**STATE OF SOUTH CAROLINA**
**IN THE COURT OF APPEALS**

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Appeal from Barnwell County
The Honorable Doyet A. Early, III, Circuit Court Judge
Appellate Case No. 2017-002014



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Opinion No. 5846 (S.C.Ct.App. filed August 11, 2021)

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THE STATE,

RESPONDENT,

v.

DEMONTAY MARKEITH PAYNE,

APPELLANT.

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**PETITION FOR REHEARING**

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On August 11, 2021, this Court issued an opinion in the captioned case that reversed the lower court's denial of a voluntary manslaughter charge, and remanded the matter for a new trial. Pursuant to South Carolina Appellate Court Rules 221 and 240, Respondent, the State of South Carolina, petitions for rehearing and asks the Court to consider the following points that Respondent submits the Court misapprehended or overlooked.

*SUMMARY OF ARGUMENT*

Respondent submits that this Court has misconstrued the facts of this case in finding evidence demonstrating the heat of passion element for voluntary manslaughter. The facts relied upon by this Court disregard the context in which the evidence was presented and are insufficient to satisfy the legal standard warranting a voluntary manslaughter charge. Moreover, the review of a jury charge is performed while taking the evidence in the light most favorable to the requesting

party, but the "light most favorable" standard also requires the court to only accept the *reasonable inferences* of the evidence presented. "To justify charging the lesser crime, the evidence presented must allow a rational inference the defendant was guilty only of the lesser offense." *State v. Geiger*, 370 S.C. 600, 607, 635 S.E.2d 669, 673 (Ct. App. 2006). "The court looks to the totality of the evidence in evaluating whether such an inference has been created." *Id*; *State v. Sims*, 426 S.C. 115, 130, 825 S.E.2d 731, 738 (Ct. App. 2019), reh'g denied (Apr. 19, 2019), cert. denied (Aug. 16, 2019).The inferences taken by this Court to satisfy the heat of passion element for voluntary murder cannot be reasonable in the face of comprehensive evidence presented by the defense's witnesses that demonstrate Appellant's mental state was not subject to an uncontrollable impulse for violence.

This court also improperly applied Supreme Court precedent set forth in *State v. Knoten*, 347 S.C. 296, 555 S.E.2d 391 (2001) and *State v. Funchess*, 267 S.C. 427, 229 S.E.2d 331 (1976) by disregarding in its entirety the trial testimony of Appellant in this court's analysis and in selectively relying upon state's evidence in an attempt to piece together a narrative supporting the element for heat of passion. This Court should grant rehearing, reverse, and affirm the ruling of the lower court.

*RELEVANT HISTORY AND FACTS*

Appellant and Devante Odom (hereinafter "Victim") encountered each other on the porch of the home belonging to Stacey Hartzog. Stacey Hartzog, Yvette Walker, Alicia Youmans, and Tyeisha Youmans were present at the time. (R. p. 14). During the encounter Appellant and Victim "ha[d] words" with each other over the course of a couple of minutes. The encounter ended and Victim walked up the street toward the intersection of Emerald Road and Wingo Estates. According to Appellant, he got in his car to go home which was in the same direction that Victim

had walked. Appellant arrived home, exited his car in the vicinity of Victim, and moments later Victim is ultimately shot and killed by Appellant. The precise testimonies of three witnesses are imperative to the voluntary manslaughter issue:

*Alicia Youmans*

Alicia Youmans testified on behalf of the State. In pertinent part, she testified that when Victim arrived at the porch he asked to buy two cigarettes from her. She did not abide the request because Victim and Appellant began to argue. (App., p. 16, lines 1-23). Her cross-examination revealed that she believed Appellant was responsible for starting the argument because Appellant lifted his shirt to Victim to show the presence of his gun. (App., p. 29, lines 15-18; p. 33, lines 1-10). She could not testify as to the topic of argument, but noted that the argument ended when Victim walked away and Appellant got in his car. Victim walked up Wingo Estates toward Emerald Road. (App., p. 17, lines 2-25). Appellant drove his car on to Wingo Estates and drove up towards Emerald Road. (App., p. 19, lines 1-5).

