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. 2013 - 002001

THE STATE,

Respondent,

v.

MANUEL ANTONIO MARIN,

Petitioner

BRIEF OF RESPONDENT

ALAN WILSON
Attorney General
JOHN W. McINTOSH
Chief Deputy Attorney General
DONALD J. ZELENKA
Senior Assistant Deputy Attorney General
ANTHONY MABRY
Assistant Attorney General
S.C. Bar No. 11973
P.O. Box 11549
Columbia, SC 29211
(803) 734-6305

BARRY J. BARNETTE
Solicitor, Seventh Judicial Circuit

***RUSSELL D. GHENT**
Assistant Solicitor
Primary Counsel
S.C. Bar No.2439
180 Magnolia Street
Spartanburg, SC 29306
(864) 596-2575
ATTORNEYS FOR RESPONDENT

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QUESTION PRESENTED

Whether the trial judge's charge on self-defense was, on the facts of the case, a correct and applicable statement of legal principles concerning Petitioner's right to use deadly force?

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.

Certiorari was timely sought by Petitioner. Certiorari was granted in this Court on October 23, 2014. This briefing follows.

ARGUMENT

The trial judge's jury charge was, on the facts of the case, a correct and applicable statement of legal principles concerning Petitioner's right to use deadly force.

The Evidence At Trial

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 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).

The Defendant at the close of the State's case first informed the trial judge that he did not wish to testify, but changed his mind during the overnight recess and took the stand in his own behalf. In doing so, he placed his own credibility in issue before the jury as to the facts of the case, especially his own version of the killing.

The Petitioner's rendering of the essential facts at trial essentially conceded circumstances supporting the verdict of murder, and a question of fact between murder and voluntary manslaughter, and no factual basis for a verdict of self-defense.

He does, however, skew what happened to the extent he can in an attempt to support his claims on certiorari, and to attribute error to the trial judge, the Court of Appeals, and now, for the first time, in the prosecutor's closing argument.

Petitioner's testimony corroborated the State's proof of a victim too drunk to walk, almost unconscious when put into Petitioner's car with Petitioner's acquiescence (Petitioner's version) or after he volunteered (testimony of nightclub personnel), after Petitioner claimed to know the victim and where he lived (he acknowledged on the stand he was only "acquainted" with the victim). (R. p.22, line 11 to p. 23, l. 14; p. 228, l. 19 to p. 229, l. 5). Once the victim was in the Petitioner's car outside Bongo's, to find his home address it was necessary to take identification from victim's person in front of the bar personnel. Then his ex-brother-in-law then seated in the front seat passenger seat put the information into his laptop GPS address. (R. p. 229, l. 11 to p. 235, l. 7). The address was a Greer address that took the car out East North Street, then past the victim's home and then to a point out Old Spartanburg Highway/Highway 29 on the Greenville/Greer side of I-85 near Tacapau Road to U.S. Lumber Company in front of which a last effort by the victim to be release from the car ended in his murder. (R. p. 5, lines 1-5; p. 11, line 20 to p. 12, l. 8; p. 75 to p. 86; p. 235, l. 8 to p. 236, l. 17).

The Petitioner claimed he was attacked by the victim from the back seat while trying to drive him home, turning the car into a "missile" and justifying that he put a gun to the back of the victim's head as the victim was prone and face down in his lap. He

then blew the man's brain's out and all over Petitioner's shirt, pants, floorboard, driver's dash side, and clear up into the gun barrel. (R. p. 106, lines 6-12; p. 170, lines 12-24; p. 163, line 11 to p. 170, line 9; p. 187, line 1 to p. 198, line 3). This was, and is now, claimed as self-defense by Petitioner.

A brief summary of the fallacy in this follows from the proof in the case, what was seen and heard by the jury and the trial judge, which are as follows: (1) a drunken, semi-conscious man, too drunk to even stand or walk was placed into the backseat of the Petitioner's car to be driven home, at Petitioner's request/offer/acquiescence (R. p. 18, lines 13-21; p.19, ll. 6-23; l. 14; p. 220) (2) he awakened to find himself in the backseat of a vehicle with two strangers/"acquaintances" driving past his street and the car continued on despite his own objections (R. p. 59, ll. 15-21; p. 51; p. 57, line 10 to p. 60) (3) the victim lunged to the front seat but was quickly shoved back (R. p. 231 to p. 235 and much later concluded after passing over the span of what jurors would have known (from their common sense, experience and the proof in the case) covered miles of lit roadways from Greenville County and on into Spartanburg County (R. p. 102, lines 2-24; p. 235-236, l. 17; p. 239, l. 21 to p. 241, l. 16), turning the car into what Petitioner's counsel has termed a "missile"; (4) continued to a point in front of a large, known company on Old Spartanburg Road/Hwy. 29 on the Greenville side of I-85, where the totally unarmed victim's final efforts to be released led to his being shot in the back of the head, twice (R. p. 76, l. 6 p. 79) and (5) then continued another 10 miles into downtown Spartanburg before the car stopped, the passenger, now seen by witnesses as hysterical and obviously outraged with the driver, jumped out, took the gun from the Petitioner and threw it down in the street, and the police arrived shortly thereafter.

I.

The trial judge's charges as to Malice, Murder, Manslaughter and Self-Defense were correct and complete statements of the law on the facts of this case.

