Rel: 3/03/2017

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2016-2017

1150487

Ex parte Paudriciquez Martez Fuller

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

(In re: Paudriciquez Martez Fuller

v.

State of Alabama)

(Jefferson Circuit Court, Bessemer Division, CC-14-422; Court of Criminal Appeals, CR-14-0368)

PER CURIAM.

WRIT QUASHED. NO OPINION.

Stuart, Bolin, Shaw, and Main, JJ., concur.

Parker, Murdock, and Bryan, JJ., dissent.

Wise, J., recuses herself.

PARKER, Justice (dissenting).

I respectfully dissent from the majority's decision to quash the writ of certiorari this Court previously issued. This Court granted certiorari review to consider whether the Court of Criminal Appeals erred in holding that the Jefferson Circuit Court ("the trial court") did not commit reversible error in refusing to give two jury instructions requested by Paudriciquez Martez Fuller. Fuller v. State, [Ms. CR-14-0368, December 18, 2015] ___ So. 3d ___ (Ala. Crim. App. 2015). Specifically, we granted certiorari review to consider 1) whether Fuller was entitled to a jury instruction under Alabama's stand-your-ground law, § 13A-3-23(b), Ala. Code 1975, and 2) whether Fuller was entitled to a jury instruction on a lesser-included offense. I would affirm the Court of Criminal Appeals' judgment as to the first issue and reverse it as to the second issue.

Alabama law defines self-defense in § 13A-3-23, Ala. Code 1975, which states, in pertinent part:

> "(a) A person is justified in using physical force upon another person in order to defend himself or herself or a third person from what he or she reasonably believes to be the use or imminent use of unlawful physical force by that other person, and he or she may use a degree of force which he or she

> reasonably believes to be necessary for the purpose. ...
>
> > "(b) A person who is justified under subsection (a) in using physical force, including deadly physical force, and who is not engaged in an unlawful activity and is in any place where he or she has the right to be has no duty to retreat and has the right to stand his or her ground."

Although not explicitly stated in § 13A-3-23, the Court of Criminal Appeals explained in Malone v. State, [Ms. CR-14-1326, June 3, 2016] ___ So. 3d ___, ___ (Ala. Crim. App. 2016), that the duty-to-retreat requirement, which was part of Alabama's common law, is still applicable under § 13A-3-23, as follows:

> "Before it was amended in 2006, § 13A-3-23(b), Ala. Code 1975, provided, in relevant part:
>
> > "'(b) Notwithstanding the provisions of subsection (a), a person is not justified in using deadly physical force upon another person if it reasonably appears or he knows that he can avoid the necessity of using such force with complete safety:
> >
> > "'(1) By retreating, except that the actor is not required to retreat:
> >
> > "'a. If he is in his dwelling or at his place of work and was not the original aggressor; or

> "'b. If he is a peace officer or a private person lawfully assisting a peace officer at his discretion.'

"As noted in the Commentary to the Code section, § 13A-3-23 in 1975 'codifie[d] much of the contemporary doctrine on self-defense and the protection of others. Little distinction exists between former Alabama law and that of these codifications, except in the aspect pertaining to third persons in whose aid defendant has acted.' With regard to former subsection (b) specifically, the Commentary stated:

> "'Subsection (b) further qualifies the use of deadly force. If the defendant can avoid the necessity of taking life by retreating, in general he must give way. Former Alabama law required retreat if it is "reasonably apparent" that it can be done without increasing the danger. Some contemporary codifications require the defendant to "know" that safe retreat is possible. The Criminal Code retains the obligation to retreat in the interest of preserving life, but gives the defendant the benefit of reasonable appearances rather than actual knowledge of an alternative. Not requiring retreat from "in" one's dwelling or place of business conforms to Alabama case law.'

"Thus, former subsection (b) was a codification of the common-law rules regarding a duty to retreat before using deadly force. As noted by one commentator, before its codification in former subsection (b), the duty to retreat had been recognized in Alabama cases for almost a century. See Jason W. Bobo, Following the Trend: Alabama Abandons the Duty to Retreat and Encourages Citizens to Stand Their Ground, 38 Cumb. L. Rev. 339, 354-58

(2008) (discussing the history of the duty to retreat in Alabama cases).

