# The Supreme Court of South Carolina

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CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211
TELEPHONE: (803) 734-1080
FAX: (803) 734-1499

## N O T I C E

In the Matter of Todd Anthony Strich, Petitioner
Appellate Case No. 2014-002456

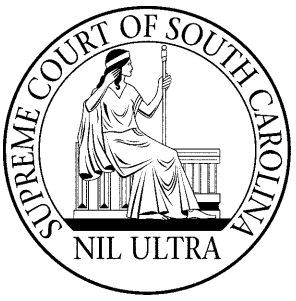
Petitioner was definitely suspended from the practice of law for one (1) year. *In the Matter of Strich*, 366 S.C. 373, 622 S.E.2d 543 (2005). Petitioner has now filed a petition seeking to be reinstated.

Pursuant to Rule 33(e)(2) of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413 of the South Carolina Appellate Court Rules, notice is hereby given that members of the bar and the public may file a notice of their opposition to or concurrence with the petition. Comments should be mailed to:

Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

These comments should be received within sixty (60) days of the date of this notice.

Columbia, South Carolina
March 18, 2015




# OPINIONS

## OF

# THE SUPREME COURT

## AND

# COURT OF APPEALS

## OF

# SOUTH CAROLINA

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**ADVANCE SHEET NO. 12**
**March 25, 2015**
**Daniel E. Shearouse, Clerk**
**Columbia, South Carolina**
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## CONTENTS

## THE SUPREME COURT OF SOUTH CAROLINA

### PUBLISHED OPINIONS AND ORDERS

27510 - The State v. Richard Bill Niles, Jr. 10

27511 - The State v. Richard Lewis 20

### UNPUBLISHED OPINIONS

2015-MO-013 - Gregory M. Gottschlich v. Strimpfel Custom Homes
(Beaufort County, Judge Marvin H. Dukes, III)

2015-MO-014 - Fatima Karriem v. Sumter County DSNB
(Sumter County, Judge Clifton Newman)

### PETITIONS – UNITED STATES SUPREME COURT

27452 - The State v. William Coaxum, Sr. Pending

2010-173586 - Bayan Aleksey v. State Pending

2014-001128 - The State v. Derringer Young
Pending

2013-001053 - James Prather v. State Pending

### EXTENSION OF TIME TO FILE PETITION FOR REHEARING

27502 - State of South Carolina ex. rel. Alan Wilson
v. Ortho-McNeil-Janssen Pharmaceuticals Granted until 3/27/2015

## PETITIONS FOR REHEARING

| | |
|---|---|
| 27475 - North American Rescue v. P. J. Richardson | Denied 3/19/2015 |
| 27484 - Columbia/CSA-HS Greater Columbia Healthcare System, et al. v. The South Carolina Medical Malpractice Liability Joint Underwriting Association, et al. | Pending |
| 27486 - Carolina First Bank v. Badd | Pending |
| 27488 - The State v. Kenneth D. Morris, II | Pending |
| 27491 - The State v. George L. Chavis | Pending |
| 27497 - The State v. Mark Baker | Pending |
| 2015-MO-005 - The State v. Henry Haygood | Pending |
| 2015-MO-009 - The State v. Tavario Dormell Brunson | Pending |

## The South Carolina Court of Appeals

### PUBLISHED OPINIONS

5305- S.C. Department of Social Services v. In the Interest of Sidney Patten, a vulnerable adult 22

### UNPUBLISHED OPINIONS

2015-UP-162-Thomas Free v. Natena Buff

2015-UP-163-Joseph N. Grate v. Andrew Rodrigues

2015-UP-164-Lend Lease v. Allsouth Electrical

2015-UP-165-State v. Denorris Hall

### PETITIONS FOR REHEARING

| | |
|---|---|
| 5253-Sierra Club v. SCDHEC and Chem-Nuclear Systems, Inc. | Pending |
| 5270-56 Leinbach Investors, LLC v. Magnolia Paradigm | Denied 03/19/15 |
| 5294-State v. Darryl L. Drayton | Denied 03/19/15 |
| 5295-Edward Freiburger v. State | Pending |
| 5297-Trident Medical Center v. SCDHEC | Pending |
| 5298-George Thomas v. 5 Star Transportation | Pending |
| 5301-State v. Andrew T. Looper | Pending |
| 2015-UP-014-State v. Melvin P. Stukes | Denied 03/19/15 |
| 2015-UP-029-HSBC Mortgage v. Otterbein | Denied 03/19/15 |