Victim had reached the intersection by the time Appellant arrived, wherein another verbal dispute arose and Appellant exited his vehicle.[1] She then testified, "they was still arguing or whatever, and he turned to go back to his car. I'm not sure if something was said or what happened, but he – when he turned back around to face Mr. Odom, he began shooting at him." (App., p. 19, line 1 through p. 20, line 25). Alicia testified that Victim attempted to run away once Appellant began shooting. (App., p. 22, lines 2-21). Alicia did not see Victim with a gun, nor did she see a gun in his vicinity when she reached the location where he fell. (App., p. 26, line 1-14).

[1] Alicia's statement to police indicated that Appellant "got out of his car swinging his arms. After that they got real close to each other, and that's when Montay Payne pulled out his gun and shot Devante Odom." (App., p. 35, lines 19-24).

*Tyeisha Youmans*

Tyeisha testified that she was in her car changing the music and did not initially notice Victim's arrival. However, she heard what she thought to be arguing and approached the porch. (App., p. 109, line 5 through p. 110, line 2). She then testified that Appellant and Victim were not "necessarily arguing, arguing, but they was just having words back and forth" and that it only lasted a few minutes. (App., p. 110, lines 6-19). She testified that Victim walked up the road to the intersection, and thereafter Appellant got in his car to leave to go home. (App., p. 110, line 20 through p. 111, line 15).

She testified that in doing so, Appellant and Victim "I guess . . . started having words again because you could tell that they was, like, had to be talking back and forth" down the street. (App., p. 113, lines 2-6). She clarified that Appellant had exited his car and walked into Emerald Road for this to occur. She testified that she saw Appellant swing at Victim, and Victim responded by pulling a gun out. (App., p. 113, line 7 through p. 114, line 13). After Victim pulled out his gun, Tyeisha testified that "Mr. Payne, like I said, he had, like, his hands like that, like I guess you don't want to fight or something like that?" (App., p. 114, lines 21-23). She explained that at this point Appellant turned around and headed back toward his house. She testified that Victim followed Appellant and that they still appeared to be arguing back and forth as he did so. (App., p. 114, line 23 through p. 115, line 25; p. 116, lines 2-4; p. 128, lines 8-21). After walking some distance back to his home, Appellant turned and faced Victim. (App., p. 116, lines 3-25). Tyeisha testified that when Appellant turned around Victim started firing at Appellant. She testified that Appellant then started firing back, and that amidst the shooting, Victim turned to run back toward the trailers on Emerald Road. (App., p. 117, line 4 through p. 118, line 5). Tyeisha confirmed that she witnessed these events from approximately 100 yards away. (App., p. 126, lines 11-24).

*Appellant Demontay Payne*

Appellant testified that once Victim arrived at Stacey Hartzog's home "he said something to me that I can't quite remember. But we engaged in a verbal argument or exchanged words, and that was it." (App., p. 152, lines 10-12). Appellant testified that though he could not recall the topic of the argument, he recalled telling Victim "I ain't worrying about it." (App., p. 152, lines 18-19). Appellant further testified that he was calm during the exchange, but that Victim was less so. (App., p. 152, line 20 through p. 153, line 1). Appellant testified the girls told Victim to leave. Victim left and walked up the road to the intersection of Emerald Road and Wingo Estates, which was in the vicinity of Appellant's grandmother's home. (App., p. 153, lines 4-18). Appellant further testified that the girls told him not to follow Victim. Appellant responded by informing the girls that he was not going to follow. Appellant testified on cross-examination that the girls telling him not to follow was due to Victim's choice to stay up at the top of the intersection, not as a result of Appellant's demeanor. (App., p. 154, lines 9-14; p. 161, line 19 through p. 162, line 4). Appellant then told Tyeisha he was going home (his grandmother's home) and left in his car. (App., 154, lines 9-24).