"The 2006 amendment to § 13A-3-23 removed former subsection (b) and replaced it with the following:

> "'A person who is justified under subsection (a) in using physical force, including deadly physical force, and who is not engaged in an unlawful activity and is in any place where he or she has the right to be has no duty to retreat and has the right to stand his or her ground.'

"As amended, § 13A-3-23 no longer includes an express codification of the common-law rules regarding the duty to retreat. In recognizing that there is no duty to retreat under certain conditions, however, § 13A-3-23 assumes that the common-law rules regarding a duty to retreat generally remain in effect in evaluating a claim of justified deadly force under § 13A-3-23. Otherwise, the no-duty-to-retreat provision of § 13A-3-23(b) makes no sense. Indeed, as this Court has recently explained:

> "'Section 13A-3-23(b) provides a qualified exception to the common-law rule that required a person to retreat rather than use deadly physical force if that person can retreat without increasing his or her peril. See Kyser v. State, 513 So. 2d 68 (Ala. Crim. App. 1987) (setting forth the standard concerning a person's duty to retreat under the common law and under a prior version of § 13A-3-23). Section 13A-3-23(b) exempts people who are not engaged in an unlawful activity and are in any place where they have the right to be from the common-law rule.'

> "Wallace v. State, [Ms. CR-14-0595, Dec. 18, 2015] ___ So. 3d ___, ___ (Ala. Crim. App. 2015) (quoting Fuller v. State, [Ms. CR-14-0368, Dec. 18, 2015] ___ So. 3d ___, ___ (Ala. Crim. App. 2015) (emphasis added)). Accordingly, an accused who claims to have been justified in using deadly force under § 13A-3-23 must have complied with the common-law rules regarding the duty to retreat unless he or she meets the requirements of § 13A-3-23(b)."

In my view, the pivotal issue in this case is whether Fuller presented evidence indicating that he was not engaged in unlawful activity so as to be entitled to a jury instruction under § 13A-3-23(b). Fuller does not dispute the fact that he was prohibited from possessing a firearm under § 13A-11-72(a), Ala. Code 1975. However, Fuller argues that he presented evidence indicating that he was justified in possessing the firearm before he needed it to actually defend himself, which, Fuller argues, entitled him to a jury instruction under § 13A-3-23(b).

Fuller's actual argument is that he presented evidence indicating that he was justified in using the firearm to defend himself and, thus, that he was justified in possessing the firearm prior to his needing it to defend himself. See Fuller's brief, at pp. 8-9. Fuller argues that he presented evidence indicating that he reasonably believed that Romaine

Witherspoon, the victim, was going to use unlawful physical force on him as evidenced by the fact that Witherspoon pointed a gun at Fuller. Fuller also argues that he presented evidence indicating that he had no reasonable opportunity to retreat. Essentially, Fuller argues that he presented evidence indicating that he is entitled to a jury instruction under § 13A-3-23(a). Fuller then appears to argue that, on this basis, he was entitled to a jury instruction under § 13A-3-23(b).

There is no question that Fuller has demonstrated that he was entitled to a jury instruction on self-defense; the trial court agreed and so instructed the jury. It is well settled in Alabama that a person prohibited from possessing a firearm under § 13A-11-72(a) may be justified in possessing a firearm for purposes of self-defense.[1] See Ex parte Taylor, 636 So.

[1]In his dissent, Justice Murdock quotes this sentence and states: "As a matter of logic, then, would it not be true that the relevant time for the application of this principle is the time at which the defendant actually uses the firearm?" ___ So. 3d at ___ (Murdock, J., dissenting). Of course Justice Murdock's statement would be true if the issue presented in this case was whether Fuller was entitled to a jury instruction on whether he was justified in using a firearm in defending himself. However, that is not the issue. Rather, the issue presented is whether a person prohibited from possessing a firearm under § 13A-11-72(a) is engaged in an unlawful activity and, thus, is not entitled to a stand-your-

2d 1246, 1247 (Ala. 1993). However, Ex parte Taylor and its progeny do not give a person prohibited from possessing a firearm under § 13A-11-72(a) carte blanche to possess a firearm at all times. This Court stated in Ex parte Taylor:

> "'We hold that when a felon is in imminent peril of great bodily harm, or reasonably believes himself or others to be in such danger, he may take possession

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ground jury instruction under § 13A-3-23(b). For purposes of this case, we are not concerned with whether Fuller was justified in possessing a firearm at the time he used it to defend himself -- that is irrelevant for purposes of § 13A-3-23(b). Instead, § 13A-3-23(b) concerns the time at which a person still has the opportunity to retreat. The real issue is whether Fuller, assuming he had the opportunity to retreat, was justified in possessing the firearm during that time, in the moments before retreat became no longer possible. If he was not justified in possessing a firearm at that time, then Fuller was engaged in unlawful activity and, thus, was not entitled to a jury instruction under § 13A-3-23(b).