| | |
|---|---|
| 2015-UP-031-Blue Ridge Electric Cooperative, Inc. v. Gresham | Pending |
| 2015-UP-036-Alison Morrett v. Capital City Ambulance | Denied 03/19/15 |
| 2015-UP-041-Nathalie I. Davaut v. USC | Pending |
| 2015-UP-059-In the matter of the estate of Willie Rogers Deas | Pending |
| 2015-UP-065-Glenda R. Couram v. Lula N. Davis | Pending |
| 2015-UP-066-State v. James Roscoe Scofield | Pending |
| 2015-UP-067-Ex parte: Tony Megna | Pending |
| 2015-UP-069-Gitter v. Gitter | Pending |
| 2015-UP-071-Michael A. Hough v. State | Denied 03/19/15 |
| 2015-UP-072-Silvester v. Spring Valley Country Club | Denied 03/19/15 |
| 2015-UP-074-State v. Akeem O. Smith | Pending |
| 2015-UP-077-Derick Ward v. Margaret Ashbaugh | Pending |
| 2015-UP-091-U.S. Bank v. Kelley Burr | Pending |
| 2015-UP-098-State v. James Lamont Moore | Pending |
| 2015-UP-102-SCDCA v. Entera Holdings | Pending |
| 2015-UP-106-Edward Eli Saleeby, III, v. SCDMV | Pending |
| 2015-UP-107-Roger R. Riemann v. Palmetto Gems | Pending |
| 2015-UP-110-Deutsche Bank v. Cora B. Wilks | Pending |
| 2015-UP-115-State v. William Pou | Pending |
| 2015-UP-117-State v. Keith Letmon | Pending |
| 2015-UP-150-State v. Jabarrie Brown | Pending |

## PETITIONS-SOUTH CAROLINA SUPREME COURT

| | |
|---|---|
| 5077-Kirby L. Bishop et al. v. City of Columbia | Pending |
| 5099-Roosevelt Simmons v. Berkeley Electric | Granted 03/19/15 |
| 5209-State v. Tyrone Whatley | Pending |
| 5229-Coleen Mick-Skaggs v. William Skaggs | Pending |
| 5231-Centennial Casualty v. Western Surety | Pending |
| 5237-Lee C. Palms v. The School District of Greenville Cty. | Pending |
| 5241-Richard A. Fisher v. Shipyard Village Council | Granted 03/19/15 |
| 5245-Allegro, Inc. v. Emmett Scully | Pending |
| 5247-State v. Henry Haygood | Pending |
| 5250-Precision Walls v. Liberty Mutual Fire Ins. | Pending |
| 5259-State v. Victor A. White | Denied 03/19/15 |
| 5263-Milton P. Demetre Family Ltd. Partnership v. Beckmann | Pending |
| 5265-State v. Wayne McCombs | Pending |
| 5268-Julie Tuten v. David C. Joel | Pending |
| 5271-Richard Stogsdill v. SCDHHS | Pending |
| 5272-Cindy Dozier v. American Red Cross | Pending |
| 5274-Duke Energy v. SCDOR | Pending |
| 5275-Mitul Enterprises v. Beaufort Cty. Assessor | Pending |
| 5276-State v. Dwayne Eddie Starks | Pending |
| 5278-State v. Daniel D'Angelo Jackson | Pending |

| | |
|---|---|
| 5279-Stephen Brock v. Town of Mt. Pleasant | Pending |
| 5281-Greens of Rock Hill v. Rizon Commercial | Pending |
| 5283-State v. Arthur Smith | Pending |
| 5284-Fayrell Furr v. Horry County | Pending |
| 5288-State v. Damon T. Brown | Pending |
| 2013-UP-147-State v. Anthony Hackshaw | Pending |
| 2013-UP-251-Betty Jo Floyd v. Ken Baker Used Cars | Pending |
| 2013-UP-322-A.M. Kelly Grove v. SCDHEC | Pending |
| 2014-UP-128-3 Chisolm Street v. Chisolm Street | Pending |
| 2014-UP-143-State v. Jeffrey Dodd Thomas | Pending |
| 2014-UP-228-State v. Taurus L. Thompson | Pending |
| 2014-UP-273-Gregory Feldman v. William Casey | Pending |
| 2014-UP-304-State v. Tawanda Allen | Pending |
| 2014-UP-346-State v. Jason Bauman | Pending |
| 2014-UP-348-State v. Anthony Jackson | Pending |
| 2014-UP-361-Russell W. Rice, Jr. v. State | Granted 03/19/15 |
| 2014-UP-365-Fatima Karriem v. Sumter Cty. Disabilities | Pending |
| 2014-UP-367-State v. Shondre L. Williams | Pending |
| 2014-UP-381-State v. Alexander L. Hunsberger | Pending |
| 2014-UP-382-State v. Julio A. Hunsberger | Pending |
| 2014-UP-385-State v. Ralph B. Hayes | Denied 03/18/15 |

