STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. Supreme Court

Appeal from Spartanburg County
J. Derham Cole, Circuit Court Judge

Appellate Case No. 2010 - 177349

THE STATE,

Respondent,

v.

MANUEL ANTONIO MARIN,

Petitioner

RETURN TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF CONTENTS i

APPELLANT'S STATEMENT OF ISSUE ON APPEAL ii

RESPONDENT'S STATEMENT OF THE CASE 1

RESPONDENT'S STATEMENT OF FACTS 1

Requests to Charge 9

ARGUMENT

I. The trial court did not err in its charge to the jury on the law of self-defense 10

CONCLUSION 25

CERTIFICATE OF SERVICE

APPELLANT'S STATEMENT OF ISSUE ON APPEAL

I.

Whether the court erred by refusing to instruct the jury on self-defense that a defendant acting in self-defense had the right to continue shooting until it was apparent that the danger of death or serious bodily injury had ended since this was a widely accepted correct instruction on the law, and appellant had a right to have the instruction crafted to the facts of the case?

RESPONDENT'S STATEMENT OF THE CASE

Petitioner, Manuel Marin, murdered Nelson Tabares on July 21, 2008 in Spartanburg County. Petitioner was arrested the same day. Petitioner was subsequently indicted by the Spartanburg County grand jury for murder and possession of a weapon during a violent crime. (Ind. # 2008-GS-42-5308). Beginning October 25, 2010, Petitioner was tried by a jury before the Honorable J. Derham Cole. (R. 1). At the trial's conclusion on October 27, 2010, Petitioner was found guilty of murder and the weapon charge. (R. 343-44). Judge Cole sentenced Petitioner to life for murder. (R. 346). Petitioner appealed. On July 3, 2013, the Court of Appeals affirmed Petitioner's convictions. State v. Manuel Marin, 404 S.C. 615, 745 S.E.2d 148 (Ct. App. 2013). A petition for rehearing was denied August 22, 2013. This petition followed.

RESPONDENT'S STATEMENT OF FACTS

Petitioner claims reversible error arising from a single issue concerning self-defense. The claim is made against a backdrop of overwhelming proof Petitioner shot the victim twice in the back of the head at point blank range during the early morning hours of July 21, 2008.

The victim, Nelson Tabares, was a well-known celebrity in the Latino community of Greenville. He was a computer professor at Greenville Technical College, who also advertised Latino events on his commercial web-page, Crazylatino.com. (R. 2-4). July 20 was Colombian Independence day, a day that ended in his brutal murder, which included an Independence Day celebration he attended where he took photos for his website. Afterwards, he attended an after-party at Bongo's restaurant and bar on East North Street in Greenville. (R. 3-5).

The victim's wife was Colombian, a working mother who assisted her husband in his web-site business as a translator because she was more proficient in Spanish than victim. (R. 8). The evening of the murder, she remained home and went to bed after turning down the volume on her telephone. (R. 10).

The owner of Bongo's testified that on the night of the murder the victim stayed until closing, was not feeling good and that he, the owner, tried to help the victim phone home, without success. (R. 12-15). One of the bouncers at the club testified that during the course of the evening the victim became intoxicated to the point the bar cut him off, that he was "pretty much just stumbling everywhere, couldn't really stand up," (R. 20), but he was not at all aggressive with anyone. (R. 20). The victim was then seated by staff in the kitchen, where he remained. At some point, Petitioner and his former brother-in-law, Alfredo Jimenez, (R. 21-22, 244), joined them and when the owner and other promoters began discussing how to get the victim home "for some reason [Petitioner] spoke up and said I will… [h]e said he knew where he lived." (R. 22, ll. 16-25).

Though Petitioner had at first said he knew where the victim lived, once the victim had been carried to Petitioner's car, the victim was too intoxicated to give information. Petitioner actually did not know the victim's address. Instead, the victim's address was obtained from his driver's license. (R. 22-26). Petitioner drove away with the victim apparently passed out in the back seat and Mr. Jimenez riding in the passenger front seat. (R. 23-26). The victim was found later at an intersection in Spartanburg in the same car, shot to death. Mr. Jimenez was at the scene with Petitioner, whose pants were covered in the victim's blood.

Ms. Traci Bodner testified that later on that same evening/early morning, she was with friends outside an apartment in downtown Spartanburg at the corner of Daniel Morgan and Main Street when they saw two men arguing heatedly in the street, outside a vehicle; one of the men was in a black shirt [Jimenez], the other in a white shirt [Petitioner]. One of the men [Jimenez] pulled what appeared to be a handgun out of the other man's [Petitioner's] pocket and threw it down in the street. (R. 31-33).

Larry Gory testified he came by the scene described by Ms. Bodner. He saw the two men described by Bodner arguing in the street. He stated the one in the black shirt [Jimenez] told him [Gory] to call the cops, and that "he [petitioner] just shot him [victim]." (R. 41-42). Gory saw the gun the two men [Jimenez and Petitioner] had been fighting over and then called 911. (R. 42-43).