Alabama's common-law rule has long been that "[t]he right to kill in self-defense does not arise until the defendant has offered or attempted to retreat, or to decline the offered combat, provided, however, there be open to him a reasonably safe mode, and that retreat would not increase his danger." Oldacre v. State, 196 Ala. 690, 693, 72 So. 303, 304 (1906) (emphasis added). Under Alabama's common law, before a person had the right to use deadly force to defend himself, he was required to retreat if retreat was reasonable; if the person failed to retreat he was not entitled to use deadly force. Obviously, if a person has an opportunity to retreat, that opportunity to retreat exists in a moment in time prior to there no longer being an opportunity to retreat and the use of deadly force becomes justifiable to defend onself. Section 13A-3-23(b) operates to remove the requirement of retreat, even if retreat is reasonable, and allows a person who is not engaged in unlawful activity to stand his ground.

> of a weapon for a period no longer than is necessary or apparently necessary to use it in self-defense, or in defense of others. In such situation justification is a defense to the charge of felon in possession of a firearm.'"

636 So. 2d at 1247 (quoting State v. Blache, 480 So. 2d 304, 308 (La. 1985)(emphasis added)). Accordingly, Fuller does not demonstrate that he presented evidence indicating that he was justified in possessing the firearm before he needed it for his self-defense.

Section 13A-3-23(b) operates to remove the requirement that a person claiming justification under § 13A-3-23(a) retreat if there is a reasonable opportunity to do so. Section 13A-3-23(b) applies, however, only if the person claiming its application is not engaged in an unlawful activity. The evidence supporting Fuller's argument that he was justified in possessing a firearm to defend himself is not evidence indicating that he was justified in possessing a firearm before he needed the firearm to defend himself. Evidence necessitating a jury instruction under § 13A-3-23(b) must relate to the time preceding the need to use physical force to defend oneself, whereas evidence necessitating a jury instruction under § 13A-3-23(a) must relate to the time at

which a person uses physical force to defend himself. Fuller has presented evidence concerning only the latter; he has not presented any evidence indicating that he was justified in possessing the firearm before his need to use it in self-defense arose.

Fuller relies on Diggs v. State, 168 So. 3d 156 (Ala. Crim. App. 2016), in support of his argument. Fuller alleges that "[t]he Court of Criminal Appeals first ruled correctly in Diggs v. State ... where it ruled that a convicted felon does not have a duty to retreat and the stand your ground law applied to convicted felons." Fuller's brief, at pp. 10-11 (emphasis omitted). Fuller has misinterpreted Diggs.

Ellis Andrel Diggs was a convicted felon who was prohibited from possessing a firearm under § 13A-11-72. On February 4, 2014, Diggs's girlfriend had had an altercation with Gary Blackwell; Blackwell hit Diggs's girlfriend, spit on her, and threatened to kill Diggs. Diggs's girlfriend told Diggs of the altercation she had had with Blackwell, and Diggs went to find Blackwell in order to verify Diggs's girlfriend's account of the incident. Diggs took a firearm with him to his meeting with Blackwell for his personal protection and because

Diggs's girlfriend had told Diggs that Blackwell also had a firearm. Diggs found Blackwell and began discussing the altercation that Blackwell had had with Diggs's girlfriend. The conversation became hostile, and Diggs and Blackwell shot their firearms at each other. Diggs shot Blackwell five times; Blackwell died from multiple gunshot wounds.

At trial, Diggs requested that the jury be instructed on self-defense; the trial court refused to give Diggs's requested self-defense jury instruction. The jury returned a verdict finding Diggs guilty and Diggs appealed.