| | |
|---|---|
| 2014-UP-387-Alan Sheppard v. William O. Higgins | Pending |
| 2014-UP-389-James Plemmons v. State Farm Mutual | Pending |
| 2014-UP-393-Patrick Bowie v. Woodbine Estates | Pending |
| 2014-UP-399-State v. Matthew B. Fullbright | Pending |
| 2014-UP-400-John Doe v. City of Duncan | Pending |
| 2014-UP-409-State v. Antonio Miller | Pending |
| 2014-UP-411-State v. Theodore Manning | Pending |
| 2014-UP-422-Johnson Koola v. Cambridge Two | Pending |
| 2014-UP-435-SCBT, N.A. v. Sand Dollar 31 (Meisner) | Pending |
| 2014-UP-438-CACH, LLC v. Hoffman | Pending |
| 2014-UP-444-State v. Eric VanCleave | Pending |
| 2014-UP-446-State v. Ubaldo Garcia, Jr. | Pending |
| 2014-UP-463-State v. Victor Weldon | Pending |
| 2014-UP-470-State v. Jon Wynn Jarrard, Sr. | Pending |
| 2015-UP-039-State v. Brad A. Day | Pending |

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

The State, Petitioner,

v.

Richard Bill Niles, Jr., Respondent.

Appellate Case No. 2012-213592

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**ON WRIT OF CERTIORARI TO THE COURT OF APPEALS**

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Appeal From Horry County
Benjamin H. Culbertson, Circuit Court Judge

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Opinion No. 27510
Heard June 25, 2014 – Filed March 25, 2015

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**REVERSED**

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Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Donald J. Zelenka, and Assistant Attorney General Brendan Jackson McDonald, all of Columbia, and Solicitor Jimmy A. Richardson II, of Conway, for Petitioner.

Chief Appellate Defender Robert Michael Dudek, of Columbia, and Reid T. Sherard, of Nelson Mullins Riley & Scarborough, LLP, of Greenville, for Respondent.

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**CHIEF JUSTICE TOAL:** Richard Bill Niles, Jr. was convicted of murder, armed robbery, and possession of a weapon during the commission of a violent crime. The court of appeals reversed Respondent's murder conviction and remanded for a new trial, finding the trial court erred in refusing to instruct the jury on the lesser-included offense of voluntary manslaughter. *State v. Niles*, 400 S.C. 527, 735 S.E.2d 240 (Ct. App. 2012).[1] We reverse.

## FACTS/PROCEDURAL BACKGROUND

This case arises from the shooting death of James Salter (the victim) in a Best Buy parking lot in Myrtle Beach. It is undisputed that Niles, his fiancé, Mokeia Hammond, and Ervin Moore met the victim at the parking lot to purchase marijuana from him.[2] Niles and Moore testified at trial,[3] and Niles's version of events matched Moore's version, except as to whose idea it was to rob the victim and whether Niles or the victim fired the first shots.[4] Thus, the evidence at trial focused on whether Niles was the aggressor in the deadly encounter.

On the afternoon of April 9, 2007, Niles and Hammond encountered Moore at a convenience store in Trio, South Carolina, and invited Moore to accompany them to Myrtle Beach. Niles and Moore were acquaintances, having known each other through various family members. On the way to Myrtle Beach, the trio smoked all of the marijuana that they had brought with them.

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[1] Niles did not appeal his convictions for the remaining offenses. *Niles*, 400 S.C. at 531 n.1, 735 S.E.2d at 242 n.1.

[2] Hammond and Moore were also charged with murder, armed robbery, and possession of a firearm during the commission of a violent crime. Moore entered into a plea agreement with the State, whereby he pleaded guilty to voluntary manslaughter, armed robbery, and possession of a firearm during the commission of a violent crime in exchange for his testimony against Niles and Hammond at their joint trial.

[3] Hammond chose not to testify in her defense.

[4] Niles admitted he shot the victim and that Moore and Hammond were unarmed.

Therefore, Niles contacted the victim[5] via telephone and arranged to meet him at the Best Buy parking lot to purchase marijuana. Niles testified that his conversation with the victim had a dual purpose. Not only was he meeting with the victim so that Moore could purchase a pound of marijuana from him, but he claimed that the victim owed him $5,000 as payment for other drug transactions. According to Moore, however, Niles subsequently decided to rob the victim instead.[6]

Once in Myrtle Beach, the trio made several stops at various motels so that Niles could sell crack cocaine before meeting the victim at the designated meeting spot at approximately 7:00 p.m. Hammond was driving Niles's rental vehicle, with Niles riding in the front passenger's seat and Moore riding in the back seat. Hammond parked the rental vehicle next to the victim's vehicle. Moore testified that his role in the robbery was "to identify the weed" for Niles. Therefore, Moore approached the victim's vehicle first. Moore joined the victim in the victim's vehicle, and the victim produced the bag of marijuana for Moore to inspect.

Moore testified that as he returned to Niles's vehicle, Niles had already exited his vehicle, and Moore told Niles that the victim had the drugs. Moore testified that as he returned to his place in Niles's vehicle, Niles was leaning inside the passenger-side door of the victim's vehicle and was speaking to the victim.[7]

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[5] While Niles testified that he and the victim did not know each other personally, they had engaged in drug transactions for the past six to nine months. Niles testified he knew the victim by his nickname, "Spice," and that the victim knew him by his nickname, "Rich Boy." Niles testified that he and the victim were "in the business of selling drugs."

