether defendant had a right to use force in self-defense against a victim, the continuing nature of the threat by that victim, who is still a threat despite

action by defendant to wound or threaten the victim, may be relevant to the apparent or actual need for force in self-defense and to the amount of force needed. State v. Hendrix, 270 S. C. 653, 244 S. E. 2d 503(1978)

Appellant acted to save his brother's life and his own, which appellant had the right to do. See State v. Dean, 51 S. E. 524(1905):

"I charge you, that no matter what the purpose of the defendant may be seeking the victim, if you find that was his purpose, if when he meets them, he does nothing to provoke the difficulty, and the deceased assaults him, so as to endanger his life or threaten him with serious bodily harm, the defendants right of self-defense is protected and is available to him. This rule does not change, even if you find that the defendant had a dangerous weapon and used it."

In such a case, the right to take the life of the assailant upon such unprovoked assault extends to any relative, friend, or bystander who would likewise have the right to take the life of such assailant if such act was necessary to save the person so wrongfully assailed from imminent danger of being murdered by such assailant. . In other words, if the assailant makes a malicious and unprovoked assault with a deadly weapon upon one person with the apparent malicious intention to take the life of the person assailed and thereby commit murder, then, where the danger of the commission of such murder is imminent, any relative, friend or bystander would have the right to take the life of such assailant if necessary in order to prevent the commission of such murder, provided there was no other reasonable means of escape for the person so assailed, and provided both the person assailed and the person coming to his defense were without legal fault in bringing on the difficulty. State v. Hays, 121 S. C. 163, 168, 169; 113 S. E. 362, 363(1922)

Under the theory of defense of others, one is not guilty of taking the life of an assailant who assaults a friend, relative, or bystander if that friend, relative, or bystander would likewise have the right to take the life of the assailant in self-defense. State v. Sales, supra; State v. Hays, 121 S. C. 163; 113 S. E. 362(1922); State v. Cook, 78 S. C. 253, 59 S. E. 862(1906); State v. Long, 325 S. C. 59, 480 S. E. 2d 62(1997)

A person is entitled to use deadly force where that force is necessary to defend a relative [another person]. The right to protect the relative [other person] arises under the same circumstances as self-defense. See, e. g. Bozeman v. State, 307 S. C. 172, 414 S. E. 2d 144(1992)(dictum); State v. Sales, 285 S. C. 113, 328 S. E. 2d 619(1985)(relative); State v. Ross, 272 S. C. 56, 249 S. E. 2d 159(1978)(siblings); State v. Hays, 121 S. C. 163, 168; 113 S. E. 362, 364(1922)("any relative, friend or bystanders...")

Amy Fleming agreed that Gadson had a shotgun, cocked it, and pointed it at Parker.(R. p. 103, lines 3-7) Rebekah Fleming also agreed that Gadson was going to shoot Parker. (R. p. 133, line 22 - p. 134, line10) Rebekah Fleming even agreed that what happened that night was not appellant's fault.(R. p. 135, lines 9-14. Parker and appellant were never the initial aggressors nor did they provoke an assault. Because Parker and Appellant did not provoke or initiate any conflict, they are, as a matter of law, without fault in bringing on the difficulty.

Under these circumstances, there is insufficient evidence of mutual willingness and intent to fight nor is there evidence of any mutual agreement to engage in an armed encounter of combat on equal terms to submit the issue of mutual combat to the jury. As noted, to warrant reversal, a jury charge must be both erroneous and prejudicial. The

mutual combat charge was prejudicial to appellant as well as erroneous. Ellison, 302 S. C. 299, 395 S. E. 2d 740(Ct. App. 1990)

The mutual combat doctrine is triggered when both parties contribute to the resulting fight. Self-defense and defense of another is available only when the defendants are without fault in bringing on the difficulty. The charging of mutual combat to the jury destroyed appellant's self-defense and defense of another defense. The mutual combat charge removed the burden from the State to disprove self-defense and defense of another. The mutual combat charge transferred the burden onto appellant to prove that there was no mutual combat, his brother and he were not at fault in bringing on the difficulty and that appellant and his brother tried to withdraw. Appellant admitted to acting only to save his brother's life and his own, and relied entirely on self-defense and defense of another at trial. The courts have always placed great emphasis on the importance of a defendant's right to assert self-defense and defense of another, and has greatly required that the burden to disprove self-defense and defense of another remain on the State. See State v. Burkhart, 350 S. C. 252, 565 S. E. 2d 298(2002); State v. Addison, 343 S. C. 290, 540 S. E. 2d 449(2000); State v. Wiggins, 330 S. C. 538, 500 S. E. 2d 489(1998); Bozeman v. State, 307 S. C. 172, 414 S. E. 2d 144(1992); State v. Sales, 285 S. C. 113, 328 S. E. 2d 619(1985); State v. Ross, 272 S. C. 56, 249 S. E. 2d 159(1978); State v. Long, 325 S. C. 59, 480 S. E. 2d 62(1997)