On appeal, Diggs argued that the trial court erred in refusing to instruct the jury on self-defense. The State argued that Diggs was not entitled to a jury instruction on self-defense because, the State argued, Diggs was the initial aggressor. The State also argued

> "that because Diggs was a convicted felon, his arming himself with a pistol constituted unlawful activity; thus, according to the State, because Diggs was engaged in unlawful activity when he went to [Blackwell's place of business], his presence at [Blackwell's place of business] was unlawful and thus negates the defense of self-defense."

168 So. 3d at 161.

The Court of Criminal Appeals held that the evidence presented by Diggs, if believed by the jury, established Blackwell as the initial aggressor. The Court of Criminal Appeals also held:

> "[C]ontrary to the State's assertion, a felon is not deprived of the right to use a firearm against the immediate need to defend his life.
>
> > "'"[W]hen a felon is in imminent peril of great bodily harm, or reasonably believes himself or others to be in such danger, he may take possession of a weapon for a period no longer than is necessary or apparently necessary to use it in self-defense, or in defense of others. In such a situation justification is a defense to the charge of felon in possession of a firearm."'
>
> "Ex parte Taylor, 636 So. 2d 1246, 1247 (Ala. 1993)(quoting State v. Blache, 480 So. 2d 304 (La. 1985)). Diggs's possession of a firearm before his need to defend his life may have been an event in violation of the law. However, his possession of a firearm was justified at the moment it became necessary for his self-defense."

168 So. 3d at 162. Accordingly, the Court of Criminal Appeals held that the trial court erred in refusing to give Diggs's requested self-defense jury instruction and reversed the trial court's judgment entered on the jury's verdict.

In the present case, Fuller argues that the holding in Diggs supports his position that he is entitled to a jury

instruction under § 13A-3-23(b). I disagree. The Court of Criminal Appeals held in Diggs only that a person prohibited from possessing a firearm under § 13A-11-72 is nevertheless entitled to use a firearm "at the moment it [becomes] necessary for his self-defense." 168 So. 3d at 162. In Diggs, the Court of Criminal Appeals held that a person prohibited from possessing a firearm under § 13A-11-72 is justified in possessing a firearm only so long as is necessary to defend himself. The Court of Criminal Appeals even noted that "Diggs's possession of a firearm before his need to defend his life may have been an event in violation of the law." 168 So. 3d at 162. Indeed, such activity is unlawful activity. However, the issue in Diggs was not whether Diggs was entitled to a jury instruction under § 13A-3-23(b), but whether he was justified in possessing a firearm in the moment Diggs needed the firearm to defend himself, thereby entitling Diggs to a self-defense jury instruction under § 13A-2-23(a). Diggs is consistent with Alabama law, and nothing in Diggs pertains to the issue before us in the present case -- whether a person prohibited from possessing a firearm under § 13A-11-

72(a) is engaged in an unlawful activity and, thus, is not entitled to a jury instruction under § 13A-3-23(b).

Accordingly, Fuller has failed to demonstrate that the Court of Criminal Appeals erred in affirming the trial court's denial of Fuller's requested stand-your-ground jury instruction. Fuller failed to present any evidence indicating that he was justified in possessing the firearm before he needed it for his self-defense. I conclude that the trial court did not exceed its discretion in refusing to give Fuller a jury instruction under § 13A-3-23(b).

Based on the above reasoning, rather than quash the writ, I would affirm the portion of the Court of Criminal Appeals' decision affirming the trial court's decision refusing to give Fuller's requested jury instruction under § 13A-3-23(b).

However, I would reverse the Court of Criminal Appeals' decision insofar as it affirmed the trial court's refusal to give Fuller's requested jury instruction on manslaughter as a lesser-included offense of capital murder. Fuller argues that "the trial court committed reversible error when it failed to charge the jury on the lesser included offense of 'provocation manslaughter.'" Fuller's brief, at pp. 11-12. In Fuller, the

Court of Criminal Appeals set forth the following applicable law concerning this issue:

> "'"'A person accused of the greater offense has a right to have the court charge on lesser included offenses when there is a reasonable theory from the evidence supporting those lesser included offenses.' MacEwan v. State, 701 So. 2d 66, 69 (Ala. Crim. App. 1997). An accused has the right to have the jury charged on '"any material hypothesis which the evidence in his favor tends to establish."' Ex parte Stork, 475 So. 2d 623, 624 (Ala. 1985). '[E]very accused is entitled to have charges given, which would not be misleading, which correctly state the law of his case, and which are supported by any evidence, however[] weak, insufficient, or doubtful in credibility,' Ex parte Chavers, 361 So. 2d 1106, 1107 (Ala. 1978), 'even if the evidence supporting the charge is offered by the State.' Ex parte Myers, 699 So. 2d 1285, 1290-91 (Ala. 1997), cert. denied, 522 U.S. 1054, 118 S. Ct. 706, 139 L. Ed. 2d 648 (1998). However, '[t]he court shall not charge the jury with respect to an included offense unless there is a rational basis for a verdict convicting the defendant of the included offense.' § 13A-1-9(b), Ala. Code 1975. 'The basis of a charge on a lesser-included

> offense must be derived from the evidence presented at trial and cannot be based on speculation or conjecture.' Broadnax v. State, 825 So. 2d 134, 200 (Ala. Crim. App. 2000), aff'd, 825 So. 2d 233 (Ala. 2001), cert. denied, 536 U.S. 964, 122 S. Ct. 2675, 153 L. Ed. 2d 847 (2002). '"A court may properly refuse to charge on a lesser included offense only when (1) it is clear to the judicial mind that there is no evidence tending to bring the offense within the definition of the lesser offense, or (2) the requested charge would have a tendency to mislead or confuse the jury."' Williams v. State, 675 So. 2d 537, 540-41 (Ala. Crim. App. 1996), quoting Anderson v. State, 507 So. 2d 580, 582 (Ala. Crim. App. 1987)."
>
> "'Clark v. State, 896 So. 2d 584, 641 (Ala. Crim. App. 2000) (opinion on return to remand).'

"Harbin v. State, 14 So. 3d 898, 909 (Ala. Crim. App. 2008).

"Section 13A-6-3(a), Ala. Code 1975, provides, in pertinent part:

> "'A person commits the crime of manslaughter if:
>
> "'....
>
> "'(2) He causes the death of another person under circumstances that would constitute murder under Section 13A-6-2[,

> Ala. Code 1975]; except, that he causes the death due to a sudden heat of passion caused by provocation recognized by law, and before a reasonable time for the passion to cool and for reason to reassert itself.'

"In Spencer v. State, 201 So. 3d 573 (Ala. Crim. App. 2015), this Court stated:

> "'"Alabama courts have, in fact, recognized three legal provocations sufficient to reduce murder to manslaughter: (1) when the accused witnesses his or her spouse in the act of adultery; (2) when the accused is assaulted or faced with an imminent assault on himself; and (3) when the accused witnesses an assault on a family member or close relative."

"'Rogers v. State, 819 So. 2d 643, 662 (Ala. Crim. App. 2001).

> "'In discussing what constitutes "imminent assault" in regard to provocation manslaughter, this Court has stated:
>
> > "'"'"'Mere words, no matter how insulting, never reduce a homicide to manslaughter. Manslaughter is the unlawful killing of a human being without malice; that is, the unpremeditated result of passion -- heated blood -- caused by a sudden, sufficient provocation. And such provocation can, in no case, be less than an assault, either actually committed, or menaced under such pending

> circumstances as reasonable to convince the mind that the accused has cause for believing, and did believe, he would be presently assaulted, and that he struck, not in consequence of a previously formed design, general or special, but in consequence of the passion suddenly aroused by the blow given, or apparently about to be given.' ..." Reeves v. State, 186 Ala. 14, 65 So. 160, 161 [(1914)].' Easley v. State, 246 Ala. 359, at 362, 20 So. 2d 519, 522 (Ala. 1944). Thus, the mere appearance of imminent assault may be sufficient to arouse heat of passion."
>
> "'Cox v. State, 500 So. 2d 1296, 1298 (Ala. Crim. App. 1986). "What constitutes legal provocation is left to the trial judge's interpretation." Gray v. State, 574 So. 2d 1010, 1011 (Ala. Crim. App. 1990) (citing Shultz v. State, 480 So. 2d 73, 76 (Ala. Crim. App. 1985)).'

"Spencer, 201 So. 3d at 596-97.