[6] Niles, on the other hand, testified that it was Moore's decision to rob the victim, and he did so without warning Niles beforehand.

[7] Niles's fingerprints were found on the victim's vehicle near where Niles was allegedly standing, corroborating Moore's testimony.

Moore testified he heard two shots and saw Niles leap into the back seat of his vehicle behind Hammond.[8] Moore then heard the victim fire a weapon in response. Niles and the victim shot back and forth multiple times. Niles had the drugs with him that Niles had stolen from the victim.

In contrast, Niles testified that Moore acted alone. Niles stated he merely set up the meeting, but Moore went over to the victim's vehicle to purchase the drugs while Niles and Hammond sat in the car and discussed their upcoming wedding. Niles said he then saw Moore and the victim fighting in the victim's vehicle, and realized that Moore was robbing the victim. Niles testified that Moore exited the victim's vehicle with the stolen drugs, and as Moore dove back into Niles's vehicle, Niles saw the victim draw his gun and shoot at them, knocking out the rear windows of Niles's vehicle. Therefore, Niles grabbed his gun, and returned fire. According to Niles, he was concerned with stopping the shooter and for Hammond's safety:

> So, while he was shooting in the car . . . I grabbed my pistol and that's when I shot two times. My eyes were closed. I wasn't even looking. I shot two times. I went pow, pow. I wasn't trying to hit nobody . . . I was just trying to get him to stop shooting. That's all I was trying to do. I didn't know if my fiancé got shot or nothing. That's the first thing that came to my head, you know.

After the shooting, Niles instructed Hammond to drive away from the scene, and the trio abandoned the vehicle at a nearby trailer park. Niles then called a taxicab to transport him and Hammond to a local motel. At that point, he and Hammond parted ways with Moore, and Moore kept the marijuana. The victim died at the scene from a gunshot wound.

On these facts, the trial court instructed the jury on the law of murder and self-defense, but refused Niles's request to instruct the jury on voluntary manslaughter, reasoning that the evidence showed Niles was either guilty of murder or he was not guilty of any crime based on his claim of self-defense.

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[8] Other witnesses to the shooting testified that they saw a "heavyset" black male running from the victim's car back to a dark sedan, which the State argued closely matched Niles's description, as Moore had a much smaller build than Niles.

The court of appeals reversed Niles's murder conviction and remanded the case for a new trial, finding the evidence compelled a jury instruction on the lesser-included offense of voluntary manslaughter. *Niles*, 400 S.C. at 534, 735 S.E.2d at 244. Specifically, the court of appeals found there was evidence of sufficient legal provocation based on Niles's testimony that he shot at the victim only after the victim began shooting first. *Id.* at 535, 735 S.E.2d at 244. Further, the court of appeals found that there was evidence that Niles acted in a sudden heat of passion based on Niles's testimony that he took Moore to meet the victim to buy marijuana; that Moore, without warning, decided to rob the victim; and that Niles did not fire his gun until after Moore perpetrated the robbery and the victim shot first. *Id.* at 536, 735 S.E.2d at 245. Therefore, the court of appeals concluded that there was evidence that Niles did not have an opportunity for cool reflection, and as such, there was evidence Niles acted in a sudden heat of passion. *Id.*

We granted the State's petition for a writ of certiorari to consider the State's argument that the court of appeals erred in determining Niles was entitled to a jury instruction on voluntary manslaughter because there was no evidence at trial that Niles acted in the sudden heat of passion.[9]

## STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Thus, this Court is bound by the trial court's factual findings unless the appellant can demonstrate that the trial court's conclusions either lack evidentiary support or are controlled by an error of law. *State v. Laney*, 367 S.C. 639, 644, 627 S.E.2d 726, 729 (2006). "The refusal to grant a requested jury charge that states a sound principle of law applicable to the case at hand is an error of law." *State v. Pittman*, 373 S.C. 527, 570, 647 S.E.2d 144, 167 (2007).

## ANALYSIS

The State maintains the trial court did not err in refusing Niles's request for an instruction on voluntary manslaughter because Niles failed to present evidence that he acted in the sudden heat of passion. We agree with the State that there was

[9] We note that the State has not challenged the court of appeals' finding that there was evidence of sufficient legal provocation.

no evidence that Niles acted within a sudden heat of passion upon sufficient legal provocation, and therefore the trial court did not err in refusing to instruct the jury on the lesser-included offense of voluntary manslaughter.

"The law to be charged to the jury is determined by the evidence presented at trial." *State v. Hill*, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993). The trial court is required to charge a jury on a lesser-included offense if there is evidence from which it could be inferred that the defendant committed the lesser, rather than the greater, offense. *State v. Drafts*, 288 S.C. 30, 340 S.E.2d 784 (1986); *Dempsey v. State*, 363 S.C. 365, 610 S.E.2d 812 (2005). 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. *Pittman*, 373 S.C. at 572–73, 647 S.E.2d at 168.