The court charged self-defense and defense of in appellant's case. Those charges were negated by the court's unwarranted jury charge on mutual combat, when there was insufficient evidence to warrant the charge. The court's mutual combat charge acted as a limitation on appellant's ability to claim self-defense and defense of another, and prejudiced him by transferring the State's burden to disprove self-defense and defense of another onto appellant, forcing appellant to prove self-defense and defense of another, in violation of Burkhart, Addison and Wiggins; thus violating appellants Federal and State Constitutional rights.

CONCLUSION

WHEREFORE, Pachak's petition to be relieved as counsel should be denied and Pachak ordered to redraft Appellant's pro-se brief to contain sufficient factual and legal citations to properly raise the issues before this Honorable Court; and/or this Honorable Court acknowledge Appellant's pro-se brief and reverse Appellant's convictions and sentences and remand this case to trial court for a new trial.

Respectfully Submitted,

Curtis T. Johnson

Curtis T. Johnson
SCDC# 337543
Pro Se Appellant

This 13 day of September, 2012

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County
Robin B. Stilwell, Circuit Court Judge

Appellate Case No. :2009-143767

Curtis Johnson,

Appellant,

v.

The State,

Respondent

CERTIFICATE OF SERVICE

The undersigned Pro Se Appellant hereby certifies that a true copy of the Appellant Pro Se Brief has been placed in the U.S. Postal Mail, postage paid and addressed to the Clerk for the South Carolina Court of Appeals at Post Office Box 11629, Columbia, SC 29211; this 13 day of September, 2012.

Curtis T. Johnson
Curtis T. Johnson
Pro Se Appellant

SUBSCRIBED AND SWORN TO before me
this 13th day of September, 2012

Susan H. Frye
Notary Public for South Carolina
My Commission Expires
My Commission Expires: March 5, 2018

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Curtis T. Johnson, Appellant.

Appellate Case No. 2009-143767

Appeal From Lexington County
Robin B. Stilwell, Circuit Court Judge

Unpublished Opinion No. 2013-UP-022
Submitted December 3, 2012 – Filed January 16, 2013

APPEAL DISMISSED

Appellate Defender Robert M. Pachak, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, and Senior Assistant Deputy Attorney General Salley W. Elliott, all of Columbia, for Respondent.

PER CURIAM: Dismissed after consideration of appellant's pro se brief and review pursuant to *Anders v. California*, 386 U.S. 738 (1967). Counsel's motion to be relieved is granted.[1]

APPEAL DISMISSED.

HUFF, THOMAS, and GEATHERS, JJ., concur.

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[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal from Lexington County
Court of General Sessions

Robin B. Stilwell, Circuit Court Judge

Appellate Case No: 2009-143767

Curtis T. Johnson, Petitioner,

V.

State of South Carolina, Respondent.

PETITION FOR REHEARING and REINSTATMENT

Pursuant to Rule 221(a), SCACR and Rule 260(a), SCACR

Curtis T. Johnson, 337543
B.R.C.I - Murray, 188
4460 Broad River Rd.
Columbia, S.C. 29210

PRO SE APPELLANT

RECEIVED
JAN 30 2013
SC Court of Appeals

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STATEMENT OF ISSUES FOR REHEARING

I. Petitioner objects to Pachak's being relieved as appellant counsel of record pertaining to the Anders Brief and the dismissal of petitioner's appeal has denied petitioner his right to the effective assistance of appellant counsel on his first appeal of right.

II. The trial court erred in refusing to grant a directed verdict to the charges against appellant because his actions were in self-defense and Defense of another.

III. There is insufficient evidence that can reasonably conclude that appellant acted in the element of sudden heat of passion to support a valid voluntary manslaughter conviction, when the element of sudden heat of passion was not established and proven, beyond a reasonable doubt as a matter of law, by the state.

IV. The trial court erred in instructing the jury on a charge of mutual combat, since the instruction was highly prejudicial to appellant's defenses and the instructions denied appellant his right to a fair trial.