Appellant next described how the violent altercation took place. He testified that, "After [driving home], as I was getting out of the car, he was coming towards, he fired, and I fired back." (App., p. 155, lines 10-11). Appellant clarified that when he pulled up to the edge of his trailer, he saw Victim coming. Appellant testified that they exchanged words, and Victim fired at him, and he "fired back in self-defense." (App., p. 155, lines 12-24). Appellant further testified as to the manner in which he fired his gun, describing that he was backing up shooting and not paying attention to where he was shooting. He testified that the reason he was backing up was, "because he was afraid for his life." (App., p. 156, lines 3-12). Appellant could not recall how many shots

he fired and only knows how many times he shot Victim because of the police report. (App., p. 156, lines 13-21). Appellant testified that he did not see where Victim ran, as he was "looking back running." (App., p. 157, lines 2-4). He then explained that, "after everything – after all the fire exchange[d], [he] was scared" and made the decision to jump in his car and leave. (App., p. 157, lines 2-8). Appellant was then asked: "when he fired at you, what went through your mind?" He responded by saying: "That the bullet was going to kill me or either I was going to lose something that I would never be able to get back." (App., p. 159, lines 6-12). He agreed with counsel's questioning that he could not "have taken another course" and "had no other choice" but to respond as he did. (App., p. 159, lines 13-18).

Appellant's cross-examination added further testimony. Appellant reiterated that he could not recall the topic of the argument. (App., p. 160, line 21 through p. 161, line 6; p. 167, lines 16-21). He agreed that he was calm in comparison to Victim, whom he agreed was out of control. (App., p. 161, lines 16-18). He testified that Victim started shooting at him before he could even close the door to his car. (App., p. 164, lines 1-4). He testified: "When you're backing up not looking, you can't see who you're shooting at or what you're shooting, you just know you're shooting to get someone away from you or anything that's firing at you away." (App., p. 164, lines 16-20). Appellant could not remember whether or not he had a subsequent verbal confrontation with Victim in the middle of Emerald Lane, prior to the shooting taking place. (App., p. 167, lines 7-12; p. 167, line 22-24). Appellant testified that he does not remember swinging at Victim. (App., p. 167, lines 13-15). Appellant denied having any knowledge of a preexisting dispute between him and Victim. (App., p. 168, lines 20-22). When asked if there was a problem between them after their argument on the porch, Appellant felt only that Victim "probably had a hostile – hostile feeling about me." (App., p. 168, line 23 through p. 169, line 3).

## THIS COURT'S OPINION

In reversing the lower court, this Court provided a recitation of facts and a lengthy survey of South Carolina cases that have previously addressed whether a voluntary manslaughter charge was warranted at trial. *The State, Respondent, v. Demontay Markeith Payne, Appellant.*, No. 2017-002014, 2021 WL 3520616, at *7-14 (S.C. Ct. App. Aug. 11, 2021). However, the opinion fails to identify and consider numerous substantially important facts that provide context to the evidence presented. *State v. Starnes*, 388 S.C. 590, 597–98, 698 S.E.2d 604, 608 (2010) (Our Supreme Court has cautioned on the frequent struggle to untangle the interplay between murder, voluntary manslaughter, and self-defense, and that the struggle may be the result of prior precedent being taken out of the evidentiary context, and removing any boundaries as to what circumstances give rise to a "sudden heat of passion upon sufficient legal provocation."); *State v. Sims*, 426 S.C. 115, 131, 825 S.E.2d 731, 739 (Ct. App. 2019), reh'g denied (Apr. 19, 2019), cert. denied (Aug. 16, 2019).

