STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County
J. Derham Cole, Circuit Court Judge

Opinion No. 5156 (S.C. Ct. App. filed 7/3/2013)
08-GS-42-05308, 05308A

THE STATE,

RESPONDENT,

V.

MANUEL ANTONIO MARIN,

PETITIONER

APPELLATE CASE NO. 2013-002001

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

ROBERT M. DUDEK
Chief Appellate Defender

DAVID ALEXANDER
Appellate Defender

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

ATTORNEYS FOR PETITIONER.

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on 8/22/2013.

QUESTION PRESENTED

Whether petitioner was entitled to a jury charge on a correct statement of law fitting the facts of this self-defense case: that one acting in self-defense has the right to continue shooting until it was apparent that the danger of death or serious bodily injury had ended?

STATEMENT OF THE CASE

Petitioner was indicted by the Spartanburg County Grand Jury for the offenses of murder and possession of a weapon during a violent crime. His case was called to trial on October 25, 2010 before the Honorable J. Derham Cole, and a jury. Tanya Jones represented petitioner. Jennifer Jordan and Susan Reese were the assistant solicitors. R. 1

On October 27, 2010, the jury found petitioner guilty on both counts. R. 343, l. 25 – 344, l. 3. Judge Cole sentenced petitioner to life imprisonment for murder. R. 346, ll. 1-6. Petitioner filed a timely appeal with the Court of Appeals.

On February 5, 2013, a panel consisting of Chief Judge Few and Judges Lockemy and Geathers heard oral argument in this case. On July 3, 2013, the Court of Appeals affirmed petitioner's convictions in a published opinion. App. 1. State v. Marin, 404 S.C. 615, 745 S.E.2d 148 (Ct. App. 2013). Petitioner filed a timely petition for rehearing which was denied on August 22, 2013. App. 15.

The denial of the petition for rehearing was not unanimous. App. 15. Judge Lockemy voted to grant rehearing. App. 15. This petition follows.

ARGUMENT

Petitioner was entitled to a jury charge on a correct statement of law fitting the facts of this self-defense case: that one acting in self-defense has the right to continue shooting until it was apparent that the danger of death or serious bodily injury had ended.

Relevant Facts

The Evidence at Trial

In a tragic confirmation of the axiom "no good deed goes unpunished," this shooting happened after petitioner attempted to give a highly intoxicated man a ride home from a bar. The state never offered a motive for the shooting. Petitioner took the stand and testified he was forced to shoot the drunken decedent in self-defense when he tried to grab petitioner's steering wheel and wreck the car. After the shooting, petitioner found a public place in downtown Spartanburg, parked, and waited for the police to arrive.

The decedent, Nelson Tabares ("Tabares"), had a blood alcohol level of 0.323. R. 173, ll. 22-25. Late on the night of July 20, 2008, Tabares was at Bongos Nightclub in Greenville, South Carolina. R. 12, l. 13 – 14, l. 18. A bouncer at Bongos, Christopher McDonald ("McDonald"), acknowledged the bar staff had to "cut [Tabares] off." R. 20, ll. 15 – 16. The bouncer observed that the decedent was "just pretty much stumbling everywhere" and "couldn't really stand up." R. 20, ll. 19 – 22. Three men—bouncer McDonald; the bar's owner, Larry Rodriguez ("Rodriguez"); and petitioner—took Tabares into the "back kitchen" where he stayed for over an hour. R. 21, ll. 5 – 24.

Rodriguez had known Tabares for a long time and noticed he was not feeling well that night. Rodriguez would be the only witness to testify Tabares was not extremely intoxicated, speculating, "He was just not feeling good." R. 13, l. 21 – 14, l. 18.

McDonald and Rodriguez were looking for someone to give the decedent a ride when petitioner offered to take him home. R. 22, l. 11 – 23, l. 10. Petitioner knew where Tabares lived. R. 22, l. 11 – 23, l. 10. McDonald remembered that he "basically carried [Tabares] out and actually put him in [petitioner's] truck." Petitioner reached for his laptop and typed in Tabares' address -- apparently on the GPS -- that went with his laptop. R. 22, l. 11 – 24, l. 22. Tabares was "kinda like in and out" but "knew where he was at." R. 29, ll. 12-17.