"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). To receive a voluntary manslaughter charge, there must be evidence of sufficient legal provocation and sudden heat of passion. *State v. Cole*, 338 S.C. 97, 101, 525 S.E.2d 511, 513 (2000).

> 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.

*State v. Walker*, 324 S.C. 257, 260, 478 S.E.2d 280, 281 (1996). Whether or not the facts constitute a sudden heat of passion is an appropriate question for the court. *State v. Hernandez*, 386 S.C. 655, 662, 690 S.E.2d 582, 586 (Ct. App. 2010) (citation omitted).

Niles's own testimony does not establish that he was overtaken by a sudden heat of passion such that he had an *uncontrollable impulse to do violence*. Rather, Niles testified that he did not want to hurt the victim; that he shot with his eyes closed; that he was merely attempting to stop the victim from shooting; and that when he shot his gun, he was thinking of Hammond rather than of perpetrating

violence upon the victim. *See Cole*, 338 S.C. at 102, 525 S.E.2d at 513 ("[T]here was no evidence presented that Appellant was overcome by a sudden heat of passion as would produce an 'uncontrollable impulse to do violence.' On the contrary, by Appellant's own testimony, he shot at the men to scare them away. Appellant's testimony appears designed to support a charge of self[-]defense, not heat of passion."). As in *Cole*, the focus of Niles's testimony at trial was on who was the aggressor—Niles or the victim—apparently to support Niles's theory of self-defense. In *State v. Childers*, we explained:

> Voluntary manslaughter, by definition, requires a criminal intent to do harm to another. But according to the defendant's story, he had no criminal intent whatsoever.
>
> If, as he suggests, the defendant returned fire in a panic for his life, surely the defense of self-defense would be appropriate. Notably, this was charged by the trial court . . . . Without any evidence supporting the view that the defendant fired the fatal shots while under an "uncontrollable impulse to do violence," the trial court properly declined to charge the law of voluntary manslaughter to the jury.

373 S.C. 367, 375–76, 645 S.E.2d 233, 237 (2007). Because Niles, by his own testimony, lacked the intent to harm the victim, we cannot see how a voluntary manslaughter charge would have been appropriate under these facts.[10]

We note further that it was undisputed that Niles, Hammond, and Moore met the victim in the parking to rob the victim during the drug transaction.[11] Niles

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[10] Undeniably, murder, self-defense, and voluntary manslaughter may coexist under the right factual circumstances; here, however, Niles's testimony went to the elements of self-defense, not voluntary manslaughter.

[11] There was conflicting testimony regarding whose idea it was to rob the victim and who in fact robbed the victim. However, it is undisputed that an armed robbery occurred, of which *all* were found guilty. *See* S.C. Code Ann. § 16-11-330(A) (Supp. 2013) (providing that any person who commits robbery while armed with a pistol or other deadly weapon is guilty of armed robbery). Importantly, Niles has not appealed his conviction. Thus, even viewing the facts in

further admitted that Moore and Hammond were unarmed, and that he fired the fatal shots, killing the victim. Thus, the scheme to rob the victim, coupled with Niles's decision to arrive at the scene armed with a deadly weapon, discounts any claim that Niles in any way act in a sudden heat of passion. Rather, Niles clearly planned for the possibility that he might have to discharge his weapon to accomplish the robbery, and did in fact kill the victim. These salient facts cannot be ignored. *See Pittman*, 373 S.C. at 575, 647 S.E.2d at 169 ("In determining whether an act which caused death was impelled by heat of passion or by malice, all the surrounding circumstances and conditions are to be taken into consideration, including previous relations and conditions connected with the tragedy, as well as those existing at the time of the killing." (citation omitted)). In other words, there was nothing *sudden* about Niles's decision to shoot the victim.[12]

Thus, we hold that the evidence did not warrant a voluntary manslaughter charge. *See State v. Smith*, 315 S.C. 547, 549, 446 S.E.2d 411, 412–13 (1994) ("The trial court may and should refuse to charge on a lesser-included offense where there is no evidence that the defendant committed the lesser rather than the greater offense.").

## CONCLUSION

For the foregoing reasons, we reverse the court of appeals.

**REVERSED.**

**BEATTY, KITTREDGE and HEARN, JJ., concur. PLEICONES, J., dissenting in a separate opinion.**

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a light most favorable to Niles, we may presume that Niles actively participated in perpetrating the armed robbery.

[12] Along the same lines, while the State has not challenged the court of appeals' findings with respect to sufficient legal provocation, we note that sufficient legal provocation cannot be found to exist where the victim is defending himself from a crime. *See State v. Knoten*, 347 S.C. 296, 314, 555 S.E.2d 391, 400 (2001) (Burnett, J., dissenting) ("A victim's attempts to resist or defend herself from a crime cannot satisfy the sufficient legal provocation element of voluntary manslaughter." (citing *State v. Shuler*, 344 S.C. 604, 545 S.E.2d 805 (2001)).