The evidence here demonstrates the complete lack of uncontrollable impulse and the lack of a requisite connection between the legal provocation and the supposed evidence of heat of passion. As such the court's ruling is based upon unreasonable inferences without support in the record. Moreover, the opinion relies upon misapplications of law stemming from both *Knoten* and *Funchess*. As a result, this Court's decision to reverse and remand Appellant's conviction for a new trial was reached in error and should be reconsidered.

*Application of the Facts Under the Any Evidence Standard*

This Court set forth an extensive explanation of the law regarding when a voluntary manslaughter charge is warranted. Paramount to the application of the facts in this case is the courts recitation that states:

> Whether a voluntary manslaughter charge is warranted turns on the facts. If the facts disclose any basis for the charge, the charge must be given." *Id.* at 597, 698 S.E.2d at 608.
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> . . .
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> When determining whether the evidence requires a charge on voluntary manslaughter, the court must view the facts in the light most favorable to the defendant." *State v. Niles*, 412 S.C. 515, 522, 772 S.E.2d 877, 880 (2015).
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> . . .
>
> A defendant is not entitled to a voluntary manslaughter charge merely because he was in a heat of passion." *Starnes*, 388 S.C. at 596, 698 S.E.2d at 608. Nor is he entitled to a voluntary manslaughter charge merely because he was legally provoked. *Id.* at 597, 698 S.E.2d at 608. "Moreover, there must be evidence that the heat of passion was ***caused*** by sufficient legal provocation." *Id.* Though one's fear immediately following an attack or threatening act may ***cause*** the person to act in a sudden heat of passion, the mere fact that one is afraid is insufficient, alone, to entitle a defendant to a voluntary manslaughter charge. *Id.* at 598, 698 S.E.2d at 609. "[I]n order to constitute 'sudden heat of passion upon sufficient legal provocation,' the fear must be the result of sufficient legal provocation **and *cause*** the defendant to lose control and create an uncontrollable impulse to do violence." *Id.* "Succinctly stated, to warrant a voluntary manslaughter charge, the defendant's fear must manifest itself in an uncontrollable impulse to do violence." *Id.* at 598-99, 698 S.E.2d at 609.

*The State, Respondent, v. Demontay Markeith Payne*, Appellant., No. 2017-002014, 2021 WL 3520616, at *7 (S.C. Ct. App. Aug. 11, 2021) (emphasis added). The need for a voluntary manslaughter charge will not arise simply because the evidence demonstrates the existence of an argument and subsequent violence. And, as is demonstrated, the law does not simply allow for the checking of boxes as to: heat of passion, legal provocation, fear, and uncontrollable impulse to do violence. Instead, each of these facets, fear being the only one not explicitly mandatory[2], is interconnected to the others, and the necessary causal relationship set forth by *Starnes* can only be

[2] Respondent is reticent as to the consequences of identifying fear, as opposed to anger, as a foundational emotion for "*heat* of *passion*". Nevertheless, the existing law dictates that fear alone is insufficient, and it must manifest in an uncontrollable impulse to do violence.

evaluated when the evidence *is considered in the context presented at trial. Id.* at 598, 698 S.E.2d at 608.

Moreover, the requirement that the reviewing court must view the facts in the light most favorable to the defendant, leaves out the standard language which requires that this only be done to the extent of drawing *reasonable inferences*. To this point, this Court has previously held that the "any evidence" standard applied to review of denied charges for lesser included offenses is subject to analogous treatment as is given to directed verdict motions lacking sufficient circumstantial evidence. As such, the record must show "any direct evidence or any substantial circumstantial evidence" in order to demonstrate that the denial of a lesser included offense was in error. *State v. Gilmore*, 396 S.C. 72, 80, 719 S.E.2d 688, 692 (Ct. App. 2011). This Court has also set forth that "[t]o justify charging the lesser crime, the evidence presented must allow a rational inference the defendant was guilty only of the lesser offense. *State v. Geiger*, 370 S.C. 600, 607, 635 S.E.2d 669, 673 (Ct. App. 2006). "The court looks to the *totality of the evidence* in evaluating whether such an inference has been created. *Id.* (emphasis added). "When the evidence supporting a request for a charge on a lesser-included offense is purely circumstantial, we examine the record to determine if there is *sufficient circumstantial evidence* to permit a reasonable inference that the defendant is guilty only of the lesser crime." *Gilmore*, 396 S.C. at 80, 719 S.E.2d at 692. (emphasis added). In this case, this Court failed to consider the fact that it was relying entirely on circumstantial evidence spliced together from the record, absent the context the evidence was presented in, and without consideration of the direct evidence from Appellant that flatly opposes the contention that he acted in a heat of passion. As such this Court has reached and relied upon unreasonable inferences in reversing the trial court's decision.