Officer Jeffery Powell of the Spartanburg Police Dept. responded to the call. At the scene, he found Petitioner wearing white and covered in blood. He was "sitting there calm," while the other individual in the black shirt was "very upset." (R. 49 - 50). The individual in the black shirt [Mr. Jimenez] "moved away from the other individual, and he's just very upset… he [Jimenez] kept saying, 'Dude shot him, dude shot him,' and he [Jimenez] would point down the road towards the guy with the white shirt on [Petitioner]." (R. 51, ll. 10-20.). The man in the black shirt [Jimenez] said "he took the gun from [Petitioner], and then he pointed towards the sidewalk just a little ways on down. And there was a weapon laying on the sidewalk." The gun was taken into custody and secured by the officer. (R. 51, ln. 22 - 52, ln. 21).

Officer George Brown of the Spartanburg Police Dept. was the shift supervisor on the scene. There he found Petitioner wearing a "white shirt, with blood covering the shirt,

sitting across the intersection from where I had pulled up." (R. 58, ll. 12 - 22). Brown also attempted to calm down an individual in a black shirt [Jimenez]. (R. 58, ll. 19-25). This person remained very upset, "crying...bouncing all over the place," and told Officer Brown "[Mr. Jiminez] just kept saying, 'Dude, dude shot him,' and kept pointing over towards the male in the white shirt... he said that he had taken the gun away from him [Petitioner] and that Officer Powell had taken that – that it was the gun that Officer Powell had taken." (R. 59, ll. 4-11) Brown further testified the man [Jimenez] told him "they had left a club over in Greenville and that they were supposed to be taking the victim—supposed to be taking him home. And they had gone past his road and he [victim] 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 of the car.* " (R. 59, ll. 15-21)(emphasis added).

Officers found the victim's body inside the vehicle in the intersection where the two men had been arguing. (R. 60).

At trial, Petitioner's attorney used the out of court statements of Mr. Jimenez in an effort to place a prior written report of the incident before the jury, an effort to discredit Officer Brown with prior inconsistencies between the report and his testimony. It suggested to the jury a theory of defense based on a struggle in the car but had the collateral effect of highlighting the fact that, if any struggle took place, it occurred *solely* between the victim and Petitioner. The passenger in the front seat, who was supposedly as much in danger, remained inexplicably detached from the "fight". According to Mr. Jimenez's words at the scene, the struggle would have taken place after Petitioner's car

continued moving further and further away from the victim's home, into Spartanburg County, and over the victim's protests. (R. 61-67).

Officer Dale Arterburn of the Greer Police Dept. retraced the route taken from Bongo's with the other passenger, Jimenez. The location of the shooting was determined to have taken place on Highway 29 in Spartanburg County, across from U.S. Lumber Company, far removed from the victim's street address in Greer. This was approximately 6 to 10 miles from downtown Spartanburg where the vehicle finally stopped. (R. 76-80).

Gunshot residue examination and other evidence regarding Mr. Jimenez, including fingerprints, blood spatter, placement of relevant physical evidence within the car, and location of road debris on Highway 29 corroborated Jimenez' story and eliminated him as being the shooter. (R. 88-92; 131-35; 137-42; 143-53; 175-82). It tended to establish Petitioner was the shooter, using a Luger 9mm automatic which belonged to him. This was the gun taken from Petitioner by Jimenez during their argument in downtown Spartanburg, and thrown by Mr. Jimenez to the curb where it was found and retrieved by investigating officers. (R. 93-128; 135; 153-58; 175-98).

The pathologist testified the victim was 5'3" tall, 180 pounds, and died from two gunshot wounds to the back of the head. The shots "came close together because they were closely approximated" and one of which was immediately fatal. (R. 163-64).

The first wound was "irregular in shape, and it had splitting of the skin and underlying beveling of the, of the bone outwards, so indicated there was an exit gunshot wound...that [entry] wound appeared in the right—*into the left occiput region, the back of the head.* It was 6 inches from the top of the head and a half inch to the left of midline. And it was split horizontally, and it—the horizontal dimensions were 5.5 centimeters, and

it was half a centimeter wide. You could ap--re-approximate that wound, and it was 1 centimeter in diameter. And the entrance was medially. Now, *the reason it was like that is because it was essentially a contact gunshot wound*... That wound passed into the base of the brain – of the skull. It passed through a large drainage area called the sagittal sinus. It went through the cerebellum, which is an inferior portion of the brain, went through the cerebrum and came out anteriorly... So the path of that bullet was back to front. It was upward at about probably 15 or 20 degrees from the horizontal. And it was almost sagittal, meaning that if you drew a perpendicular line through the face and through the body, that's the sagittal plane. *So it was going from back to front and slightly upward and almost straight through.*" (R. 164, ln. 22 - 165, ln. 21)(emphasis added).

The pathologist went on to testify "wounds three and four were associated gunshot wounds. And as the gunshot wound exited it went through the ear, the pinna of the ear, the surface of the ear... But, nevertheless, the gunshot wound entered in the right posterior neck. It was a little bit lower, 6.75 inches from the top of the head, and it was a half inch to the right of the midline...This wound also had a little bit of splitting of the skin indicating that it was probably contact, being loose contact. And there was a little bit of charring of the skin surrounding that from the heat of the weapon. The charring was from 5:00 to 1:00 o'clock...*The, the first [wound] I described would have been almost immediately fatal.* The other one would have, like I said; only been potentially fatal. He could have lost consciousness from that one, but more than likely not." (R. 165, ln. 22 - 167, ln. 24)(emphasis added).