"'"In addition, '[p]rovocation has been defined as that treatment by another which arouses anger or passion, which produces in the minds of persons ordinarily constituted the highest degree of exasperation, rage, anger, sudden resentment, or terror. Johnson v. State, 129 Wis. 146, 108 N.W. 55 (1906).' Nelson v. State, 511 So. 2d 225, 240 (Ala. Crim. App. 1986), aff'd, 511 So. 2d 248 (Ala. 1987), cert. denied, 486 U.S. 1017, 108 S. Ct. 1755, 100 L. Ed. 2d 217 (1988)."' James v. State, 24 So. 3d 1157, 1163 (Ala. Crim App. 2009), quoting McDowell v. State, 740 So. 2d 465, 468 (Ala. Crim. App. 1998).

> Furthermore, '[s]elf-defense and provocation manslaughter are not mutually exclusive.' James, 24 So. 3d at 1164."

Fuller, ___ So. 3d at ___.

The Court of Criminal Appeals then concluded that there was no evidence indicating that Fuller was provoked by Witherspoon's actions. The Court of Criminal Appeals stated:

> "Fuller testified that the reason he fired the shots at Witherspoon was to protect himself and his 'family,' i.e., Fuller testified that he decided to 'do what [he] had to do' and fire the shots in self-defense. However, there was no testimony indicating that Fuller fired the shots as a result of 'heated blood,' i.e., as a result of 'the highest degree' of rage, terror, or anger."

Fuller, ___ So. 3d at ___.

Fuller's argument that the Court of Criminal Appeals erred in affirming the trial court's decision not to instruct the jury on provocation manslaughter as a lesser-included offense of capital murder is based almost exclusively on the dissenting portion of Judge Kellum's special writing, concurring in part and dissenting in part, in Fuller. I find the following reasoning set forth in Judge Kellum's writing persuasive:

> "'The "safer" practice is to charge upon all degrees of homicide: "(I)t is much the safer rule to charge upon all the

> degrees of homicide included in the indictment, when a party is on trial for murder, unless it is perfectly clear to the judicial mind that there is no evidence tending to bring the offense within some particular degree." Pierson v. State, 99 Ala. 148, 153, 13 So. 550 (1892), approved in Williams v. State, 251 Ala. 397, 399, 39 So. 2d 37 (1948).'

"Phelps v. State, 435 So. 2d 158, 163 (Ala. Crim. App. 1983). In determining whether an accused is entitled to a jury instruction on a lesser-included offense, this Court must view the evidence in the light most favorable to the accused. See Ex parte McGriff, 908 So. 2d 1024 (Ala. 2004). 'The mere appearance of an imminent assault may be sufficient to constitute legal provocation to support heat-of-passion manslaughter.' Harris v. State, 683 So. 2d 26, 28 (Ala. Crim. App. 1996). '"To constitute adequate legal provocation, it must be of a nature calculated to influence the passions of the ordinary reasonable man."' Id. (quoting Biggs v. State, 441 So. 2d 989, 992 (Ala. Crim. App. 1983)).

"Contrary to the majority's conclusion, the fact that Fuller testified that he fired the shots to protect his 'family,' who he believed was in danger, does not preclude a jury instruction on heat-of-passion manslaughter. '[S]elf-defense and provocation manslaughter are not mutually exclusive concepts.' Lane v. State, 38 So. 3d 126, 130 (Ala. Crim. App. 2009). Indeed, heat-of-passion manslaughter '"is designed to cover those situations where the jury does not believe a defendant is guilty of murder but also does not believe the killing was totally justified by self-defense."' Williams v. State, 675 So. 2d 537, 541 (Ala. Crim. App. 1996). In McDowell v. State, 740 So. 2d 465 (Ala. Crim. App. 1998), we said:

> "'In denying McDowell's requested charges on manslaughter, the trial court stated that because McDowell had testified that his purpose in returning to the scene was to effect a reconciliation, it would be improper to instruct the jury on heat-of-passion manslaughter because McDowell was not "in such a blind fury that he acted regardless of the admonition of the law, in other words, that he was beside himself with fury in the shooting." The trial court failed to recognize that passion encompasses more than the single emotion of fury or rage. Black's Law Dictionary 1124 (6th ed. 1990) defines passion as it relates to manslaughter as "any of the emotions of the mind known as rage, anger, hatred, furious resentment, or terror, rendering the mind incapable of cool reflection." J. Miller, Handbook of Criminal Law § 92(d) (1934), states: "Although the passion of manslaughter is frequently referred to as a passion of anger it may be any of the other emotional outbursts which are referred to as passion as for instance sudden resentment, or fear, or terror, provided only that it result from adequate provocation and that it be actually the cause of the killing." There was evidence presented that, if believed by the jury, would support a finding that in those moments when Simon was approaching him, McDowell believed that Simon was about to assault him and that McDowell acted out of fear.'