It was undisputed that petitioner drove, and that his friend Alfredo Jimenez ("Jimenez") (petitioner's former brother-in-law) rode in the front seat. Tabares was placed in the backseat of petitioner's SUV. R. 243, l. 21 – 244, l. 6.

Larry Gory was apparently coming home from "personal business" early that morning when he came upon petitioner and Jimenez standing beside the road. R. 41, ll. 16 – 24. R. 44, ll. 3 – 22. Gory said it appeared they were trying to "pull something away from each other . . . one of the guys said could [you] call the police, he just – he shot him." R. 41, ll. 3-24.

Spartanburg Police Officer Jeffery Powell ("Powell") testified he arrived on the scene at about 4:05 a.m. and he recalled seeing petitioner and Jimenez. R. 49, ll. 15 – 21. Powell testified: "One of them [was] sitting in the intersection and one standing in the intersection of Daniel Morgan Avenue and West Main Street." R. 49, ll. 17 – 21. He recalled that one of the men was very calm and the other was very upset. R. 49, l. 17 – 50, l. 13. Powell saw a weapon lying on the sidewalk and he picked it up and put it in his trunk. R. 51, l. 15 – 52, l. 7.

Powell remembered: "I asked him where it happened at, and he would just say Wal-Mart. He did say Wal-Mart . . . he said that the other individual [Tabares] was grabbing a hold of the steering wheel" and he was trying to wreck petitioner's SUV. R. 56, ll. 9-18. Jimenez told Powell that they had left a club in Greenville and were supposed to be taking Tabares home. When they

apparently passed what Tabares thought was "his road," he "got very upset and was trying to, to get them to stop the car, and the driver wouldn't stop. He said he just wouldn't stop. And he said that was when he started fighting with the driver." R. 59, ll. 2-21. Jimenez never testified, and it was unclear from the record in this case if he disappeared prior to trial or why he was not called as a witness.

Petitioner later testified in his own defense. Petitioner was the marketing director for a newspaper, and he recalled the events of July 20, 2008. R. 225, ll. 4-10. Petitioner went to the Colombian Festival that evening and afterwards made his way to Bongos. R. 225, l. 8 – 226, l. 20. Petitioner was mingling with Jimenez when Rodriguez asked him to give Tabares a ride home "and I agreed." R. 227, l. 5 – 228, l. 9.

Petitioner remembered one of the bouncers gave him Tabares' driver's license "and I put the address on my laptop." The laptop included a GPS. R. 230, l. 12 – 231, l. 20. The police confirmed that Tabares' address had been entered into the computer. R. 147, ll. 11 – 14.

Petitioner recalled as they were driving he was talking with Jimenez "about the three Americans that had been liberated that past week, I mean, yeah, the past week, and the presidential candidate that [was] kidnapped in Colombia." R. 231, l. 23 – 232, l. 6.

While he was talking with Jimenez, Tabares jumped up from the backseat and put petitioner in a headlock: "I hit the brakes. I hit the brakes, and the car went on the oncoming lane. And it was headed towards a telephone pole. But I got the car back on the road." R. 232, l. 11 – 233, l. 12.

Petitioner said he was very scared after he almost hit the telephone pole, and "at that point . . . I decided not to take him home. I was just trying to find a public place, you know, people where I could, you know, possibly jump out of the car and get some help . . ." R. 234, ll. 8-14. Petitioner testified that given the hour "nothing seemed to be open . . . all of a sudden, you know,

Mr. Tabares jumps up and grabs the steering wheel and he tries to run the car off the road . . . I kept pushing him, pushing him back . . . ." Petitioner said Tabares continued coming after him, and "I grabbed the glove box and opened the glove box and got the pouch out which I had the gun in it . . . I pulled the gun out and I shot Mr. Tabares." R. 234, l. 5 – 236, l. 11.