**JUSTICE PLEICONES:** I respectfully dissent. In my opinion, the court of appeals was correct in its holding that there is evidence in the record entitling Niles to a charge on voluntary manslaughter.

If there is any evidence to support a jury charge, the trial judge should grant the request. *State v. Shuler*, 344 S.C. 604, 632, 545 S.E.2d 805, 819 (2001). "To warrant the court in eliminating the offense of manslaughter it should very clearly appear that there is no evidence whatsoever tending to reduce the crime from murder to manslaughter." *State v. Wharton*, 381 S.C. 209, 214, 672 S.E.2d 786, 788 (2009). Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation. *State v. Smith*, 391 S.C. 408, 412-413, 706 S.E.2d 12, 14 (2011). The sudden heat of passion needed to justify a voluntary manslaughter charge 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 may be called an uncontrollable impulse to do violence. *State v. Cole*, 338 S.C. 97, 101-102, 525 S.E.2d 511, 513 (2000).

In this case, a voluntary manslaughter charge should have been given if there were *any* evidence in the record from which a jury could infer that this killing was the result of sufficient legal provocation which caused Niles to experience an uncontrollable impulse to do violence. In my opinion, there is.

First, as the court of appeals noted, the unprovoked shooting by Salter amounted to evidence sufficient for a jury to infer that there was legal provocation. *See State v. Pittman*, 373 S.C. 527, 573, 647 S.E.2d 144, 168 (2008) ("This court has previously held than an overt, threatening act or a physical encounter may constitute sufficient legal provocation."). Second, I agree with the court of appeals that Niles's testimony that he immediately returned fire out of fear for himself and his fiancée provided evidence from which a jury could find that Niles was acting pursuant to an uncontrollable impulse to do violence. *State v. Wiggins*, 330 S.C. 538, 549, 500 S.E.2d 489, 495 (1998) (holding that the lower court properly charged the jury on voluntary manslaughter where defendant testified he was in fear of the threat of physical assault). Accordingly, I would affirm the court of appeals because I cannot say there is no evidence whatsoever tending to reduce this crime from murder to manslaughter.

Unlike the majority, I am unable to discern Niles' intent and state of mind on April 9, 2007, and to resolve numerous factual issues much as a jury might have done. For example, the majority states with certitude that Niles determined "to arrive at

the scene armed with a deadly weapon," thus demonstrating he "clearly planned for the possibility that he might have to discharge his weapon to accomplish the robbery . . . ." In light of this premeditated decision, the majority states "there was nothing *sudden* about Niles' decision to shoot the victim." In my opinion, the majority exceeds our scope of review in this law case by resolving disputed issues of fact in order to deny Niles a new trial. *E.g.*, *State v. Sams*, 410 S.C. 303, 764 S.E.2d 511 (2014).

I would affirm the court of appeals.

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

The State, Petitioner,

v.

Richard Lewis, Respondent.

Appellate Case No. 2013-001571

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**ON WRIT OF CERTIORARI TO THE COURT OF APPEALS**

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Appeal from Laurens County
The Honorable Frank R. Addy, Jr., Circuit Court Judge

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Opinion No. 27511
Heard March 4, 2015 – Filed March 25, 2015

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**CERTIORARI DISMISSED AS IMPROVIDENTLY GRANTED**

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Attorney General Alan M. Wilson and Senior Assistant Deputy Attorney General Salley W. Elliott, both of Columbia, for Petitioner.

C. Rauch Wise, of Greenwood, for Respondent.

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**PER CURIAM:** We granted certiorari to review the court of appeals' decision in *State v. Lewis*, 403 S.C. 345, 743 S.E.2d 124 (Ct. App. 2013). We now dismiss the writ as improvidently granted.

**TOAL, C.J., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.**

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

South Carolina Department of Social Services,
Respondent,

v.

In the Interest of Sidney Patten, a vulnerable adult,
Appellant.

Appellate Case No. 2014-001394

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Appeal From York County
Joseph W. McGowan, III, Family Court Judge

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Opinion No. 5305
Heard February 3, 2015 – Filed March 25, 2015

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**REVERSED AND REMANDED**

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Melinda Inman Butler, of The Butler Law Firm, of Union, for Appellant.

David E. Simpson, of the South Carolina Department of Social Services, of Rock Hill, for Respondent.

Ernest M. Spong, III, of Winnsboro, Guardian Ad Litem.

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**KONDUROS, J.:** Sidney Patten appeals the family court's order finding him a vulnerable adult under the Omnibus Adult Protection Act, sections 43-35-5 to -595

of the South Carolina Code (2015 & Supp. 2014) (the Act). We reverse and remand.