At the close of the State's case, Petitioner was appropriately advised of his constitutional rights not to have to prove anything in his own defense and his right not to

testify, or his right to testify should he choose to. He was thoroughly questioned by the court as to whether he wished to take the stand in his own behalf and advised the court he did not. (R. 201-04). The court denied the request of Petitioner's counsel for a directed verdict, (R. 206-09), and entertained requests by Petitioner's counsel for charges to the jury on voluntary and involuntary manslaughter, self-defense under *S.C. Code Ann. 16-11-440(c)*, and statutory immunity from prosecution purportedly under the Castle Doctrine. The court deferred rulings on these jury charge requests overnight. (R. 209-21).

The following morning Petitioner informed the court he wanted to testify in his own behalf and did so. (R. 222 - 24). Petitioner testified that at the time of the incident, he had imbibed only four drinks during the course of the entire day, (R. 226, ll. 3-14; .242, ll. 3-9), but that Mr. Jimenez was intoxicated, (R. 231, ll. 2-7) and the victim was intoxicated. (R. 229, ln. 20 - 230, ln. 5). He claimed he was asked by the club owner to give the victim a ride home, (R. 228, ll. 6-9), but knew of the victim only as an acquaintance. (R. 291, ll. 19-25). He stated the security guard helped the victim into the back seat of Petitioner's vehicle at approximately 3:00 a.m. (R. 229-30). He told the security guard initially he knew where the victim lived but then had to get his address off his driver's license; then he and Mr. Jimenez, who was riding in the front passenger seat, proceeded up East North Street in Greenville to take the victim home. (R. 230-31).

According to Petitioner, he and Jimenez were having a discussion "[a]lmost political in nature" about kidnappings in Colombia by FARC, a revolutionary group which opposes the government there. (R. 232). Petitioner claimed the victim then sprang from the back seat and grabbed him "[o]n my forehead." (R. 233). Prompted by constant leading from his attorney, Petitioner elaborated on his terror, his efforts "to find a public

place, you know, people where I could, you know, possibly jump out of the car, and get some help you know...I mean, I was looking for a public place with people somewhere stopped." (R. 234, ll. 11-25).

Petitioner testified he had "been up all day", had "[b]een drinking throughout the day," and was tired. (R. 235, ll. 2-7). He stated the victim kept jumping forward to grab the steering wheel, and that he pushed repeatedly but that did not seem to work. (R. 235 - 236). "At that point I pushed him off, and I grabbed the, the glove box and I opened the glove box and got the pouch out which had the gun in it... I pulled out the gun and I shot Mr. Tabares... He fell on my knee." (R. 236, ln. 2- 237).

Again, with extensive leading from his attorney Petitioner recounted his fear and shock after shooting the victim, driving from a point on East North St. in Greenville, and ending up in downtown Spartanburg. He elaborated on his confrontation with Jimenez in Spartanburg while he "still had the gun in [his] hand," his remaining at that scene, it being "fair to say it's traumatic" when something like this happens. (R. 238-41).

He was asked by his attorney whether he ever thought about stopping the car or slamming on the brakes. The answer was: "No. When, when, I kept pushing him back he, he pulled the car towards, you know, trying to run it off the road. And I saw we were headed towards some trees. So." (R. 240, ll. 12-18).

Under cross-examination, Petitioner reiterated his knowledge of the extent of the victim's intoxication before agreeing to take him home, (R. 242), and confirmed the road to the victim's home took him in the opposite direction of his own home. (R. 243, ll. 4-20). Petitioner offered denials and then equivocations that the victim became upset because Petitioner passed by the road he lived on and because Petitioner would not stop

or turn around when told to do so. (R. 245-46). He claimed again he was looking for a public place to stop and let the victim out, "[s]ome place to stop and get some help where I could jump out and get some help, possibly let him out. And I don't know, maybe later get a cab. But my main concern was to get some help, me jumping out of the car." (R. 246, ln. 22 - 247, ln. 4).

Petitioner admitted the victim had no weapon, not a gun, or a knife, or even a plastic fork. (R. 247, ll. 9-13). However, he argued that he didn't *know* that simply stopping the car would have ended the threat, retreating from his earlier testimony about the extent of the victim's inebriation. (R. 247, ll. 14-25).

Petitioner could not deny that he had the presence of mind to reach into the glove box, extract a bag, and take a loaded and cocked gun from that bag. Then, while the victim supposedly struggled with him, and while a front seat passenger supposedly sat idly by with a threat of death clear and imminent, Petitioner moved the victim into a position of total helplessness and shot him twice, point-blank, in the back of the head, killing him instantly. (R. 248-53).