These unreasonable inferences are based upon five pieces of circumstantial evidence this Court set forth as tending to show Appellant's mental state was one of an uncontrollable impulse to do violence. These include: 1) there was evidence of an argument "heated enough" for the women to instruct Victim to leave and Payne not to follow; 2) there was testimony, even witnessed at a distance, that a second argument occurred; 3) there was evidence that Payne tried to punch Victim; 4) Victim fired his gun first, causing Payne to return fire, striking Victim four times, despite Victim running away; and 5) Payne testified he was afraid for his life. *The State, Respondent, v. Demontay Markeith Payne, Appellant.*, No. 2017-002014, 2021 WL 3520616, at *16 (S.C. Ct. App. Aug. 11, 2021). Each of these evidentiary grounds set forth by the court lacks the context and causal relationship needed to satisfy the any evidence/substantial circumstantial evidence standard for charging voluntary manslaughter.

Regarding the first piece of evidence, there is indeed evidence of an argument, and there is evidence that someone told Appellant not to follow Victim. However, neither of these facts addresses Appellant's state-of-mind as it pertains to the creation of an uncontrollable impulse to do violence. This Court disregarded consideration of such contextual evidence.

The context surrounding this first piece of evidence demonstrates that this exchange between Appellant and Victim included Appellant telling Victim: "I ain't worrying about it"; that Appellant testified he was calm during and after the exchange of words with Victim; that Appellant told the women he had no intention to follow Victim; that Appellant testified their instruction not to follow was based on Victim's actions, not on Appellant's demeanor; and that *both* Tyeisha and Appellant testified that Appellant left to go home, as opposed to rekindle an argument with Victim. (App., p. 152-154; p. 162). This additional evidence, which is *necessarily* contextual, reveals that in no way did this initial argument with Victim cause Appellant to enter into a heat of passion

state-of-mind or even cause Appellant to become mildly angry. As demonstrated, *all* of the evidence is to the contrary, as it shows Appellant was capable of cool reflection after the argument ended. Heat of passion does not arise simply from the existence of an argument.

This Court's second piece of evidence, that witnesses viewed a second argument from a distance, is likewise without any context or support demonstrating a change in the state-of-mind of Appellant. The evidence available demonstrates an argument took place, but there is no basis to demonstrate the topic of the argument or to demonstrate that it had an impact upon Appellant's state-of-mind that caused an uncontrollable impulse to do violence. To the contrary, Appellant's testimony demonstrates that he still could not recall the subject of the argument, or even if a second argument took place. Appellant also testified that Victim's attack took place before he could even fully exit his vehicle. (App., p. 167; p. 164). Appellant testified that he bore no dispute against Victim, and that if such a dispute existed, it existed solely by Victim expressing hostility toward him. (App., p. 168-169). The existence of an argument cannot satisfy the heat of passion element without also having legal provocation, and that such legal provocation *caused* Appellant to experience an uncontrolled impulse to do violence. The supposed second argument, and particularly Appellant's clear lack of impact by it, demonstrates that it provides no evidence in support of a voluntary manslaughter charge.