STATEMENT of THE CASE

Appellant was indicted for murder, two counts of assault and battery with the intent to kill, and possession of a weapon during the commission of a violent crime by the Lexington County Grand Jury. He was tried along with his brother, Kerwin S. Parker. Trial was held September 14-18, 2009, before the Honorable Robin B. Stilwell and a jury. Appellant was found guilty of voluntary manslaughter, two (2) counts of assault and battery of a high and aggravated nature, and possession of a weapon during the commission of a violent crime, recieving a sentence of thirty five (35) years total.

Appellant was represented by Elizabeth C. Fullwood, Esquire, while codefendant Parker was represented by Jack Duncan, Esquire. The state was represented by Donald Myers, Esquire, and Colleen Dixon, Esquire. Because certain portions of the transcript were not able to transcribe, a reconstruction hearing was held on October 3, 2011. The reconstruction hearing transcript was included in the record on appeal.

Appellate Defender, Robert M. Pachak, was assigned to represent Petitioner on appeal. Mr. Pachak filed a petition to be relieved as Counsel and filed a brief pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967)

In the Anders brief, Mr. Pachak argued "The trial court erred in refusing to grant a directed verdict to the charges against appellant because his actions were in self-defense and defense of another."

Petitioner filed a Pro Se Brief response to Mr. Pachak's Anders brief, identifying several other meritable issues that were significant. These significant meritable issues were:

(I) Appellant objects to Pachak's petition to be relieved as counsel of record, and that the granting of Pachak's petition would deny appellant his right to the effective assistance of appellate counsel on his first appeal of right.

(II) There is insufficient evidence that can reasonably conclude that appellant acted in the element of sudden heat of passion to support a valid voluntary manslaughter conviction, when the element of sudden heat of passion was not established and proven beyond a reasonable doubt, as a matter of law, by the state.

(III) The trial court erred in instructing the jury on a charge of mutual combat, since the instruction was highly prejudicial to Appellant's defenses and the instruction denied appellant his right to a fair trial.

On January 16, 2013, this court filed an unpublished opinion dismissing Petitioner's appeal and granting appellate counsel's petition to be relieved, affirming Petitioner's convictions and sentences. State v. Johnson, 2013-up-022 (S.C.Ct.App., Jan. 16, 2013)

This petition for rehearing follows.

I

Petitioner objects to Pachak's being relieved as appellant Counsel of record pertaining to the Anders Brief and the dismissal of Petitioner's appeal has denied petitioner of his right to the effective assistance of appellant counsel on his first appeal of right.

The Petitioner respectfully moves this Honorable court for a Rehearing, Pursuant to Rule 22(a), SCACR and Reinstatment of Appeal, Pursuant to Rule 260(a), SCACR; to review its decision on dismissing Petitioner's appeal pursuant to Anders and granting Mr. Pachak's petition to be dismissed as counsel. Petitioner respectfully ask this court to please reverse its decision in dismissing his appeal and please reinstate his appeal, so that Petitioner's case can proceed under the normal appellate process. Petitioner respectfully ask because Petitioner is innocent and is held unconstitutionally and illegaly in prison for saving his brother's life and his own; this violates Petitioners federal and state constitutional rights; and this is a miscarriage of justice. "A prisoner may establish a fundamental miscarriage of justice by showing that a constitutional error probably resulted in the conviction of one who is actually innocent." see, e.g., Deitz v. Money, 391 F.3d 804, 808 (6th Cir. 2004) Petitioner will state with particularity the points that have been over looked and misapprehended by the court.

Appellate counsel had provided Petitioner with ineffective assistance of appellate counsel by failing to find non frivolous arguable issues and failing to file a merits brief on issues that the petitioner would have prevailed on in his appeal. ("A criminal defendant is constitutionally entitled to the effective assistance of appellate counsel.") Evitts v. Lucey, 469 U.S. 387, 398, 105 S.Ct. 830, 83 L.Ed. 821 (1985); U.S.C.A Const. Amed. 6 ("Appellate counsel is required to raise every issue to which there is a reasonable likelihood of success.") U.S.C.A. Const. Amend. 6 - Id. Appellant counsel shouldn't have found petitioner's case wholly frivolous, after his "conscientious examination" of it. Meritable issues were raised to the trial court and preserved for appellate review. Appellant counsel was ineffective for not doing a merits brief on these issues that were preserved for appellate review, thus not

perfecting petitioner's appeal. ("Counsel found ineffective for not perfecting appeal for indigent defendant.") Frasier v. State, 410 S.E. 2d 572 (1991) Appellant counsel should of filed a merits brief on those preserved issues. ("finding that even where appellate counsel believes his client's appeal is without merit and thus files an Anders brief, the appellant may have been entitled to a merits brief and the challenge of appellate counsel's performance should be reviewed under strickland.") Smith v. Robbins, 528 U.S. 259, 284, 120 S.Ct. 746, 145 L.Ed 2d 756 (2000)