Requests to Charge

Petitioner's counsel requested the court charge the law of self defense, the castle doctrine, voluntary manslaughter and involuntary manslaughter. (R. 255-65). In support of involuntary manslaughter Petitioner relied upon *State v. Brayboy, 387 S.C. 174, 691 S.E.2d 482 (Ct. App. 2010)*, (R. 260 - 263). The State agreed to a charge to the jury on murder, voluntary manslaughter, and on self-defense. (R. 263).

The trial judge gave proper instructions to the jury on charges of possession of a firearm during the commission of a violent offense, (R. 324 -325), the law of murder, (R.

313 -316), of **voluntary manslaughter**, (R. 316 -319), **the Castle Doctrine**, (R. 318 - 320), and of **self-defense**, (R. 320, ln. 10-324, ln. 11). The instructions fully and correctly stated the law applicable to the facts of the case.

ARGUMENT

I. The trial judge did not err in his charge to the jury on the law of self-defense.

At the conclusion of the case, Petitioner requested the trial judge charge the jury that when a defendant acts in self-defense and shoots he is entitled to shoot until the threat is eliminated. Petitioner argues "[t]his is a legitimate case of self-defense. Petitioner acted consistently with a person acting in self-defense. He waited on the police to arrive, and he was in a state of shock and disturbed after the bizarre events that the grossly intoxicated decedent - with a .323 blood-alcohol reading – had inflicted on him." (*IBOA*, p. 12). The argument is without merit.

Petitioner glosses over the actual facts of the murder and the fact the victim died of two gun-shot wounds to the back of the head. The contact bullet wounds were all but instantly fatal and were inflicted on a diminutive man who had been put into Petitioner's car, either with Petitioner's consent and acquiescence (his story) or at Petitioner's request (the story of other witnesses).

The entire reason why the victim was put there was he had too much to drink and needed to be driven home. The testimony was clear he was unable to walk to the car without assistance. The tale ended with the man dead and in Petitioner's car, Petitioner covered in his blood and in another city, miles and miles removed from the club they had departed from, and equally far removed and in the wrong direction from the home to which the victim was to have been driven. Petitioner did not "wait on the police to

arrive" so much as he was resigned to the inevitable, an impending place in the dock after a heated exchange with his former brother in law, the other passenger in the car, who had witnessed what happened and finally was able to get out of the vehicle and take the murder weapon away from Petitioner.

The elements of self-defense are: (1) the defendant must be without fault in bringing on the difficulty; (2) the defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger; (3) if his defense was based upon his belief of imminent danger, that a reasonable prudent man of ordinary firmness and courage would have entertained the same belief, or if his defense is based on his being in actual danger, that the circumstances were such as would warrant a man of ordinary prudence, firmness, and courage to strike the fatal blow in order to save himself from serious bodily harm, or losing his own life; and (4) the defendant had no other means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance. *State v. Hendrix, 270 S.C. 653, 657-658, 244 S.E.2d 503 (1978)*; McAninch, *The Criminal Law of South Carolina, pp. 675-686 (S.C. Bar, 4th Ed., 2002).*

Petitioner either agreed to (or offered) his car as a means of transit, one for taking the victim from a club where he had had too much to drink, and to deliver the victim to his home. This was the underlying cause of all circumstances which followed. It is therefore undisputed Petitioner assumed the care, custody, and control of a person whom he recognized as being too intoxicated to care for himself. He then continued to drive by the street where the victim actually lived and continued into another county over the victim's protests.

Even assuming for argument the events were as Petitioner claimed at trial, Petitioner was not "without fault" in bringing on the difficulty which ultimately led to a man's death. There was simply no question that the State had negated the first element of self-defense in its case in chief through all of the circumstances proven; *see, State v. Santiago, 370 S.C. 153, 634 S.E2d 23,27 (Ct. App. 2006)(taking a loaded gun to the site of a prior confrontation with the victim, and where the fatal encounter occurred, repudiated a claim defendant was without fault in bringing on the confrontation); State v. Wigington, 375 S.C. 25, 649 S.E.2d 185(Ct. App. 2007)(*"[a] person need not retreat or seek to escape, even though he can do so without increasing his danger, but may lawfully resist event to the extent of taking life if necessary, where, being without fault in bringing on the difficulty, he is assaulted while in his own dwelling house... *However, the rule is predicated on the absence of aggression or fault on his part in bringing on the difficulty; the doctrine is for defensive, and not offensive, purposes) (emphasis added).*

A defendant must be without fault in bringing on the difficulty, meaning "[o]ne who provokes or initiates an assault cannot escape criminal liability by invoking self-defense...*Any act of the accused in violation of the law and reasonably calculated to produce the occasion* amounts to bringing on the difficulty and bars his right to assert self-defense as a justification or excuse for a homicide." *Wigington, 375 S.C. at p. 32.* In *State v. Slater, 373 S.C. 66, 644 S.E.2d 50 (2007)*, this Court held the defendant was not entitled to a self-defense charge, having approached an altercation that was already underway with a loaded weapon by his side, such activity being reasonably calculated to bring on the difficulty that arose.

Petitioner here offered/consented to take the victim home under conditions that gave him notice the victim was intoxicated. The State's case established that Petitioner's conduct clearly showed his own fault in provoking or initiating circumstances leading to the fatal assault by ignoring the victim's protest to stop or turn around, violations of the law which were reasonably calculated to produce the occasion and amounting to his having brought on the difficulty.