Third, this Court identified evidence that Appellant threw a punch at Victim. This is the first instance of any violence, but violence alone cannot demonstrate Appellant was suffering an *uncontrollable impulse* to do such violence. When the evidence in connection to this punch is considered, it is demonstrated to be decidedly unimpulsive and fully controlled. First, Appellant testified that he does not even recall throwing a punch. More importantly, Tyeisha testified that after the punch was thrown and Victim pulled out his gun, Appellant made the decision to put his

hands up in a fashion demonstrating that he did not further expect to fight. In doing so, the only evidence available demonstrates that Appellant was in control of his actions and did not continue with violence. Therein, he demonstrated both control, deliberation, and specifically, the capability for cool reflection. (App., p. 114).

While this is sufficient to show Appellant's state-of-mind was not one bearing heat of passion, the evidence further shows that after this supposed exchange, and despite Victim having his gun pulled, Appellant disengaged from the altercation and walked back toward his home. (App., p. 114-115). Appellant's decision demonstrates he was not only *capable* of cool reflection, but actually *chose to do so*. The opinion cites long quotations that included Appellant's decision to turn around and walk away, but the opinion pays this fact no weight in evaluating Appellant's requisite state-of-mind. It is axiomatic to conclude that one who deliberately disengages from an argument cannot also be said to bear an *uncontrollable impulse* for violence as a result of that argument. The context and surrounding circumstances of the evidence presented do not support the elements for voluntary manslaughter, and neither the jury nor the court can "reasonable infer" support for such elements by citing only to the violence and never to a defendant's choice to disengage, turn around, and head home.

Fourth, this Court cites the testimony demonstrating that Victim started shooting first at Victim, and that Appellant fired back in response striking Victim four times, even though Victim was running away. Here again, the analysis lacks any proof that Victim's attack caused Appellant to succumb to an uncontrolled impulse for violence, and the context surrounding that evidence which proves the contrary was disregarded by this Court. It should not be, as it is discerning.

This fourth piece of relied upon evidence demonstrates for the first time under any testimony, from any witness, that there is evidence of sufficient legal provocation.[3] If Tyeisha and/or Appellant are to be believed, and Victim shot first, the law dictating the need to charge voluntary manslaughter requires the following:

1) There must be evidenced that the legal provocation *caused* the Appellant's heat of passion;
2) That if Victim's attack caused Appellant's fear, there is evidence that that fear "must be the result of legal provocation and *cause* the defendant to lose control and create an uncontrollable impulse to do violence."

*Starnes*, 388 S.C. at 597-99, 698 S.E.2d at 608-09. This particular issue is where this Court, and others, have lost the plot as to differentiation between self-defense and voluntary manslaughter. It cannot be so simply argued that legal provocation via gunfire, resulting in fear, and the defendant's reaction to "do violence" by firing back satisfies as evidence to warrant a voluntary manslaughter charge. To do so would be completely indistinguishable from the elements of self-defense. The decision to charge voluntary manslaughter demands an assessment of the state-of-mind of the defendant, and that the fear or anger involved from the provocation caused an uncontrollable impulse for violence. This Court's characterization of the evidence in this case fails to establish the necessary causal relationship demanded in *Starnes*, disregards the evidence that would demonstrate the absence of that causal connection, and further demonstrates that the record does not support the finding that an uncontrolled impulse for violence existed. The context of the evidence is key, but the context was not considered.

[3] As only Tyeisha and Appellant testified that Victim shot first, Alicia's testimony depicting an unprovoked, undefended, and malicious shooting by Appellant, cannot be deconstructed and utilized in part to establish the elements of voluntary manslaughter. (*Infra*; See *State v. Funchess,* 267 S.C. 427, 229 S.E.2d 331 (1976)).