The issues that Petitioner briefed and Appellant counsel briefed are arguable issues of merit. The granting of Appellant counsel's petition to be relieved of counsel of record and the dismissal of Petitioners appeal is an unfairness which makes the result of the dismissal of Petitioners appeal a denial of due process and violates other state and federal rights of petitioner. Petitioner will show why the issues that appellate counsel and petitioner raised are nonfrivolous and of arguable merit by addressing the arguable merit of these successive prevailing issues. Petitioner ask this court to please after reviewing its decision on petitioner's appeal to reinstate his appeal and allow his appeal to proceed under the normal appellate process.

II

The trial court erred in refusing to grant a directed verdict to the charges against appellant because his actions were in self-defense and Defense of another.

In this case the petitioner was charged with murder, assault and battery with intent to kill (two counts) and possession of a weapon during the commission of a crime. At the end of the state's case, trial defense counsel for petitioner moved for a directed verdict of not guilty on all indictments on the fact that there was insufficient competent evidence from which a rational trier of fact could conclude, beyond a reasonable doubt, that the state had proved every element of the offenses charged, and mainly that the state did not prove the essential element of malice of murder and assault and battery with intent to kill. (R.p. 627, line 22 - p. 629, line 17) The state has the burden of proof as to all the essential elements of the crime. State v. Attardo, 263 S.C. 546, 550, 211 S.E. 2d 868, 870 (1975) The trial court made its ruling denying the motion for directed verdict. (R.p. 629, lines 18-23). That ruling was in error.

An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law. State v. Pagan, 369 S.C. 201, 208, 631 S.E. 2d 262, 265 (2006) The judge should grant a directed verdict when the evidence merely raises a suspicion that the accused is guilty. State v. Schrock, 283 S.C. 129, 132 S.E. 2d 450, 452 (1984) State v. Horne, 324 S.C. 372, 379, 478 S.E. 2d 289, 293 (Ct. App. 1996) Petitioner was entitled to a directed verdict of not guilty because the state's evidence produced at trial was a fatal variance within the allegations in the indictment. A defendant is entitled to a directed verdict when the state fails to present evidence of a material element of the offense charged. Russell v. United States, 369 U.S. 749 (1962); State v. Ladner, 373 S.C. 103, 120, 644 S.E. 2d 684, 693 (2007); State v. Brown, 360 S.C. 581, 586, 602 S.E. 2d 392, 395 (2004); State v. McKnight, 352 S.C. 635, 642, 576 S.E. 2d 168, 171 (2003)

Petitioner was convicted of the lesser included offenses of voluntary manslaughter and assault and battery of a high and aggravated nature (ABHAN) (two counts), which are two non-malice charges that the state did not want to be charged

to the jury and the state was not trying to prove and convict petitioner of. The trial judge also on a personal level didn't think the charges were appropriate, (R.p.767, line 4-p.768, line 17; p.774, line 7-p.775, line 1)

In Bailey v. State, 392 S.C. 422, 435-434, 709 S.E.2d 671, 677 (2011), the court gave the following explanation of south carolina law on the issue of variance between the charge(s) in an indictment and the evidence presented at a criminal trial:

"In South Carolina, 'it is a rule of universal observance in administering the criminal law that a defendant must be convicted, if convicted at all, of the particular offense(s) charged in the bill of indictment.'" State v. Gunny 313 S.C. 124, 136, 437 S.E.2d 75, 82 (1993) (quoting State v. Cody, 180 S.C. 417, 423, 186 S.E. 165, 167 (1936)). "A material variance between charge and proof entitles the defendant to a directed verdict; such a variance is not material if it is not an element of the offense." Id. (citation omitted); see 41 Am. Jur. 2d Indictments and Informations § 252 (2005) (stating that one of the two ways an indictment can be improperly modified is through "a variance, whereby the charging terms of the indictment are left unaltered, but the evidence offered at trial proves facts materially different from those alleged in the indictment"),