The forensic evidence corroborated petitioner's version of events. A City of Greer police officer confirmed that there were fresh skid marks in the road where Jimenez said the incident occurred. R. 77, ll. 16 – 25. Also in the road were "particles of debris that appeared to be consistent with the vehicle's condition that had had some damage to the front end." R. 77, ll. 16 – 25. The front bumper of the car was missing. R. 125, ll. 1 – 4. Gunshot residue was found on the palm and the back of Tabares' hands. R. 178, ll. 16 - 25. The crime scene investigator found Tabares' torso between the front seats on the center console with his upper body in the front of the car. R. 127, ll. 8 – 21. All of the blood spatter was in the front of the car with none in the back. R. 127, l. 22 – 128, l. 6.

After the shooting, petitioner said Tabares fell on his knee and "I was terrified. I was really shocked." R. 237, ll. 2 – 4. Petitioner continued to look for a public place where he could stop the car and ended up in downtown Spartanburg. R. 236, l. 2 – 237, l. 18.

Petitioner testified that Jimenez was also in shock when the men got out of the car. R. 238, ll. 1 – 3. They were both talking "fairly loud": "[W]hy was he trying to kill me? Why was he trying to run us off the road?" R. 238, ll. 6 – 9. Petitioner said Jimenez "grabbed the gun, and I let him have it." Petitioner did not recall where Jimenez put the gun. R. 238, ll. 1-21. However, as seen above, the gun was found nearby by the police officer and placed in his trunk. Petitioner testified, "I sat down and waited for the police to come . . . I sat down on the median." R. 239, ll. 7-20.

On cross-examination, petitioner explained to the solicitor that it was very dark as he was driving that night and he was trying to keep the decedent from "killing us" by wrecking his SUV. R. 248, l. 1 – 251, l. 4. When the solicitor asked petitioner on cross-examination why there were *two shots* fired, petitioner answered: "It just happened within seconds." R. 250, l. 22 – 252, l. 16.

The Defense's Request to Charge

Defense counsel requested and the trial court agreed to charge self-defense. R. 259, l. 13 – 260, l. 9. R. 263, ll. 19 – 21. Then, during her closing, the solicitor made the highly inflammatory argument that the jury could infer malice because two shots were fired. The solicitor said, "Ladies and gentlemen, I submit this is malice. Two shots, not one, two shots to the back of the head. One of them tight contact, barrel up against the head." R. 298, ll. 22 – 24. The solicitor also argued, "So when you shoot somebody in the head and they stop struggling with you, if that's what they're doing, you don't have—you won't shoot them a second time unless you pull that trigger a second time." R. 293, ll. 15 – 22. The solicitor said, "Would a reasonable person shoot someone twice in the back of the head?" R. 301, ll. 2 – 3.

When the trial court asked for exceptions after his charge, defense counsel stated he wanted an instruction that:

> [I]f the defendant is justified in defending himself or others in firing the first shot, then the defendant—also continue—to continue shooting until it is apparent that the danger of death or serious bodily injury has been completed—has completely ended.

R. 332, ll. 6 – 12. For this proposition of law, defense counsel cited State v. Rye, 375 S.C. 119, 651 S.E.2d 321 (2007). R. 332, ll. 11 – 12. The trial judge responded that the proposed charge "sounds like a comment on the facts to me." R. 332, ll, 13 – 14. After argument, Judge Cole declined to give petitioner's requested charge. R. 332, l. 15 – 336, l. 1.

The jury then requested additional instruction on the defintions of malice and voluntary manslaughter. R. 336, ll. 16 – 19. The trial judge repeated his malice charge. R. 336, l. 21 – 338, l. 23. Following the jury's confusion about malice and the additional charge, appellant again asked for the "continuing to shoot" charge, this time citing Douglas v. State, 332 S.C. 67, 504 S.E.2d 307 (1998) and State v. Hendrix, 270 S.C. 653, 244 S.E.2d 503 (1978). R. 341, l. 14 – 342, l. 11. The trial judge again refused to give the charge. R. 342, l. 12 – 343, l. 2. Approximately an hour later, the jurors returned with a verdict finding appellant guilty of murder. R. 343, l. 12 – 344, l. 5.

