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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Barnwell County
The Honorable Doyet A. Early, III, Circuit Court Judge

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

2017-GS-06-00066

THE STATE,

PETITIONER,

v.

DEMONTAY MARKEITH PAYNE,

RESPONDENT.

Appellate Case No. 2017-002014

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled upon by the Court of Appeals on August 31, 2021.

QUESTIONS PRESENTED

I. **Did the Court of Appeals fail to adhere to the "reasonable inference" standard required for review of the facts of record when evaluating the necessity of a lesser included offense charge?**

II. **Did the Court of Appeals fail to properly apply this Court's precedent in *Knoten* and *Funchess* by reviewing certain facts in isolation of Respondent's direct evidence as to his own state-of-mind, and in using portions of the State's case for malice as evidence supporting a heat of passion killing?**

STATEMENT OF THE CASE

Respondent was indicted for murder by a Barnwell County Grand Jury (2017-GS-06-00066). Assistant Solicitors David Miller and Jackson Cooper represented the State at trial, and Defendant Demontay Markeith Payne (hereinafter "Respondent") was represented by attorney Joshua Koger, Esquire (hereinafter "Defense Counsel"). (R., p. 1). Prior to trial, Respondent filed a Motion to Dismiss pursuant to the Protection of Persons and Property Act, for which a hearing was conducted by the Honorable Doyet A. Early, III, on August 22-23, 2017. The trial court heard testimony and concluded that the testimony of witnesses differed considerably, such that he could not find by preponderance of the evidence that Respondent was entitled to protection under the Act. The case was then called to trial before Judge Early and a jury on September 18-19, 2017. (R., p. 1). At the conclusion of trial the jury returned a guilty verdict against Respondent for murder. Judge Early sentenced Respondent to thirty-five (35) years imprisonment with credit for time served. (R., p. 240).

Respondent filed a timely notice of appeal on September 29, 2017. Respondent sought reversal of the conviction on the grounds that the trial court abused its discretion in denying a voluntary manslaughter charge. The parties completed briefing in July 2019 and conducted oral argument on September 15, 2020. The Court of Appeals reversed Respondent's conviction by its Opinion filed August 11, 2021. *State v. Payne*, 862 S.E.2d 81 (S.C. Ct. App. 2021), reh'g denied (Aug. 31, 2021). The State filed a Petition for Rehearing on August 26, 2021, and rehearing was denied by the Court of Appeals on August 31, 2021.

This Petition for Writ of Certiorari now follows:

STATEMENT OF FACTS

The Crime

Respondent 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 Respondent 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. (R., p. 17-19; p. 110). According to Respondent, he got in his car to go home, which was in the same direction that Victim had walked. Respondent arrived home, exited his car in the vicinity of Victim, and moments later Victim was shot and killed by Respondent. (R., p. 19). Respondent then fled the scene. (R., p. 24-25; p. 158). Forensics recovered six .380 caliber casings in the yard and street where Petitioner fired. (R., p. 56-57; p. 168). A single .40 caliber shell casing was found in the vicinity of Victim's body in the location where Victim fell after fleeing from Petitioner's gunfire. (R., p. 58). No firearms were recovered from the scene. Respondent turned himself in

approximately one week later. (R., p. 96). 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 Respondent began to argue. (R., p. 16, lines 1-23). Her cross-examination revealed that she believed Respondent was responsible for starting the argument because Respondent lifted his shirt to Victim to show the presence of his gun. (R., p. 29, lines 15-18; p. 33, lines 1-10). She could not testify as to the topic of their argument, but noted that the argument ended when Victim walked away and Respondent got in his car. Victim walked up Wingo Estates toward Emerald Road. (R., p. 17, lines 2-25). Respondent drove his car on to Wingo Estates and drove up towards Emerald Road. (R., p. 19, lines 1-5).

Victim had reached the intersection by the time Respondent arrived, wherein another verbal dispute arose and Respondent 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." (R., p. 19, line 1 through p. 20, line 25). Alicia testified that Victim attempted to run away once Respondent began shooting. (R., 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. (R., p. 26, line 1-14).