"While a conviction may be sustained under an indictment which is defective because it omits essential elements of the offense, such is not true when the indictment facially charges a complete offense and the State presents evidence which convicts under a different theory than that alleged" Thomason v. State, 892 S.W. 2d 8, 11 (Tex. crim. App. 1994) (citations ommitted)." A conviction under the latter circumstance violates principals of due process, ... because the ~~State~~ has failed to prove beyond a reasonable doubt every fact necessary to constitute the crime with which a defendant was charged." Id. (citations omitted); see 41 Am. Jur. 2d Indictments and Informations § 256 (2005) ("A material variance that violates a defendant's substantial right to be tried only on charges presented in an indictment constitutes fatal error and warrants a reversal on an appeal of a judgement of conviction of the offense not charged in the indictment.")

At the conclusion of all the testimony, defense counsel renewed the direct verdict motions recognizing that appellant's testimony established self-defense and defense of another as a matter of law. The trial court denied the motions. (R.p. 765, line 21 – p. 766, line 6). That ruling was inerror also.

When reviewing a denial of a directed verdict, this court must view the evidence and all reasonable inferences in the light most favorable to the state. State v. Burdette, 335 S.C. 34, 46, 515 S.E.2d 525, 531 (1999) If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury. State v. Patterson, 337 S.C. 215, 232, 522 S.E.2d 845, 853 (Ct. App. 1999).

However, when a defendant claims self-defense, the state is required to disprove the elements of self-defense beyond a reasonable doubt. State v. Wiggins, 330 S.C. at 544-45, 500 S.E.2d at 492-93. This requirement goes for defense of another as well. Under the theory of defense of others, one is not guilty of taking the life of an assailant who assualts a friend, relative, or bystander if that friend, relative, or bystander would likewise have the right to take the life of the assailant in self-defense. State v. Long, 325 S.C. 59, 480 S.E. 2d 62 (1997) The state did not carry the burden of disproving beyond a reasonable doubt the four elements of self-defense and defense of another. The courts have always placed great emphasis on the importance of a defendant's right to assert self-defense and defense of another, and has greatly required that the burden to disprove self-defense and defense of another remain on the state. see. State v. Burkhart, 350 S.C. 252, 565 S.E. 2d 298 (2002); State v. Addison, 343 S.C. 290, 540 S.E. 2d 449 (2000); Wiggins, Id.; Long, Id.

During the state's closing argument the state's main theme for disproving the four elements of self-defense and defense of another was that the petitioner and his brother shouldn't have gone to the other party's residence and they should have retreated and left. (R.p. 809, line 2 – p. 811, line 1) Petitioner testified multiple times repeatedly that their intentions for going over to the other party's residence was to talk and make peace of the situation, they did not intend to go harm anyone and they did not want anyone to get hurt. Petitioner testified more that once his brother and he seen that they could not talk to the threemen, whom confronted them with shotguns, petitioner and his brother withdrew

from the situation and tried to go home. This withdrawal was communicated to all three men of the other party by word and action. Then, the three men unprovokingly attacked petitioner's brother and him. This left petitioner with no other choice but to act only in Defense of another and self-defense. (R.p.678, line 3 - p.679, line 4) (R.p.685, line 24 - p.686, line 9) (R.p.696, line 15 - p.699, line 24) (R.p.705, lines 5-7) (R.p.938, line 23 - p.939, line 8) (R.p.952, line 22 - p.953, line 19) (R.p.906, line 23 - p.907, line 23) (R.p.960, line 13 - p.961, line 8)

The state did not disprove beyond a reasonable doubt that the petitioner and his brother went to the other party's residence to talk and make peace, and the state did not disprove beyond a reasonable doubt that petitioner and his brother withdrawed from the situated and tried to go home. As emphasized in State v. Dean, 51 S.E. 524 (1905)

> "I charge you, that no matter what the purpose of the defendant may be seeking the victim, if you find that was his purpose, if when he meets them, he does nothing to provoke the difficulty, and the deceased assaults him, so as to endanger his life or threaten him with serious bodily harm, the defendant's right of self-defense is protected and his right of self-defense is avaible to him. This rule does not change, even if you find that the defendant had a dangerous weapon and used it."