The Court of Appeals' Decision

The Court of Appeals inconsistently held that: (1) the requested charge was not a correct statement of the law, and (2) that the requested charge had been sufficiently covered by the trial judge's charge. Compare App. 4 ("We are concerned the charge [petitioner] requested is not a correct statement of law.") with App. 6 ("Considered as a whole, the trial court's charge explained this principle of law."). With respect to its first inconsistent holding, the court stated that if requested charge were correct, then defendants could continue to shoot "so long as the initial danger has not '*completely* ended.'" App. 4 (emphasis in original). With respect to its second inconsistent holding, the court held that petitioner's requested charge "derives from the correct principle of law that, if no other element has been disproven, any particular act of deadly force done in self-defense is justified if the act was reasonably necessary to prevent death or serious bodily injury, under the circumstances as they existed at the time of the act." App. 6. From this late recognition that petitioner's requested charge was a correct statement

of the law, the court concluded the requested charge was subsumed within the "may use such force

is reasonably necessary" charge given by the trial court. App. 6-7.

Discussion

The Court of Appeals' fundamental error was ignoring that the trial judge had a responsibility to craft a self-defense charge tailored to the facts of this case. State v. Brandt, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011). In State v. Fuller, 297 S.C. 440, 444-45, 377 S.E.2d 328, 331 (1989), this Court held the trial judge had a duty to craft his self-defense instruction to the facts of the case. In Fuller, the Court noted the trial judge erred in not charging a jury that in a self-defense case a defendant had the right to act on appearances. Id.

In Fuller, the judge also erred in not charging that "words accompanied by hostile acts, may, depending on the circumstances, establish a plea of self-defense." Id. Finally, the judge erred in not instructing that an individual had no duty to retreat if by doing so he would increase his danger of being killed or suffering serious bodily injury. Id. See also State v. Jackson, 227 S.C. 271, 87 S.E.2d 681 (1955); State v. Hardin, 114 S.C. 80, 103 S.E. 557 (1920).

Here, the proper jury instruction petitioner wanted was similar in content – although a different principle – to the one improperly refused in Fuller. The solicitor was urging upon the jury the incorrect sophomoric idea that you never have to shoot more than once to defend yourself. Self-defense is not an algebra problem and a defendant has the right to have the jury understand that. It was an elementary request on the law that once a defendant *properly fires in self-defense he can continue firing* until the danger is removed.

The language requested by petitioner comes directly from this Court's decision in State v. Hendrix, 270 S.C. 653, 661, 244 S.E.2d 503, 507 (1978). In Hendrix, the Court specifically held that "when a person is justified in firing the first shot, he is justified in continuing to shoot until it is apparent that the danger to his life and body has ceased." Id. This Court rejected the State's

argument that Hendrix used excessive force by firing four times. Id. The court of appeals' first inconsistent holding is in error because Hendrix shows that petitioner's requested charge was a correct statement of South Carolina law.

The court of appeals also incorrectly dissected the requested charge in order to give it an illogical meaning. App. at 4-5. The court improperly singled out the phrase "completely ended" from the remainder of the charge. The requested charge makes clear that what must "completely end" is the "danger of death or serious bodily injury." This statement of the law is correct. Hendrix at 661, 244 S.E.2d at 507. The court erred in taking this language out of context to produce the extreme result that a defendant would be justified in continuing to shoot if a "minimal danger" existed. "Minimal danger" was never the petitioner's argument. The danger to be defended against was death or serious bodily injury.

In Douglas v. State, 332 S.C. 67, 72-73, 504 S.E.2d 307, 309-10 (1998), the Supreme Court noted the judge had charged that if the defendant was justified in firing the first shot he was justified in firing in continuing to shoot until any danger to his life and body had ceased. The jury here likewise had a right and a need to know that firing more than one shot was not excessive force and that it did not remove a legitimate case of self-defense. Id.