Furthermore, it cannot be credibly argued that, once Petitioner took the stand in his own behalf, anything he said demonstrated his lack of fault in those underlying circumstances. He could have stopped the car, but he did not. He could have let the victim out, but he did not. Instead he chose to reach in a glove box, remove a gun contained in a bag, remove the gun from the bag and then he shot the victim twice in the back of the head.

The State's proof demonstrated by the facts and circumstances offered in its case in chief that Petitioner could have resorted to other means of avoiding danger. Even after taking the stand, Petitioner did not point to, and could not point to any evidence that he had *no other means* to avoid the danger presented, other than to shoot the victim twice in the back of the head.

The danger posed by a car in motion, which Petitioner's counsel argued "going down the road is a missile", (R. 271, ln. 15-19), could have been negated far short of taking a man's life. The car could have simply been stopped. The victim could have been removed. The matter should have been ended without resorting to deadly force.

A life would not have been taken had the response to this "danger," allegedly that of a small, inebriated man wanting to get out of a car and get home, been one other than

using deadly force to kill him. Even in a time and place that venerates the right "for law-abiding citizens to protect themselves, their families, and others from intruders and attackers," reasonableness and proportionality still remain "the key to self-defense." *See McAninch, The Criminal Law of South Carolina, 4th Ed., p. 674 (S.C. Bar, 2002), citing State v. Wood, 1 S.C.L. (1 Bay)(1794).*

There was neither a perceived nor actual imminent danger under which a man of ordinary prudence, firmness, and courage would have acted as Petitioner did under these circumstances. There could be no reasonable belief that a person of ordinary prudence, firmness, and courage would have entertained any notion that using deadly force was the only way he could have saved himself.

It is further respectfully noted that shooting a man in the back, or here more specifically the back of the head, is generally construed by "law-abiding citizens" as being an oxymoron when describing acts which are of either "firmness" or "courage." The fact that the victim was not even facing Petitioner at the time he was shot further negates any claim of self-defense and underscores his helplessness when he was murdered.

Petitioner's reliance on *State v. Hendrix* is totally misspent. In *Hendrix,* the defendant and the deceased had a confrontation during a lake outing on undeveloped property. The hostilities continued until both were armed with shotguns and defendant fired four times in rapid succession, killing the victim. The Court concluded the defendant was entitled to a directed verdict of acquittal *as a matter of law*. The defendant was on his own property, attempted to avoid the encounter and made this known to the victim, had done nothing to provoke the altercation, and the facts were conclusive the

defendant was actually in immediate danger of losing his life. The rule as stated in *Hendrix* was that one is *not* justified in shooting or employing a deadly weapon after the adversary has been disarmed, but a confrontation with shotguns which resulted in firing four shots in such rapid succession that the last was fired before the deceased "hit the ground...[showed} that "[u]nder these circumstances the force used was not excessive." *Hendrix, 270 S.C. at 661.*

In the instant case, Petitioner had secured the release of the victim into his care and custody, knowing the victim was inebriated, with an understanding with bar personnel that he would take him home. The victim was not armed with any type of weapon whatsoever. Petitioner drove past the street where the victim lived, and continued on for miles in another direction, and this was done over the victim's objections, continued as Petitioner murdered him and continued on until the car finally stopped in another city, downtown Spartanburg. The victim died face down, shot twice in the back of the head. The facts, the position of the body, the victim's head resting on Petitioner's knee and leg, the blood that covered Petitioner's pants, the testimony of witnesses including Petitioner, as well as the location of the lethal wounds, all of this evidence did not support a charge from the trial judge of a right to keep shooting until danger had ceased. Rather, the rule that offset such an instruction, one taken from the same paragraph in the same case, *id*, was that "*ordinarily one is not justified in shooting or employing a deadly weapon after the adversary has been disarmed or disabled.*" *Id. (emphasis added).*

The victim was never armed in the instant case. Petitioner was not without fault in bringing on the circumstances of the murder. The facts and circumstances fully

established that the victim had been disabled (facing down and away from Petitioner and his gun), and Petitioner never denied shooting the man twice in the back of the head. He could not explain this, because there was no valid excuse or explanation. Any answer was a matter of credibility and the indefensibility of what he had done was overwhelmingly supported by the facts.

The fact that both shots were in the back of the head speaks inevitably to whether '[u]nder these circumstance the force used was… excessive," *Id,* and whether Petitioner was in the first instance "justified in shooting or employing a deadly weapon." *Id.*

Assuming that trial judges should tailor their self-defense charges to the facts of a case, as they should, and where, as here, it is a given that the victim was shot twice in the back of the head, the jury instruction requested by Petitioner was simply not proper to the facts of the case. One shot to the back of the head of a prostrate, intoxicated, and unarmed man was excessive *per se*, as likewise would have been the second one.