The same applies to defense of another as well. see. State v. Hays, 121 S.C. 163, 168, 169, 113 S.E. 362, 363 (1922), State v. long, 325 S.C. 59, 480 S.E.2d 62 (1997) At the end of trial defense counsel for petitioner motioned for a new on the grounds of all objections and exceptions taken during the course of the trial, thus the motions and rulings on the direct verdict issue was preserved for appellate review. In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial court. State v. Turner, 373 S.C. 121, 126 n.1, 644 S.E.2d 693, 696 n.1 (2007)

Thus, in this case petitioner was entitled to a direct verdict of not guilty because the state did not prove and convict of, beyond a reasonable doubt, the charges of Murder, Assault and Battery with intent to kill and possession of a weapon during the commission of a crime offenses that petitioner was originally indicted on, and the state did not disprove defense of another and self-defense beyond a reasonable doubt as a matter of law.

III

There is insufficient evidence that can reasonably conclude that Petitioner acted in the element of sudden heat of passion to support a valid voluntary manslaughter conviction, when the element of sudden heat of passion was not established and proven, beyond a reasonable doubt as a matter of law, by the state.

Voluntary manslaughter is the intentional and unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation. State v. Smith, 391 S.C. 408, 412-13, 706 S.E. 2d 12, 14 (2011) There must be evidence of both heat of passion and sufficient legal provocation at the time of the killing to warrant a charge on voluntary manslaughter. State v. Starnes, 388 S.C. 590, 596, 698 S.E. 2d 604, 608 (2010) A person's fear immediately following an attack or threating act may cause the person to act in a sudden heat of passion, but only when such fear causes the person to lose control and creates an uncontrollable impulse to do violence. id. at 598, 698 S.E. 2d 609

In this case, the evidence is insufficient to sustain a valid conviction of voluntary manslaughter because the element of sudden heat of passion was not established beyond a reasonable doubt. Due process of law requires the state to establish each element of each offense by proof beyond a reasonable doubt. In re Winship, 397 U.S. 358 (1970) "We explicitly hold that the due process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." id at 397 U.S. 358, 364 Due process as guaranteed by the Fourteenth Amendment requires "that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof - defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense. Jackson v. Virginia, 443 U.S. 307, 316, 99 S. Ct. 2781, 2787 (1979)

In State v. Starnes, 388 S.C. 590, 698 S.E. 2d 604 (2010), the South Carolina Supreme Court clarified the law with respect to whether fear can constitute sudden heat of passion. It clarified the law concerning "how a defendant's fear following an attack or a threating acts relates to voluntary manslaughter," Id. at 597, 698 S.E. 2d at 608. Specifically, the court stated: "We reaffirm the principle that a a person's fear immediately following an attack or threating 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. A person may act in a deliberate, controlled manner, not withstanding the fact that he is afraid or in fear. Conversely, a person can be acting under an uncontrollable impulse to violence and be incapable of cool reflection as a result of fear. The latter situation constitutes sudden heat of passion, but the former does not. Evidence that fear caused a person to kill another in a sudden heat of passion will mitigate a homicide from murder to manslaughter - it will not justify it. This is the distinction between voluntary manslaughter and self-defense."

Petitioner was in fear, but petitioner was not acting to under fear that produced an uncontrollable impulse to do violence. Petitioner acted only in saving his brother's life and his own. Petitioner was in full control of himself by only reacting to stop an unprovoked attack that came from the other party. After petitioner crashed his vehicle he reasoned to get out the vehicle without a weapon to save his brother. Next, the petitioner even shot a warning shot; warning the other party to stop their life threating actions on his brother. Petitioner's giving of this warning shows that petitioner's mind state was of reasoning and cool reflection, because he wanted to first warn and try to get the other party to leave his brother alone before he acted any further. When the other party didn't stop and continued to threaten his brother's life, petitioner managed to get out of the vehicle and stop the other party from killing his brother. (R.p. 940, line 6 - p. 949, line 20)

Turning to the facts of this case, sufficient evidence shows beyond a reasonable doubt that petitioner was acting in a deliberate, controlled manner, not withstanding the fact that he was afraid or in fear. There was insufficient evidence presented at the trial from which the jury could have found that petitioner acted in the element of sudden heat of passion beyond a reasonable doubt at the time of the shooting that would support the voluntary

manslaughter conviction. The evidence shows that petitioner deliberately and intentionally shot the other party and supports a finding that either petitioner shot with malice or in defense of another and self-defense.