Tyeisha testified that Victim shot first, but she did not offer any testimony as to whether Appellant's reaction to fire back was the result of an uncontrolled impulse. Nor did she testify as to the emotions that Appellant was feeling at the time and how he responded to those emotions. Nor did she even offer testimony as to the subject matter of the argument before gunfire ensued. However, Appellant was able to testify to his state-of-mind, and thereby provided *direct evidence* as to this state-of-mind. His testimony demonstrated 1) he explicitly fired back in self-defense; 2) he was "backing up shooting"; 3) he was not paying attention to where he was shooting (demonstrating no desire to harm); 4) he was "looking back running"; 5) that he stated "when you're backing up not looking, you can't see who you're shooting or what you're shooting. You just know you're shooting to get someone away from you, or anything that's firing at you away" (demonstrating no desire to harm); 6) he could not recall how many shots he fired; 7) he only knows how many times Victim was struck because of the police report; and 8) Appellant's *decision* to return fire was the only *option* he believed he had under the circumstances. (App., p. 155-157; p. 159; p. 164). These statements provide direct evidence as to Appellant's state-of-mind and they directly refute the court's inference that Appellant knew Victim was running away or how many times he had struck victim.

This evidence is exclusively indicative of an individual *trying to get away* from violence. Contrary to this court's findings, the record is devoid of evidence which would characterize Appellant's actions as an uncontrolled desire to do violence against another out of fear or anger. Evidence taken in the light most favorable is limited to only the reasonable inferences that can be drawn from that evidence. None of the defense's evidence can be reasonably inferred to show that Victim's attack created an uncontrolled impulse to desire violence. The simple act of shooting back at Victim does not demonstrate Appellant's state-of-mind. All of the correlating evidence

that does relate to state-of-mind demonstrates that it was a *decision* made by Appellant who desired to get away from violence and to get the ensuing violence away from him – it therefore cannot be reasonably inferred as an uncontrollable desire to do violence upon another.

Lastly, the court cites to the quotation that Appellant was "afraid for [his] life." However, a careful reading of the record demonstrates that this statement from Appellant was the response given for "why [he] was backing up" after being shot at by Victim. (App., p. 156, lines 8-12). Not only was this precise quote not useful to this Court in demonstrating heat of passion, it is decidedly against a finding of heat of passion, as it demonstrates that Appellant reacted to his fear by *trying to get away*, not by succumbing to an uncontrolled impulse to do violence. As was succinctly stated in *Starnes,* the same applies to the case at hand:

> [W]hile [defendant] testified he shot . . . out of fear, there is no evidence he was out of control as a result of his fear or was acting under an uncontrolled impulse to do violence. The only evidence in the record is that Appellant deliberately and intentionally shot [victims] and that he either shot the men with malice aforethought or in self-defense.

*Id.* at 599, 698 S.E.2d at 609. Therefore, based upon the facts of this record, it is an entirely unreasonable inference to find that Appellant's fear *caused* an uncontrollable impulse for violence, as is required by law. The conviction should therefore be affirmed.

*Application of Law Under Knoten and Funchess*

This Court provides a partial concession that "Payne's testimony alone" may leave the evidence insufficient to support a jury charge for voluntary manslaughter. However, the opinion then relies upon *State v. Knoten*, 347 S.C. 296, 305-09, 555 S.E.2d 391, 396-98 (2001) and attempts to dodge the utility of such testimony in favor of the circumstantial evidence it has chosen to focus upon. Therein, this Court stated:

> We acknowledge that, under Payne's testimony alone, the evidence may be insufficient to support a jury charge for voluntary manslaughter. However, we are not limited to considering a defendant's *trial testimony* on the matter. See *Knoten*, 347 S.C. at 305-09, 555 S.E.2d at 396-98 (noting, in spite of the State's contention the defendant was not entitled to a voluntary manslaughter charge because he recanted his confession at trial, one of defendant's statements to police that was introduced at trail supported such).

T*he State, Respondent, v. Demontay Markeith Payne, Appellant.*, No. 2017-002014, 2021 WL 3520616, at *15 (S.C. Ct. App. Aug. 11, 2021). This Court's reliance upon *Knoten* is such a way is misplaced. In *Knoten*, the Court did not feel that the defendant's recanted statements to police introduced at trial could be ignored as evidence of defendant's state-of-mind, even if it was not consistent with subsequent trial testimony. *Id.* Understandably so, as such would constitute a question for the jury as to which of defendant's stories they find most credible. The court's reliance on *Knoten* seems simply inapplicable, as there is no self-contradictory testimony at issue in Appellant's case.