"740 So. 2d at 468-69. In Cox v. State, 500 So. 2d 1296 (Ala. Crim. App. 1986), we said:

> "'Under the present facts, the appellant fired the first shot during a fight between his wife, the deceased's

> ex-wife, and the deceased. The deceased then verbally threatened the appellant and made a movement towards him, whereupon the appellant shot the deceased in the stomach, which resulted in his death. The jury could have reasonably found that the appellant believed that he was about to be assaulted, and, therefore acted out of the heat of passion.'

"500 So. 2d at 1298. In Wylie v. State, 445 So. 2d 958 (Ala. Crim. App. 1983), we further stated:

> "'Appellant's testimony was presented in support of her claim of self-defense to prove that she was, indeed, justified in killing her husband. Implicit in appellant's version of the facts was the theory that she was provoked by her husband's imminent attack upon her. If believed, appellant's version of the facts might have provided a "rational basis" for a conviction of manslaughter pursuant to § 13A-6-3(a)(2), Code of Alabama 1975. But see, Pennell v. State, [429 So. 2d 679 (Ala. Crim. App. 1983)] (evidence did not justify a manslaughter instruction [where evidence established there was no provocation recognized by law and, even if there were, there was sufficient time for the accused to cool off]). However incredible appellant's version of the facts might have been, in light of the state's convincing evidence to the contrary, there was evidence of sufficient provocation to reduce the offense from murder to manslaughter. See, Reeves v. State, 186 Ala. 14, 65 So. 160 (1914); Roberson v. State, 217 Ala. 696, 117 So. 412 (1928). Under these circumstances the jury would have been authorized to find the appellant

> guilty of only manslaughter, as the result of an imperfect claim of self-defense.'
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> "445 So. 2d at 963.
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> "Similarly, here, implicit in Fuller's testimony that he fired the shots to protect himself and his 'family,' who he believed was in danger, was the theory that Fuller was provoked by the victim's pointing a gun at him and, therefore, that he acted out of fear. Simply put, viewing the evidence in the light most favorable to Fuller, there was evidence presented that, if believed by the jury, would support a finding that Fuller believed that the victim was about to shoot him and that Fuller, therefore, fired his gun in a sudden heat of passion. The question whether Fuller, in fact, shot and killed the victim because of a sudden passion caused by seeing the victim point a gun at him was a question that should have been submitted to the jury. See, e.g., Rogers v. State, 819 So. 2d 643, 661 (Ala. Crim. App. 2001) ('The question whether Rogers shot and killed Angelo Gordon and Michael Davis because of a sudden passion caused by seeing his brother Rudolph engaged in a fight with Gordon, seeing Gordon with a gun, and knowing that Gordon had shot and seriously injured Rudolph the year before, was a question for the jury.'); and Cox, 500 So. 2d at 1298 ('This court has previously addressed this issue and held that "[w]hether heat of passion was sufficiently proven was for the jury to determine."')."

Fuller, ___ So. 3d at ___ (Kellum, J., concurring in part and dissenting in part).

I agree with the reasoning set forth in Judge Kellum's writing. Based on the authorities and analysis in that writing, I am of the opinion that the trial court exceeded its

discretion in refusing to give Fuller's requested jury instruction on provocation manslaughter as a lesser-included offense of capital murder. Fuller presented evidence entitling him to this requested jury instruction. Accordingly, I would reverse the Court of Criminal Appeals' decision in Fuller insofar as it affirmed the trial court's refusal to give Fuller's requested jury instruction on provocation manslaughter as a lesser-included offense of capital murder.

MURDOCK, Justice (dissenting).

I dissent from quashing the writ of certiorari previously issued. I believe this Court should examine critically the conclusion of the trial court and the Court of Criminal Appeals that Paudriciquez Martez Fuller was not entitled to a stand-your-ground instruction. I also believe a manslaughter charge should have been given. As to the latter issue, I agree in the main with Justice Parker's special writing and the dissenting portion of Judge Kellum's special writing below, concurring in part and dissenting in part. I write separately, however, to address the former issue, whether Fuller was entitled to a stand-your-ground instruction.