After reviewing the evidence, no rational trier of fact could have found the essential element of heat of passion and convicted petitioner of voluntary manslaughter. As such petitioner cannot, as a matter of law, be guilty of voluntary Manslaughter. State v. Pittman, 373 S.C. 527, 576, 647 S.E. 2d 144, 170 (2007) (holding although sufficient legal provocation arguably existed, there was no evidence the defendant was in a heat of passion); see also. State v. Starnes, 388 S.C. 590, 698 S.E. 2d 604 (2010)

This jury verdict of voluntary manslaughter is not a valid conviction, when the State did not establish, and prove the element of sudden heat of passion beyond a reasonable doubt. This invalid voluntary manslaughter conviction is in violation of appellant's federal and state constitutional rights.

IV

The trial court erred in instructing the jury on a charge of mutual combat, since the instruction was highly prejudicial to appellant's defenses and the instructions denied appellant his right to a fair trial.

The state claimed and requested mutual combat. (R.p.769, lines 19-25) The trial court said it would charge mutual combat (R.p.770, lines 18-22) Trial counsel for petitioner objected to the mutual combat charge, citing State v. Taylor, 589 S.E. 2d 1. (2003) (R.p.771, line 6 - p.772, line 24) Trial counsel stated the fact that to charge mutual combat to the jury when there was no evidence to support the charge destroys/negates petitioner's self-defense and defense of another offenses. The trial court made it's ruling to give the mutual combat charge (R.p.772, line 25 - p.773, line 4) The trial court erred in ruling to charge mutual combat, and petitioner was prejudiced by the charge.

In general, the trial judge is required to charge only the current and correct law of South Carolina, Cohens v. Atkin, 333 S.C. 345, 509 S.E. 2d, 286 (Ct. App. (1998), and the law to be charged to the jury is determined by the evidence at trial. State v. Hill, 315 S.C. 260, 262, 433 S.E. 2d 848, 849 (1993) A trial judge has a duty to give a requested instruction that correctly states the law applicable to the issues and which is supported by the evidence, State v. Peer, 320 S.C. 546, 466 S.E. 2d 375 (Ct. App. 1996) An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law. State v. Pagan, 369 S.C. 201, 208, 631 S.E. 2d 262, 265 (2006) To warrant reversal, a trial judge's charge must be erroneous and prejudicial. Ellison v. Parts Distributors, Inc., 302 S.C. 299, 395 S.E. 2d 740 Ct. App. 1990)

To warrant a charge of mutual combat, mutual combat requires mutual intent and willingness to fight, if a defendant is found to have been involved in mutual combat, the "no fault" element of self-defense can not be established. State v. Taylor, 356 S.C. 227, 589 S.E. 2d 1 (2003) Case

law does establish that there must be "mutual intent and willingness to fight" to constitute mutual combat. State v. Graham, 260 S.C. 449, 450; 196 S.E. 2d 495 (1973) Mutual intent is manifested by the acts and conduct of the parties and the circumstances attending and leading up to the combat. Id. Whether or not mutual combat exists is significant because the plea of self-defense is not available to one who kills another in mutual combat. Id. Citing State v. Jones, 113 S.C. 134; 101 S.E. 647 (1919) In order to claim self-defense, the defendant must be without fault in bringing on the difficulty. State v. Davis, 282 S.C. 45, 46; 317 S.E. 2d 452, 453 (1984) If the defendant is engaged in mutual combat, self-defense is unavailable unless the defendant withdraws from the conflict before the killing occurs. State v. Graham, 260 S.C. 451; 196 S.E. 2d 495-496. Defendant is not considered by the law to be bringing on the difficulty if, following a joining in mutual combat some initial aggressive or wrongful conduct directed toward the victim, the defendant abandons that mutual combat conduct and withdraws from the situation in a manner that conveys this withdrawal to the victim. In this case, defendant's right to self defense is said to "revive" and he is entitled to the right of self-defense as if his initial conduct had not occurred. Thus, he is entitled to use force if the victim attacks him after the defendant has withdrawn from the situation. see, e.g. State v. Graham, 260 S.C. 449; 196 S.E. 2d 495 (1973); Annot; withdrawal, after provocation of conflict, reviving right of self-defense, 55 A.L.R. 3D 1000.