The trial judge tailored the charge to what was before the jury to decide: "[A] person may use such force as is reasonably necessary even to the point of taking human life if such is reasonable to prevent death or great bodily injury to himself or to another person…The law recognizes the right of every person to defend himself or herself or a friend, relative or another from death or from sustaining serious bodily harm. To do this a person may use such force as is reasonably necessary even to the point of taking human life where such is reasonable. The right of self-defense is founded upon necessity, either actual or reasonably apparent necessity… The law does not hold someone to a refined assessment of the danger as might be accomplished having an adequate time to reflect, provided however that the defendant has acted as a person of ordinary reason, firmness

and courage would have acted or should have acted in meeting the appearance of danger. In other words, one does not have to wait until his or her assailant gets the advantage, for one always has the right under the law of self-preservation to prevent another from getting an advantage." (R. 318-19; 323).

Petitioner's reliance on *Douglas v. State, 332 S.C. 67, 504 S.E.2d 301 (1998)* is without merit. *Douglas* was a post-conviction relief action resulting in the grant of a belated appeal. The case arose from conviction of the applicant for voluntary manslaughter and possession of a firearm during the commission of a crime of violence. The applicant and another individual had begun shooting into a crowd at a Waffle House after, according to the applicant, a group of people in the crowd rushed them. Douglas claimed the trial judge erred in rejecting a proposed jury instruction that "the defendant, if without fault, has the right to use such necessary force as required for his complete protection from loss of life or serious bodily harm and cannot be limited to the degree or quantity of attacking opposing force.[citing *State v. Campbell, 111 S.C. 112, 113, 96 S.E. 543, 544 (1918)].*" In *Campbell,* the defendant shot a man who attacked him with a bottle and claimed self-defense. The trial judge instructed the jury that the defendant was limited in his response to one which used force, essentially measure for measure. In *Douglas,* this Court applied the "dictates" of *Campbell* which had rejected the trial judge's conclusion that a defendant acting *without fault* could use *the same force and no more* than that with which he was threatened. *Douglas, 332 S.C. at p. 72.* The charge in *Douglas* instructed the jury that (1) a justified firing of a first shot could justify a subsequent shot until it appears any danger to life and body had ceased, and (2) that the defendant does not have to wait until "the deceased gets the drop on him or the deceased

begins to shoot him. He has the right to act upon the law of self-preservation and prevent this." *Id. at 72-73*. The Court in *Douglas* held the refusal of the trial judge to give the requested instruction, and the instruction as actually given was, again, "consistent with the dictates of *Campbell*" and was therefore not error. *Id. at p.73*.[citing *State v. Hicks, 305 S.C. 277, 407 S.E. 2nd 907 (1991)* as unstated support, but following from the proposition that *"although charges requested by a party may be a correct statement of law, a judge does not err by refusing to deliver the charges verbatim."](emphasis added).*

As in *Douglas*, in the instant case the trial judge in no way limited the force that Petitioner could use to a *measure for measure* equivalence, as Petitioner suggests in his brief. (*IBOA*, p.11). Instead, the charge was a correct statement of law carefully crafted to the evidence put before the jury, without invading the province of the jury to find the facts: "The law of self-defense encompasses preventive action taken to protect one's own life without another if such action is taken in anticipation of imminent danger of losing one's life or sustaining serious bodily injury. A defendant has a right to act upon appearances. He may be mistaken. The law does not hold someone to a refined assessment of the danger as might be accomplished having an adequate time to reflect, provided however that the defendant has acted as a person of ordinary reason, firmness and courage would have acted or should have acted in meeting the appearance of the danger. In other words, one does not have to wait until his or her assailant gets the advantage, for one always has the right under the law of self-preservation to prevent another from getting an advantage." (R. 322-23).

The requests made by Petitioner for charges included "self-defense as it relates to the Castle Doctrine in terms of that he can meet force with force, it's his vehicle, he has

no duty to retreat, as well as self-defense." (R. 259, ll. 16-23). As indicated above, the trial judge gave a proper instruction regarding the use of force and self-defense. The charge given on the Castle Doctrine was proper under both *S.C. Code Ann. Sec. 16-11-440(C)* and the common law: "Section 16-11-440 (C) provides that a person who is not engaged in an unlawful activity and who is attacked in a place where he has a right to be, including his home, business, or motor vehicle, has no duty to retreat and the right to stand his ground and to meet force with force, including deadly force, if he reasonably believes it is necessary to prevent death or great bodily injury to himself or to another person." (R. 319, ll. 10-19). The charge was a correct statement of the law and gave Petitioner every benefit that could be accorded to him under the facts of the case. Again, as in *Douglas*, the charge was "consistent with the tenets of *Campbell*" and provided the jury with a proper and fair statement as to the exercise and use of deadly force.

Furthermore, the charge, the statute and the common-law are all consistent in stating that there is no duty to retreat in a place where one has a right to be, *provided he is not engaged in an unlawful activity while he is there.*

When Petitioner chose to continue on instead of taking the victim back to the club, or instead of releasing him by the side of the road, or instead of taking him to his home, Petitioner was no longer even arguably within the ambit of *S.C. Code Ann. Sec. 16-11-440 (C)* ("[a]person who is not engaged in an unlawful activity"); and *cf. S.C. Code Ann. Sec. 16-3-910*, Kidnapping, ("Whoever shall unlawfully ...confine...or carry away any other person, by any means whatsoever without authority of law...is guilty of a felony"); *Lynch v. Toys "R" Us- Delaware, Inc., 375 S.C. 604, 615; 654 S.E.2d 541, 547-48 (Ct. App. 2007)*("The essence of the tort of false imprisonment consists of depriving a

person of his or her liberty without lawful justification... To establish false imprisonment under South Carolina law, the plaintiff must show that the defendant restrained the plaintiff; the restraint was intentional and the restraint was unlawful.").