Finally, the court of appeals erred in determining that the charge as a whole covered the requested language. It used this principle to avoid the trial court's duty to craft its instructions to the facts when fashioning a self-defense charge. State v. Fuller, 297 S.C. 440, 443, 377 S.E.2d 328, 330 (1989). The "continuing to shoot" charge was required by the facts of this case, especially after the jury's question about malice was provoked by the solicitor's argument. On cross-examination, petitioner explained to the solicitor that it was very dark that night and he was trying to keep the decedent from "killing us" by wrecking his vehicle. R. 248, l. 1 – 251, l. 4. When the solicitor asked

petitioner on cross-examination why there were *two shots* fired, petitioner answered: "It just happened within seconds." R. 250, l. 22 – 252, l. 16.

The solicitor's inflammatory closing argument highlights the necessity of the jury understanding this legal principle. The solicitor repeatedly referenced the fact that two shots were fired. The solicitor said, "So when you shoot somebody in the head and they stop struggling with you, if that's what they're doing, you don't have—you won't shoot them a second time unless you pull that trigger a second time." R. 293, ll. 15 – 22. The solicitor argued, "Would a reasonable person shoot someone twice in the back of the head?" R. 301, ll. 2 – 3. Finally, the solicitor made the extremely prejudicial argument that the jury could infer malice because two shots were fired instead of one. The solicitor said, "Ladies and gentlemen, I submit this is malice. Two shots, not one, two shots to the back of the head. One of them tight contact, barrel up against the head." R. 298, ll. 22 – 24. Once the jury requested the definition of "malice," the need for petitioner's requested charge became indispensable. See State v. Blassingame, 271 S.C. 44, 46-47, 244 S.E.2d 528, 530 (1978) (noting that a court's answers to a jury's questions receive "special consideration" since they are in response to a jury's own inquiry).

Finally, the Court erred in reasoning that petitioner's requested charge was subsumed within the "may use such force is reasonably necessary" charge given by the trial court. If this reasoning were correct, then any specific self-defense charge would be unnecessary. Fuller's charge that the defendant has the right to act on appearances could be inferred from a general self-defense charge, but the Supreme Court still held the trial judge should have given a complete appearances charge. Fuller at 443-45, 377 S.E.2d at 330-31. The court of appeals' opinion renders meaningless Fuller's command that trial courts shall tailor self-defense charges to the facts of the case.

This was a legitimate case of self-defense. Petitioner's actions were reasonable and consistent with a person acting in self-defense. He waited on the police to arrive. He was in shock and disturbed after the bizarre events that the grossly intoxicated Tabares– with a .323 blood-alcohol reading – had inflicted on him. R. 273, ll. 1-25. Petitioner described how Tabares grabbed him from the backseat and almost caused him to hit a telephone pole after his SUV was forced into oncoming traffic and the forensic evidence corroborated petitioner's testimony. The jury was confused about whether they could infer malice after the state's inflammatory closing argument. Petitioner was entitled to a fair trial with a properly instructed jury on self-defense.

CONCLUSION

For the reasons stated above, the Court should grant the petition with the ultimate result of a new trial.

Respectfully submitted,

By: _____

David Alexander
Appellate Defender

Robert M. Dudek
Chief Appellate Defender

ATTORNEYS FOR PETITIONER.

This 21st day of November, 2013

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County
J. Derham Cole, Circuit Court Judge

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THE STATE,

RESPONDENT,

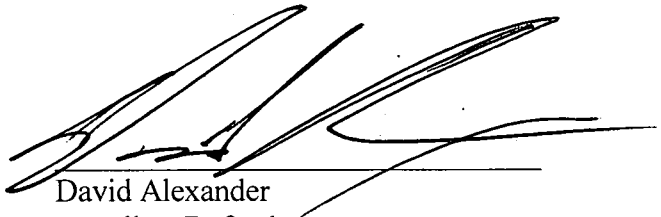
V.

MANUEL ANTONIO MARIN,

PETITIONER

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on Donald J. Zelenka, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and the S.C. Court of Appeals this 21st day of November, 2013.



David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

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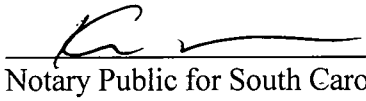
of November, 2013.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