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[1] Alicia's statement to police indicated that Respondent "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." (R., 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. (R., p. 109, line 5 through p. 110, line 2). She then testified that Respondent and Victim were not "necessarily arguing, arguing, but they was just having words back and forth" and that it only lasted a few minutes. (R., p. 110, lines 6-19). She testified that Victim walked up the road to the intersection, and thereafter Respondent got in his car to leave and go home. (R., p. 110, line 20 through p. 111, line 21). Tyeisha testified that Respondent made no mention of the back-and-forth with Victim to her or the other individuals before he left in his car. (R., p. 112, lines 1-9).

She testified that after leaving to go home, Respondent 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. (R., p. 113, lines 2-6). She clarified that Respondent had exited his car and walked into Emerald Road for this to occur. She testified that she saw Respondent swing at Victim, and Victim responded by pulling a gun out. (R., 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." (R., p. 114, lines 21-23). *She testified that at this point Respondent turned around and headed back toward his house.* She testified that Victim followed Respondent and that they still appeared to be having words back and forth as he did so. (R., 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, Respondent turned and faced Victim. (R., p. 116, lines 3-25). Tyeisha testified that when Respondent turned around Victim started firing at Respondent. She testified that Respondent then started firing back, and that amidst the shooting, Victim turned to run back toward the trailers on Emerald Road. (R., p. 117, line 4 through p. 118, line 5). Tyeisha

confirmed that she witnessed these events from approximately 100 yards away. (R., p. 126, lines 11-24).

Respondent Demontay Payne

Respondent 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." (R., p. 152, lines 10-12). Respondent testified that though he could not recall the topic of the argument, he recalled telling Victim "I ain't worrying about it." (R., p. 152, lines 18-19). Respondent further testified that he was calm during the exchange, but that Victim was less so. (R., p. 152, line 20 through p. 153, line 1). Respondent 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 Respondent's grandmother's home. (R., p. 153, lines 4-18). Respondent further testified that the girls told him not to follow Victim. Respondent responded by informing the girls that he was not going to follow. Respondent 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 Respondent's demeanor. (R., p. 154, lines 9-14; p. 161, line 19 through p. 162, line 4). Respondent then told Tyeisha he was going home (his grandmother's home) and left in his car. (R., 154, lines 9-24).

Respondent 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." (R., p. 155, lines 10-11). Respondent clarified that when he pulled up to the edge of his trailer, he saw Victim coming. Respondent testified that they exchanged words, and Victim fired at him, and he "fired back in self-defense." (R., p. 155, lines 12-24). Respondent 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." (R., p. 156, lines 3-12). Respondent could not recall how many shots he fired and only knows how many times he shot Victim because of the police report. (R., p. 156, lines 13-21). Respondent testified that he did not see where Victim ran, as he was "looking back running." (R., 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. (R., p. 157, lines 2-8). Respondent 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." (R., 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. (R., p. 159, lines 13-18).

Respondent's cross-examination added further testimony. Respondent reiterated that he could not recall the topic of the argument. (R., 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. (R., p. 161, lines 16-18). He testified that Victim started shooting at him before he could even close the door to his car. (R., 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." (R., p. 164, lines 16-20). Respondent 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. (R., p. 167, lines 7-12; p. 167, line 22-24). Respondent testified that he does not remember swinging at Victim. (R., p. 167, lines 13-15). Respondent denied having any knowledge of a preexisting dispute between him and Victim. (R., p. 168, lines 20-22). When asked if there was a problem between them after their

argument on the porch, Respondent thought only that Victim "probably had a hostile – hostile feeling about me." (R., p. 168, line 23 through p. 169, line 3).

ARGUMENT

I. The Court of Appeals failed to adhere to the "reasonable inference" standard required for review of the facts of record when evaluating the necessity of a lesser included offense charge.