## FACTS/PROCEDURAL BACKGROUND

At the time of his hearing, Patten was sixty-three years old and in reasonably good physical health. The record reflects he moved slowly, took blood pressure medication, used eye drops, and may have taken medication for anxiety. Patten came to the Department of Social Services' (DSS) attention in Rock Hill based on allegations relating to his living conditions and reports he was dirty and had called 911 numerous times claiming persons were damaging his home or property.[1] According to the record, Patten was living in a home with no running water or electricity and cluttered with various items. Although the record contains little direct information about the exterior of the house, it appears the yard contained an extensive amount of debris and clutter as well. Additionally, the kitchen ceiling had a hole in it from a kitchen fire at some point in the past.[2] Martha Jones was assigned as Patten's DSS caseworker and testified at the final hearing. According to Jones, when she visited Patten in his home in December, she did not think his condition or living conditions warranted his being placed in protective custody although the situation was not ideal. Jones returned to the home in January and observed Patten had not made any changes to his living conditions.

Simultaneously with the DSS investigation, Patten was involved with the City of Rock Hill's Environmental Court.[3] Patten indicated he had not corrected issues with the house because he did not have the money to make the required repairs to get a city permit and have water and electrical services restored. Patten received $782 per month in social security disability. He did not pay to live in the home as it was apparently family property belonging to him and other relatives who make no claim to the dilapidated residence.

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[1] The record contains no evidence regarding the alleged 911 calls or whether others were damaging Patten's home or property.

[2] The size and severity of the "hole" is unclear from the record other than a social worker's testimony you could see light through it.

[3] Environmental Court is a division of municipal court addressing owners' maintenance of their property.

Patten was using propane tanks at times to heat the home and warm food, and he had bottles of water and a bucket functioning as his bathroom. Floretta Anderson, a social worker with the Environmental Court, testified that the day she visited Patten, his home was freezing and she was concerned about the condition of the home. As a result, she alerted city authorities and persuaded Patten to go with the police to have his health evaluated. After an emergency hearing, the family court determined Patten was a vulnerable adult and should remain in DSS protective custody.

Jones continued seeing Patten once he was in DSS custody. She testified Patten had a psychological evaluation that was inconclusive. She also provided Patten was more stable at the time of the hearing than during some of their previous visits during which he was often upset about his placement in DSS custody. She further indicated Patten was capable of getting food and medicine and getting to where he needed to go.

Patten's testimony at the final hearing reflected he was not coherent on some subjects and got confused. He did not have a clear plan regarding where he would live if his home was condemned and had no specific plan on how to make the repairs required by the City.

The family court determined DSS presented "evidence of a non-medical nature which substantiates the vulnerability of Mr. Patten." The family court stated "[e]vidence was presented which showed that Mr. Patten is confused at times regarding his marital status, regarding his family members and regarding his abilities to correct his living situation on his own. His own testimony was at times confused and rambling." The order further indicates "[t]he evidence is clear that Mr. Patten, when allowed to attempt to provide for himself is unable to do so in a safe manner." Consequently, the family court ordered Patten to remain in DSS custody. This appeal followed.

## STANDARD OF REVIEW

"In appeals from the family court, the appellate court reviews factual and legal issues de novo. *De novo* review permits appellate court fact-finding, notwithstanding the presence of evidence supporting the [family] court's findings." *Doe v. S.C. Dep't of Soc. Servs.*, 407 S.C. 623, 632, 757 S.E.2d 712, 716-17 (2014) (alteration by court) (citation and internal quotation marks omitted). "However, we

recognize this broad scope of review does not alter the fact that a family court is better able to make credibility determinations because it has the opportunity to observe the witnesses." *Id*. at 632, 757 S.E.2d at 717 (citation and internal quotation marks omitted).

**LAW/ANALYSIS**

Patten argues the family court erred in finding he was a vulnerable adult. We agree.

The recent case of *Doe v. South Carolina Department of Social Services*, 407 S.C. 623, 757 S.E.2d 712 (2014), controls the disposition of this case as it sets forth the requisite analysis for determining if someone is a vulnerable adult within the meaning of the Act.[4]

The Act defines a vulnerable adult as follows:

> [A] person eighteen years of age or older who has a physical or mental condition which substantially impairs the person from adequately providing for his or her own care or protection. This includes a person who is impaired in the ability to adequately provide for the person's own care or protection because of the infirmities of aging including, but not limited to, organic brain damage, advanced age, and physical, mental, or emotional dysfunction. A resident of a facility is a vulnerable adult.

S.C. Code Ann. § 43-35-10(11) (2015).

"By its clear terms, the infirmities of aging must 'substantially impair' the person's ability to adequately provide for his or her own care or protection." *Doe*, 407 S.C. at 634, 757 S.E.2d at 718. "[F]or a person to be deemed a vulnerable adult under the Act[,] the person's physical or mental condition, including advanced age, must cause a diminished ability to adequately provide for self-care or protection." *Id*. at

[4] We note the learned family court judge and trial counsel did not have the benefit of the *Doe* case as it was decided after Patten's hearing.