One possible justification for the outcome of this case as it relates to the application of Alabama's stand-your-ground statute is expressed by Justice Parker in his special writing. I am struggling with the proposition, however, that the dispositive issue is simply a temporal one, i.e., that what matters is whether the defendant was "engaged in an unlawful activity" before the time the defendant stands his or her ground.

Justice Parker's analysis of this issue begins with the following premise with which I do agree:

> "It is well settled in Alabama that a person prohibited from possessing a firearm under § 13A-11-72(a)[, Ala. Code 1975,] may be justified in possessing a firearm for purposes of self-defense."

___ So. 3d at ___ (Parker, J., dissenting). As a matter of logic, then, would it not be true that the relevant time for the application of this principle is the time at which the defendant actually uses the firearm? If the defendant is justified in using the weapon at that time, then he or she is justified in having possession of it at that time. If timing is dispositive, would not that be the relevant time? Whether the defendant was in possession of, or justified in being in possession of, the firearm at some previous moment in time is not the issue, is it? As to the present case, then, the only question would appear to be whether Fuller was engaged in an unlawful activity at the time during which Fuller actually used the firearm.

It is posited, however, that "[e]vidence necessitating a jury instruction under § 13A-3-23(b)[, Ala. Code 1975,] must relate to the time preceding the need to use physical force to defend oneself, whereas evidence necessitating a jury

instruction under § 13A-3-23(a) must relate to the time at which a person uses physical force to defend himself." ___ So. 3d at ___ (Parker, J., dissenting). But there may not be such a "time preceding the need to use physical force to defend oneself." The threat could arise so suddenly that there is only time for one choice in the moment: retreating or defending.

And more fundamentally, I do not see any textual basis (or other authority) for such a temporal difference. To the contrary, both subsections speak in the present tense, referring to a person who "is justified" and "is not engaged in an unlawful activity and is in any place where he or she has the right to be." In addition, it is clear that the two provisions were drafted to work in tandem. Both relate to the time when the person is using the physical force in question and address whether the person's actions are justified at that time.

My thoughts on the foregoing issue find support in the following statement in Diggs v. State, 168 So. 3d 156, 162 (Ala. Crim App. 2015):

> "'[The defendant's] possession of a firearm before his need to defend his life may have been an event

> in violation of the law. However his possession of a firearm was justified at the moment it became necessary for his self-defense.'"

Ultimately, therefore, I cannot agree that what matters is simply whether any "unlawful activity" occurred and whether it occurred for some time (how much is not clear) before the defendant "stood" his or her ground. What I do think matters is whether an unlawful activity takes place before the defendant's standing of his or her ground that materially contributes to the defendant's being in a position where he or she must choose either to retreat or to defend. That is, I believe the legislature intended that the unlawful activity be tied to, or be a part of, the confrontation that ensues -- that it bear sufficient causal relation to that confrontation. If a felon in possession of a firearm brandishes it in such a way as to cause another to perceive a threat and thereby cause an escalation that subsequently results in a deadly confrontation, that is one thing. But I cannot believe that the legislature intended that a minor who is in possession of a stolen package of cigarettes from a convenience store or a woman who is driving a car one mile per hour over the speed limit is unable to defend himself or herself under the stand-

your-ground doctrine when approached by an aggressor seeking to cause the unlawful actor great bodily harm completely unrelated to these prior (and continuing) transgressions. And I do not believe the text chosen by our legislature requires such an understanding. To the contrary, I believe the text permits the meaning I assert. See, e.g., Beal v. State, [No. 2014-KA-01424-COA, July 19, 2016] ___ So. 3d ___, ___ (Miss. Ct. App. 2016) (Barnes, J., dissenting); cf. City of Jackson v. Perry, 764 So. 2d 373, 379 (Miss. 2000) (holding that, for recovery under the Mississippi Tort Claims Act to be barred because of a victim's criminal activity at the time of the injury, "it must be shown that the criminal activity has some causal nexus to the wrongdoing of the tortfeasor"). I believe the facts of the present case should be examined under this understanding of Alabama's stand-your-ground statute.