The Court of Appeals failed to correctly apply the legal standard that a jury charge for a lesser included offense is only proper upon any evidence supporting a *reasonable inference* of guilt for only that lesser included offense. Instead, the Court of Appeals relied upon a superficial application of the "any evidence" standard by citing random and disjointed facts to conclude there existed circumstantial evidence of heat of passion. The Court of Appeals failed to consider these facts in context and was dismissive of Respondent's own explicit testimony[2] as to his own state-of-mind at the time of the crime. In doing so, the Court of Appeals' ruling is legally incorrect and is based upon unreasonable inferences. Its decision to reverse Respondent's conviction was therefore reached in error, and certiorari is warranted.

a) The Court of Appeals did not abide the reasonable inference standard of review.

Jury charges are generally subject to an "any evidence" standard, but jury charges on lesser included offenses are only proper where the totality of the evidence is considered and is found to support a *reasonable inference* that the jury could find the defendant guilty of only the lesser included offense. In short, the standard requires any evidence supporting a reasonable inference of guilt to only the lesser included offense. *State v. Lambright*, 279 S.C. 535, 537, 309 S.E.2d 7, 8 (1983)("When the evidence is susceptible of the inference that an accused person is guilty of only

[2] Not that such testimony is dispositive, but neither may it be completely ignored.

a lesser included offense, it is the duty of the trial judge to charge the lesser offense so the jury may choose."); *State v. Geiger*, 370 S.C. 600, 607, 635 S.E.2d 669, 673 (Ct. App. 2006) ("To justify charging the lesser crime, the evidence presented must allow a rational inference the defendant was guilty only of the lesser offense."); *Id.* S.C. at 607, S.E.2d at 673 ("The court looks to the totality of the evidence in evaluating whether such an inference has been created."); *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). That focus upon "reasonableness" is likewise present in the maxim that facts must be viewed in the light most favorable to the party requesting the charge; this directive requires that such only be done to the extent that *reasonable inferences* may be drawn therefrom.

The Court of Appeals did not accurately apply that distinction to the facts of this case. It instead relied entirely upon circumstantial evidence to draw strained inferences from innocuous facts taken out of the context in which they were presented, while disregarding the direct evidence of Respondent's own testimony wherein he claims that he fired in self-defense while trying to escape the alleged danger presented by Victim.

To this point, the Court of Appeals 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). "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). The Court

of Appeals' holding in *Gilmore* presents sound analogous logic for consideration of charging lesser included offenses, but such logic was not followed in this case.

Here, the totality of the evidence was not considered. Here, despite reliance upon strained inferences from purely circumstantial evidence, the Court did not ask if that circumstantial evidence was substantial so as to support a *reasonable inference*, as it did in *Gilmore*. To the contrary, in this case the Court of Appeals failed to consider the fact that it was relying entirely on circumstantial evidence spliced together from the record, absent the context in which the evidence was presented, and without consideration of the direct evidence from Respondent that flatly opposes the contention that he acted in a heat of passion. As such, the Court of Appeals has not properly applied the correct legal standard in this case.

b) The Court of Appeals reached unreasonable inferences from the evidence that lack the causal relationship required between the legal provocation and heat of passion elements for voluntary manslaughter.

In addition to the Court of Appeals' omission of the reasonable inference standard based upon the totality of the evidence, the court failed to properly analyze the facts within the legal standard it did set forth. The Court of Appeals set forth the following excerpts from its statement of the law:

> 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.
>
> . . .
>
> 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).
>
> . . .
>
> 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.

State v. Payne, 862 S.E.2d 81, 88-89 (S.C. Ct. App. 2021), reh'g denied (Aug. 31, 2021) (emphasis added). What is present in the recitation of law, but absent from the Court of Appeals' analysis, is the context of the facts relied upon by the court, and the causal relationship between the legal provocation and the heat of passion elements for voluntary manslaughter.

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 by *Starnes*, 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[3], is interconnected to the others, and the necessary causal relationship set forth by *Starnes* can only be evaluated when the evidence *is considered in the context it was presented at trial. Id.* at 598, 698 S.E.2d at 608.