The victim in this case was not trying to force his way *into* any dwelling, habitation, or vehicle of Petitioner. According to the account of the only other passenger in the vehicle, the victim just wanted *out of the vehicle* because Petitioner was taking him away from his home, while Petitioner ignored his protests. The car had only to be stopped by Petitioner and the victim allowed to get out of it or to be removed from it.

Petitioner's reliance on *State v. Fuller, 297 S.C. 440, 377 S.E.2d 328 (1989)* is also misplaced. Unlike in *Fuller*, here the trial judge did not use the charge set forth in *State v. Davis, 282 S.C. 45, 317 S.E.2d 452 (1984)* as "an exclusive charge...to eradicate the body of common law self-defense." *Fuller, 377 S.E.2d at p. 330.* And the trial judge here satisfied this Court's language as to the law of appearances in his charge. *See Fuller, 297 S.C. at 444-45; and cf. R. 321, ln. 20-323, ln. 15.* The trial judge's instruction on the law of appearances was equally consistent with language from *State v. Hardin, 114 S.C. 280, 103 S.E. 557, 558-59(1920)*, and neither precedent offers any support for a claim as to deficiency in the charge based upon "words accompanied by hostile acts." *Fuller, 297 S.C. at 445; Hardin, 103 S.E. at 559.*

Petitioner complains that the instructions requested by his trial counsel were not granted. To a great extent, this glosses the record of what took place in the lower court proceedings, and the issues first invited and then almost as quickly laid to rest by Petitioner's own words and testimony.

Petitioner claimed in his initial brief that the reliance of his counsel on *State v. Rye, 375 S.C. 119, 651 S.E.2d 321 (2007)*, "might not be the case on point" for the principle of law that one may continue shooting until the threat is ended but "that that *was a correct proposition of law*."(*IBOA*, p. 10). He then claims that the matter ended when "the judge maintained that he considered this instruction a comment on the facts and he ruled was not going to charge it." *(IBOA*, p. 10).

The issue was first raised by counsel who was in fact clearly relying at that time on *State v. Brayboy, 387 S.C. 174, 691 S.E.2d 482 (Ct. App. 2010)*, not upon *Rye*, and the primary issue Petitioner's attorney was arguing over was whether a charge of involuntary manslaughter was proper; Petitioner's counsel argued it was proper, because "as far as the involuntary manslaughter charge goes, Your Honor, we believe that he armed himself in self-defense." (R. 212, ll. 14-16). The trial judge agreed that "if you lawfully arm yourself in self-defense and you act criminally negligent, then you could be guilty of involuntary manslaughter. But you have to arm yourself appropriately in self-defense. I'm not certain that there's been any evidence of self-defense." (R. 213, ll. 12-17). Petitioner's counsel then asked for and was granted leave to lay out her case for Petitioner's having acted in self-defense. (R. 213-21). The trial judge did *not* at that time reject the request, but clearly stated on the record that the matter remained open: "Okay. All right. Any other requests? I'll reflect upon those overnight as to involuntary manslaughter and self-defense." (R. 220, ll. 23-25). As noted above, the next morning Petitioner invited the trial proceedings to continue by making his own decision to testify and show the jury he acted in self-defense. (R. 222-24). The effort obviously failed both in the facts he testified to, as well as in the verdict which resulted. Most significantly,

Petitioner's own testimony established there was no struggle for the gun, no accidental shooting, but rather only a deliberate firing of two shots from Petitioner's pistol, by Petitioner, to the back of victim's head, which killed the victim almost instantly.

The decision in *Brayboy* involved a question of fact over whether the firing of the fatal shot during an argument and the handling of the gun was accidental or not. *287 S.C. 174, 178.* The Court of Appeals held "under the facts of this case, there is evidence from which the jury could determine Brayboy was lawfully armed in self-defense and negligently handled the loaded gun causing it to discharge, and he was therefore entitled to a charge on involuntary manslaughter." Petitioner does not now argue the application of *Brayboy,* a claim for a charge on involuntary manslaughter, even though it was the first authority cited by his attorney at trial so as to argue his having been lawfully armed in self-defense. Instead, Petitioner argues the applicability of *Rye*. However, the decision in *Rye* offers even less support than *Brayboy* for Petitioner's efforts to rework his claim on appeal.