Petitioner testified multiple times repeatedly that his brother and his intentions for going over to the other party's residence was to talk and make peace of the situation, they did not intend to go harm anyone and they did not want anyone to get hurt. Petitioner testified more that once his brother and he seen that they could not talk to the other party, whom confronted them with shotguns, petitioner and his brother withdrew from the situation and tried to go home. This withdrawal was communicated to the other party by word and action. Then, the other party unprovokingly attacked petitioner's brother and him. This left petitioner with no other choice but to act in Defense of another and self-defense. (R. p. 678, line 3 - p. 679, line 4)

(R.p.685) line 24 - p.686, line 9) (R.p.696, line 15 - p.699, line 24) (R.p.705, lines 5-7) (R.p.938, line 23 - p.939, line 8) (R.p.952, line 22 - p.953, line 19) (R.p.906, line 23 - p.907, line 23) (R.p.960, line 13 - p.961, line 8)

Mutual combat acts as a bar to self-defense of another because it requires mutual agreement to fight on equal terms for purposes other than protection. This is inherently inconsistent with the concept of self-defense and defense of another and directly conflicts with the "no fault" finding necessary to establish self-defense and defense of another. As such, it is only logical that the evidence of agreement to fight be plain. In petitioner's case, there is insufficient evidence of mutual combat. The mutual combat doctrine is triggered when both parties contribute to the resulting fight. Self-defense and defense of another is available only when the defendants are without fault in bringing on the difficulty. The charging of mutual combat to the jury negated and destroyed petitioner's self-defense and defense of another defense. The mutual combat charge removed the burden from the State to disprove self-defense and defense of another. The mutual combat charge transferred the burden onto petitioner to prove that there was no mutual combat, his brother and he were not at fault in bringing on the difficulty, and that petitioner and his brother tried to withdraw. Appellant admitted to acting only to save his brother's life and his own, and relied entirely on self-defense and defense of another at trial. The courts have always placed great emphasis on the importance of a defendant's right to assert self-defense and defense of another, and has greatly required that the burden to disprove self-defense and defense of another remain on the state. State v. Burkhart, 350 S.C. 252, 565 S.E.2d 298 (2002)

The trial court charged self-defense and defense of another in petitioner's case. Those charges were negated by the court's unwarranted jury charge on mutual combat, when there was insufficient evidence to warrant the charge. The trial court's mutual combat charge acted as a limitation on petitioner's ability to claim self-defense and defense of another, and prejudiced him by transferring the state's burden to disprove self-defense

and defense of another onto appellant, forcing petitioner to prove self-defense and defense of another, in violation of Burkhart, Addison and Wiggins, thus violating petitioner's federal and state constitutional rights.

CONCLUSION

Wherefore, Petitioner respectfully ask this Honorable court to please reconsider its decision in dismissing the Petitioner's appeal and please reinstate his appeal; and order appellant counsel to rebrief and file a merits brief for petitioner on these meritable prevailing issues. These issues are of arguable merit. Petitioner prays that the Appellate Court will reinstate his appeal, direct the parties to file merit briefs, and allow the case to proceed under the normal appellate process.

Respectfully submitted,

Curtis T. Johnson

Curtis T. Johnson
SCDC# 337543
PRO SE Petitioner

This 28 day of January, 2013

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County
Robin B. Stilwell, Circuit Court Judge

Appellate Case No.: 2009-143767

Curtis T. Johnson, Petitioner,

v.

STATE of SOUTH CAROLINA, Respondent.

Certificate of Service

The undersigned Pro Se Petitioner hereby certifies that a true copy of the Petitioner Pro Se Petition for Rehearing and Reinstatment has been placed in the U.S. Postal Mail, postage paid and addressed to the Clerk for the South Carolina Court of Appeals at Post office Box 11629, Columbia, SC 29211, this 28 day of January, 2013.

Curtis T. Johnson
Curtis T. Johnson
PRO SE Petitioner

SUBSCRIBED AND SWORN TO before me
this 28th day of January, 2013

Susan N. Frye
Notary Public for South Carolina

My Commission Expires: My Commission Expires March 5, 2018

The South Carolina Court of Appeals

The State, Respondent,

v.

Curtis T. Johnson, Appellant.

Appellate Case No. 2009-143767

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Thomas E. Huff J.

Paula H. Thomas J.

John D. Geathers J.

Columbia, South Carolina

cc:
Curtis T. Johnson
Salley W. Elliott

FILED
21 JUN 2013

The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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April 07, 2013

The Honorable Beth Carrigg
205 E Main St Ste 146
Lexington SC 29072-3557

REMITTITUR

Re: The State v. Johnson, Curtis T.
Lower Court Case No. 2007GS3201474, 2007GS3201475, 2007GS3201476, 2007GS3201473
Appellate Case No. 2009-143767

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

CLERK

cc: Curtis T. Johnson
Salley W. Elliott