The Court of Appeals relied upon five pieces of circumstantial evidence for its finding that Respondent's mental state was one of an uncontrollable impulse to do violence. These include: 1)

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[3] 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.

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, 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. *Id. 862* S.E.2d at 99. Each of these evidentiary grounds lacks the context and causal relationship needed to create a reasonable inference from substantial circumstantial evidence that Respondent acted under a sudden heat of passion. Those errors in factual findings were then compounded by the Court of Appeals marginalizing Respondent's direct evidence testimony as to his own state-of-mind, in favor of its own strained inferences.

Regarding the first piece of evidence, there is indeed evidence of an argument, and there is evidence that someone told Respondent not to follow Victim. The Court of Appeals references this as its first fact supporting reversal. However, neither of these facts addresses Respondent's state-of-mind as it pertains to the creation of an uncontrollable impulse to do violence, and moreover, the Court of Appeals failed to tell the whole story behind that particular piece of evidence.

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

demonstrated, *all* of the evidence is to the contrary, as it shows Respondent was capable of cool reflection after the argument ended. Heat of passion does not arise simply from the existence of an argument, and the court's reliance in part upon this fact was an unreasonable inference as to the heat of passion element.

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 Respondent. Most of the evidence available suggests 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 Respondent's state-of-mind that caused an uncontrollable impulse to do violence. To the contrary, Respondent's testimony demonstrates that he still could not recall the subject of the argument, *or even if a second argument took place*. Respondent also testified that Victim's attack took place before he could even fully exit his vehicle. (R., p. 167, lines 22-24; p. 164). Respondent testified that he bore no dispute against Victim, and that if such a dispute existed, it existed solely by Victim expressing hostility toward him. (R., p. 168-169). The Court of Appeals dismissed this direct evidence to the issue in favor of its unsupported circumstantial evidence inference to the contrary. The existence of an argument cannot satisfy the heat of passion element without also having legal provocation, and that such legal provocation *caused* Respondent to experience an uncontrolled impulse to do violence. No such causal relationship has been shown to arise. The supposed second argument, and particularly Respondent's clear lack of impact by it, demonstrates that it provides no evidence in support of a voluntary manslaughter charge. Reaching an inference to the contrary is not a reasonable view of the evidence, but a strained and artificial construction of a narrative not supported by the fullness of the record.

Third, the Court of Appeals identified evidence that Respondent threw a punch at Victim. This is the first instance of any violence, but violence alone cannot demonstrate Respondent 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, Respondent 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, Respondent 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 Respondent was in control of his actions and did not continue with violence. Therein, he demonstrated control, deliberation, and specifically, the capability for cool reflection. (R., p. 114).

While this is sufficient to show Respondent'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, *Respondent disengaged from the altercation and walked back toward his home.* (R., p. 114-115). Respondent's decision demonstrates he was not only *capable* of cool reflection, but actually *chose to do so*. The Court of Appeals' Opinion cites long quotations that included Respondent's decision to turn around and walk away, but the opinion pays this fact no weight in evaluating Respondent'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, the Court of Appeals cites testimony demonstrating that Victim started shooting first at Respondent, and that Respondent 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 Respondent to succumb to an uncontrolled impulse for violence, and the context surrounding that evidence which proves the contrary was disregarded by the Court of Appeals. It should not have been, as it is telling.

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.[4] If Tyeisha and/or Respondent are to be believed, and Victim shot first, the law dictating the need to charge voluntary manslaughter requires the following:

1) There must be evidence that the legal provocation *caused* the Respondent's heat of passion;
2) That if Victim's attack caused Respondent'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 the Court of Appeals 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 suffices 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

[4] As only Tyeisha and Respondent testified that Victim shot first, Alicia's testimony depicting an unprovoked, undefended, and malicious shooting by Respondent, 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)).

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 crucial, but the context was not considered.