Petitioner here did not also claim a defense of habitation, as was the case in *Rye*, but rather only asserted self-defense, which "our precedents properly recognize... are analogous [but] the defenses are not identical." *Rye, 375 S.C. 119, 124.* As the Court noted in *Rye,* "the defense of habitation provides that *where one attempts to force himself into another's dwelling*, the law permits an owner to use *reasonable force to expel the trespasser.*" *Id.* Petitioner never requested a charge on habitation nor on the reasonableness of the force used under a theory of defense of habitation, nor could he under the statute; by definition, the scene of the murder was a car, not a dwelling. *S.C. Code Ann. Sec. 16-11-430 (1) &(4)*; *Black's Law Dictionary p. 505 (West 6th Ed. 1990).*

Even assuming for argument that the charge had been requested and given, the only scenario under which it might in theory have been claimed to apply, that of standing upon the right of self-defense while claiming immunity from a duty to retreat, *id.*, would still have been to no avail to Petitioner under the tenets of *Rye*. In *Rye*, trespassers upon the defendant's business property stole his tools, damaged the property and made sport of killing his pets. A confrontation between the defendant and some of these trespassers resulted in one of the victims being shot and killed by the defendant. *375 S.C. 119, 121-123*. The trial judge refused the defendant's proposed request on the defense of habitation. *Id. at p. 124*. In his charge to the jury, the trial judge differentiated habitation from self-defense "with the sole caveat that "[a] person defending his or her home or premises...has no duty to retreat." Though this was most of the picture, it was not the complete picture." *Id.* The Court in *Rye* held that "the charges in the instant case incorrectly implied that habitation requires a defendant to establish that his person or property was in some danger of injury or harm." *Id.*

Petitioner in this case never sought a charge on defense of habitation; his argument at p. 10 of his initial brief was merely an effort to now reconfigure and raise an issue via the back door. The question put to the jury was whether the killing of the victim was self-defense, murder, or voluntary manslaughter. Petitioner's counsel did not, and again could not, claim the car was a habitation in which Petitioner was lawfully armed and acting reasonably to *expel* a trespasser. The vehicle was claimed by Petitioner *as a weapon*, a "missile" against which Petitioner was acting in self-defense when he used deadly force upon the victim.

After the charge to the jury, Petitioner's counsel argued *Rye* only as support for the proposition that if a defendant is justified in shooting once, he is justified to continue until the threat is completely ended. (R. 332-35). Later on, at the jury's request during their deliberations, the judge recharged on the law of murder and voluntary manslaughter. (R. 336). After that, Petitioner argued *Douglas* and *Hendrix* in support of the one shot warranting another shot argument, which had been raised before without supporting precedent. The argument for that charge has been refuted herein.

Here, the jury requested only to be recharged on the law of murder and voluntary manslaughter at that point in the proceedings. For the trial judge to have added the improper charge of "shoot him once and you can shoot him again" at that point in time would have potentially confused the jury, or improperly suggested some particular weight to be given to a charge that was properly refused in the first place.[1]

The trial judge gave a properly crafted charge to the jury on the law of self-defense. During the incident in question, the facts at trial clearly established there was no danger present that would justify shooting the victim and continuing to shoot him.

Even assuming the charge as it was requested, that Petitioner could continue shooting the victim after the first shot, was a correct proposition of law, a trial judge is not required to give a charge, as requested, verbatim, and the charge actually given to the jurors in this case properly covered the issue of a reasonable use of deadly force in defense of self or of others. *State v. Brandt, 393 S.C. 526, 713 S.E.2d 591 (2011).* The

[1]The jury did not request to be recharged on self-defense or that self-defense be further explained or defined. It is clear the jury had already determined shooting someone in the back of the head under these circumstances, much less shooting someone twice in the back of the head under these circumstances, was not reasonable. The jury was trying to determine if Petitioner had committed murder or voluntary manslaughter, i.e. which crime Petitioner had committed.

request to charge was not properly raised and supporting authority was not offered to the court in timely fashion.

There was no error, there was no prejudice, and the denial of the request to charge was harmless, if constituting error at all. *See State v. Hicks, Douglas v. State and discussion above. See also State v. Curry, 406 S.C. 364, 752 S.E.2d 263 (2013)*; *Brandt, 393 S.C.at 549, 713 S.E.2d at 603* (in reviewing charges for error, this Court will review the charge as a whole in light of the evidence and issues presented at trial); *Priest v. Scott, 266 S.C. 321, 324, 223 S.E.2d 36, 38 (1976)*(an alleged error in a portion of a charge must considered in the light of the whole charge and must be prejudicial to warrant a new trial).

CONCLUSION

Based upon the foregoing, the petition for writ of certiorari should be denied.

Respectfully submitted,

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Anthony Mabry

April 23, 2014

RECEIVED
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S.C. Supreme Court

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Spartanburg County
J. Derham Cole, Circuit Court Judge

THE STATE,

Respondent,

V.

MANUEL ANTONIO MARIN,

Petitioner

CERTIFICATE OF SERVICE

I, Anthony Mabry, certify that I have served the ***Return to Petition for Writ of Certiorari*** on Petitioner by depositing two (2) copies of same in the InterAgency mail addressed to his attorney of record:

Robert M. Dudek,
Chief Appellate Defender for Capital Appeals
South Carolina Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
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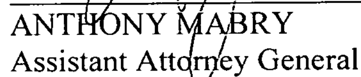
This 23rd day of April, 2014.



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