Respondent acknowledges that this Court is not limited to any certain portion of the evidence, but likewise, *Knoten* does not stand for the proposition that the court can evaluate only the evidence it chooses, in isolation of the remaining evidence, or outside the context for which the evidence was offered. Respondent argues precisely the opposite; this Court erred because it focused solely on "certain evidence" that in isolation might pass muster to warrant the requested charge. To do so is in contradiction to this Court's previous holdings that "the evidence presented must allow a rational inference the defendant is guilty only of the lesser offense" in order to justify the requested charge and "the court looks to the totality of the evidence in evaluating whether such an inference has been created." *Geiger*, 370 S.C. at 607, 635 S.E.2d at 673. *Knoten* does not relieve the court of that responsibility.

Lastly, this court also erred in failing to abide by the limitations set forth in *State v. Funchess*, 267 S.C. 427, 229 S.E.2d 331 (1976). Therein, the Supreme Court set forth that reversal of a denial of a lesser included offense charge cannot be based upon the contention that the jury would accept in part and reject in part the evidence presented by the State in support of the greater charge. *Id.* at 430, 229 S.E.2d at 332. This limitation is monumentally important to the case at hand, because this Court expressly did so by relying upon part of Alicia's testimony to supplement the complete absence of heat of passion demonstrated by the defense.

Alicia's testimony described Appellant as clearly having a state-of-mind that desired violence. However, that evidence cannot be excised from Alicia's remaining testimony that such a state-of-mind was one that acted *in malice* by shooting Victim without any threat of violence or any legal provocation. Alicia's testimony as to how the shooting took place does not support voluntary manslaughter, and under *Funchess*, this Court cannot therefore take the portions of that testimony that might be inferred to satisfy the heat of passion element and pair them with defense's assertion that legal provocation existed when Victim shot first. Such a limitation is further demonstrated by again referring to the need to show that the heat of passion was *caused* by the legal provocation. *Starnes*, 388 S.C. at 596, 698 S.E.2d at 608. The seemingly brutal violence described by Alicia lacks a causal connection due to the absence of legal provocation. The legal provocation supposedly testified to by Tyeisha and Appellant lacks any proof that it caused Appellant to succumb to a heat of passion state-of-mind. To disregard *Funchess*, and permit the mix and match of facts, such that the elements are satisfied, would essentially render all murders worthy of voluntary manslaughter charges. This court erred in doing so.

*Conclusion*

For all the foregoing reasons, Respondent respectfully requests this Court grant rehearing, reconsider and reverse its ruling, and affirm the lower court.

Respectfully submitted,

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August 26, 2021

**STATE OF SOUTH CAROLINA**
**IN THE COURT OF APPEALS**

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Appeal from Barnwell County
The Honorable Doyet A. Early, III, Circuit Court Judge
Appellate Case No. 2017-002014

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Opinion No. 5846 (S.C.Ct.App. filed August 11, 2021)

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THE STATE,

RESPONDENT,

v.

DEMONTAY MARKEITH PAYNE,

APPELLANT.



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**CERTIFICATE OF SERVICE**
Appellate Case No. 2018-001647

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I, Donna D'Alessio, am an employee of the Respondent, hereby certify that as per the March 20, 2020 Order of the Chief Justice, the Petition for Rehearing and Certificate of Service has been forwarded to Appellant's counsel, Susan Hackett, Esq., via email today, August 26, 2021 to shackett@sccid.sc.gov, and to her assistant at kkasperski@sccid.sc.gov.

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

This 26th day of August, 2021.

Donna D'Alessio, Legal Assistant for
W. Joseph Maye
Assistant Attorney General