Tyeisha testified that Victim shot first, but she did not offer any testimony as to whether Respondent's reaction to fire back was the result of an uncontrolled impulse to do violence. Nor did she testify as to the emotions that Respondent 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, Respondent 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) Respondent's *decision* to return fire was the only *option* he believed he had under the circumstances. (R., p. 155-157; p. 159; p. 164). These statements provide direct evidence as to Respondent's state-of-mind and they directly refute the Court of Appeals' inference that Respondent 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 Court of Appeals' findings, the record is devoid of evidence which would characterize

Respondent'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 Respondent's state-of-mind. All of the correlating evidence that does relate to state-of-mind demonstrates that it was a *decision* made by Respondent 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 Respondent was "afraid for [his] life" as its fifth piece of circumstantial evidence. However, a careful reading of the record demonstrates that this statement from Respondent was the response given for "why [he] was backing up" after being shot at by Victim. (R., p. 156, lines 8-12). Not only was this precise quote not useful to the Court of Appeals in demonstrating heat of passion, it is decidedly against a finding of heat of passion, as it demonstrates that Respondent 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 Respondent 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 Respondent's fear *caused* an uncontrollable impulse for violence, as is required by law.

Certiorari should be granted to not only correct the Court of Appeals' decision to the contrary, but also to clarify that this Court's precedent requires full consideration of the facts in context to fairly assess the necessity of a lesser included offense.

II. The Court of Appeals failed to properly apply precedent set forth by this Court in *Knoten* and *Funchess.*

The Court of Appeals provided 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, the Court of Appeals 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).

Id. 862 S.E.2d at 98. The Court of Appeals' reliance upon *Knoten* is such a way is misplaced. In *Knoten*, the Court resolved that the defendant's recanted statements to police introduced at trial could be not be ignored as evidence of defendant's state-of-mind, even if it was not consistent with his 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 Respondent's case.

Petitioner acknowledges that a reviewing court is not limited to any certain portion of the evidence, but likewise, *Knoten* does not stand for the proposition that a reviewing court can

evaluate only the evidence it chooses, in isolation of the remaining evidence, or outside the context for which the evidence was offered. Petitioner argues precisely the opposite; the Court of Appeals 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 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 a court of that responsibility.

Lastly, the Court of Appeals 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, this 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 the Court of Appeals expressly did so by relying upon part of Alicia's testimony to supplement the complete absence of heat of passion demonstrated by the defense. *Payne*, 862 S.E.2d at 99.

Alicia's testimony described Respondent 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*, the Court of Appeals erred by taking the portions of that testimony that might be inferred to satisfy the heat of passion element and pairing 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 Respondent lacks any proof that it caused Respondent 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. The Court of Appeals erred in doing so and certiorari should be granted to correct the error.

CONCLUSION

The Court of Appeals fell into the very confusion this Court warned of in *State v. Starnes.* This Court has cautioned judges 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." *Starnes,* 698 S.E.2d at 608; *Sims*, 825 S.E.2d at 739. This Court was nothing less than prophetic in *Starnes;* the confusion that now exists in determining the propriety of charging lesser included offenses has resulted in the Court of Appeals' errors in the case at hand. For all the foregoing reasons, Respondent respectfully petitions this Court to grant certiorari so that the specific errors of the Court of Appeals can be corrected and so that further guidance on a muddled area of law can be provided to lower courts.

Signature block on following page

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Columbia, South Carolina
September 29, 2021

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Barnwell County
The Honorable Doyet A. Early, III, Circuit Court Judge

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

2017-GS-06-00066

THE STATE,

PETITIONER,

v.

DEMONTAY MARKEITH PAYNE,

RESPONDENT.

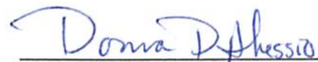
Appellate Case No. 2017-002014

PROOF OF SERVICE

I, Donna D'Alessio, am an employee of the Petitioner, hereby certify that as per the March 20, 2020 Order of the Chief Justice, the Petition for Writ of Certiorari, and Proof of Service has been forwarded to Respondent's counsel, Susan Hackett, Esq., via email today, September 29, 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 29th day of September, 2021.



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