635, 757 S.E.2d at 718. "Without question, an involuntary removal under the Act deprives a person of his liberty as well as property if the court orders a vulnerable adult to pay for the care received while in the custody of DSS." *Id*. at 637, 757 S.E.2d at 719. "Accordingly, . . . a heightened standard of proof, i.e., clear and convincing evidence, is necessary under these circumstances." *Id*.

> [P]overty or the lack of adequate funds or resources may have a deleterious effect on an individual's ability to adequately provide for her care and protection; however, poverty alone is not sufficient to satisfy the definition of a vulnerable adult under the Act. Rather, there must be evidence of other factors that cause the deleterious effect.

*Id*. at 638 n.16, 757 S.E.2d at 720 n.16.

Doe was an eighty-six-year-old woman with a heart condition. *Id*. at 627, 757 S.E.2d at 714. She lived alone without family support. *Id*. Deputies who arrived to investigate an allegation regarding her living conditions observed the home was "in an unsanitary and deplorable condition." *Id*. at 627-28, 757 S.E.2d at 714. They noted a hole in the roof and a hose running from a neighbor's home to provide water. *Id*. at 628, 757 S.E.2d at 714. They observed "mold on the window curtains and piles of items on the floor giving the appearance that Doe was a 'hoarder.'" *Id*. After her removal, Doe was evaluated by Dr. Marc Harari, a licensed counseling psychologist. *Id*. at 629, 757 S.E.2d at 715. He concluded "Doe appeared to have 'the minimum levels of competency to function independently' as there was no evidence of dementia, severe emotional issues, or obvious physical limitations."[5] *Id*. at 630, 757 S.E.2d at 715. When asked about repairing her home, Doe testified the hole in the roof had been repaired and her water had been turned off over a disputed bill. *Id*. at 631, 757 S.E.2d at 716. She indicated she had paid the bill and could request to have the water turned back on. *Id*. The family court concluded Doe met the statutory definition of a vulnerable adult under the Act.[6] *Id*. In reversing that decision, the supreme court focused on

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[5] Dr. Harari also recommended DSS maintain an open treatment case to ensure Doe's home was repaired and that she interact with peers to alleviate feelings of isolation. *Id*.

[6] The family court determined Doe would continue in DSS protective custody until (1) her water supply was reconnected; (2) the house was clean; (3) electrical power

the lack of a causal relationship between Doe's living conditions and any mental or physical limitation.

> Significantly, counsel for DSS admitted the evidence was "scant" and there was only a "scintilla of evidence" to show that Doe qualified as a vulnerable adult under the terms of the Act. Furthermore, there is no evidence that Doe's advanced age substantially impaired her ability to adequately provide for her own care and protection. Specifically, there is no evidence of physical or mental infirmities that would prohibit Doe from living independently. To the contrary, the evaluating psychologist concluded Doe possessed a level of competency sufficient for her to function independently and she had no obvious physical limitations. Moreover, there is no evidence the unfavorable home condition that precipitated Doe's involuntary removal was causally related to her advanced age. Instead, the problems with Doe's home were dependent on the finances needed to repair the roof and turn on the water supply. Although there is some evidence that Doe's home was in disarray, DSS offered no evidence attributing the lack of cleanliness to a deficiency in Doe's mental or physical condition. Accordingly, we find the family court erred in classifying Doe as a vulnerable adult.

*Id*. at 638, 757 S.E.2d at 719-20 (footnote omitted).

Using the framework set forth in *Doe*, we conclude DSS failed to prove by clear and convincing evidence Patten was a vulnerable adult under the Act. First, Patten's psychological evaluation was inconclusive and no information regarding the evaluation was presented to the family court or included in the record on appeal. Additionally, Patten had been able to sustain himself in relatively good health in the home even though the home was not in a condition that most people

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was supplied to the home; (4) the heating system was operational; (5) an air conditioning system, if in place, was operational; and (6) the house had adequate food and cleaning supplies. *Id*. at 631-32, 757 S.E.2d at 716.

would find suitable. The record demonstrates he eats well, including sometimes visiting the local soup kitchen; obtains his medications; attends a local church; and is generally able to get where he wants to go, either on foot or by other means. Therefore, we reverse the family court's determination Patten was a vulnerable adult.

We are mindful circumstances may have changed during the pendency of this appeal. Remand is needed, as in *Doe*, for DSS to inform the family court of the current status of Patten's health, home, and finances and to determine what additional community services he may be entitled to in light of his return to the community. The review hearing should be conducted in a manner consistent with this opinion and as expeditiously as possible so Patten does not spend any more time in custody than absolutely necessary.

**REVERSED AND REMANDED.**

**THOMAS and GEATHERS, JJ., concur.**