The State argued that the proof established an intentional killing of the victim with malice aforethought, murder and refutation of self-defense beyond a reasonable doubt. (R. p. 277 to p. 303). The State expressly told the jury that a failure to find malice also left them the option of voluntary manslaughter. (R. p. 299, lines 5-25).

The trial judge's charge to the jury on murder and malice was appropriate in its entirety. (R. p. 312, line 19 to p. 317). The charge as to Voluntary Manslaughter was appropriate in its entirety. (R. p. 317, line 4 to p. 318, l. 22). The charge as to Self-Defense was appropriate in its entirety. (R. p. 320, line 2 to p. 324, l. 11).

The trial judge committed no error of law, and charged a correct statement of the law that was applicable to the case. When requested, the trial judge must charge a correct and applicable principle of the law. *State v. Brandt, 398 S.C. 526, 549, 713 SE 2d 591, 603 (2011).* But the trial judge is not required to use any particular language in explaining that principle. *State v. Mattison, 388 S.C. 469, 478-79, 697 SE 2d 578, 583 (2010).* The charge as a whole must be considered in determining whether the trial judge charged the correct law applicable to the case. *Barber v. State, 393 S.C. 232, 236, 712 SE 2d 436, 438 (2011).*

The trial judge gave a full and clear application of the use of force and deadly force as a legal principle in the law of self-defense. (R. p. 320 to p. 324, l. 11). In doing so, the Court stated initially that, "[t]he right of self-defense is founded upon necessity, either actual or reasonably apparent necessity. (R. 320, ll. 17-18).

The trial judge from there proceeded through the elements in a charge that was thorough, fair, and a correct statement of legal principles, (R. p. 320, l. 10 to p. 327, l. 11) but which admittedly did not tell jurors that having once shot an unarmed man who was pinned face down, while he was being held in a car against his will, in the back of the head at contact range, the Defendant was essentially entitled to do so again from a slightly different angle until the threat posed "had completely ended."

The only exception to the charge raised and now argued on certiorari were the failure to charge that justifiable first shot entitles one to a second shot, (the "continuing to shoot charge") relying on *State v. Rye, 375 S.C. 119, 651 SE 2d 321 (2002).* (R. p. 332 to p. 336, l. 8). The jury retired to deliberate at 1:10 p.m. and returned at 3:00 p.m., after sending a request to the Court "to provide [them] a reinstruction on the definition of malice and also the definition of voluntary manslaughter. (R. p. 336 ll. 14-20). The Court reinstructed them as requested. (R. p. 336, l. 21 to p. 340, l. 15).

The jury reported a verdict convicting Petitioner of Murder and Possession of a Firearm during a Commission of a Violent Crime at 4:25 p.m. (R. p. 343 to 346) and the trial judge imposed sentence.

The Petitioner has now for the first time made attacks against the assistant solicitor in the case, claiming her argument "mirrored" the jury charge in *State v. Belcher, 385 S.C. 597, 675 SE 2d 180 2 (2009)* There are several problems with this.

First, *Belcher* addressed and, under certain circumstances, has stricken a jury charge that instructs a jury that malice can be inferred from the use of a deadly weapon; this was held to be a violation of State common law principles 385 S.C. 517, 602-611; however, the argument of the prosecutor in this case was just that, an argument, and was

made without objection or claim at trial of a *Belcher* violation, one "mirrored" or otherwise. Now it is claimed for the first time on appeal in an attempt to bootstrap claims of prejudice. The "this" the Petitioner refers to is in fact the facts of the case in fact in their entirety and at no time encouraged the jury to infer malice merely from the use of a gun.

"This" was evidence of pulling a gun from the glove compartment while holding the victim face down, then cocking it under a four-pound pull or simply taking it from a bag, already cocked and at the ready, (R. p. 295, l. 9 to p 296, l.9; p. 293, line 3 to 22); this happened with malice aforethought after a second attempt by the victim to escape had nearly succeeded.

"This" was Petitioner's claiming at the Bongo's Bar in Greenville that he knew the victim whom Petitioner testified was only an "acquaintance", one who was drunk and barely conscious. "This" was ignoring the victim's efforts to get out of the car as it passed his home a short distance away. (R. p. 287, l. 10 to 28; ; p. 287 to 288, l. 14). "This" was taking no action to simply choose some other way for the victim to get home.

"This" was expecting a jury to believe that miles of major roadway between large, conjoining cities in South Carolina was virtually unlit and unpeopled even at 3:00 a.m. (R. pp.270-277).

"This" was two shots to the back of the head, so close the victim could have felt the barrel against his skin as it was fired. And "this" was a cold indifference to what Petitioner had done, continuing to ride on for another ten miles into downtown Spartanburg with a man's head and chest still in his lap, and blood and brains all over the

Petitioner's shirt, pants and floorboard, (R. p. 251 to 253, l. 14), while another passenger was hysterical beside him. (R. p. 40 to ( ).

Against this record, the Petitioner now claims that the Solicitor's argument based on the facts somehow violated a prohibition as to jury charges under *Belcher*.

Against this record, these proven facts, it is argued that the Petitioner was (1) without fault in bringing about the difficulty; (2) actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; or actually was in such danger; (3) if his acts were only based on appearances, that a reasonable prudent man of ordinary firmness and courage would have thought likewise an acted as Petitioner did; and (4) the Petitioner 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. 2nd 503 (SC 1978); McAninch, The Criminal Law of South Carolina, pp. 675-686 (The South Carolina Bar, 4th Ed. 2002).*

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 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).

[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, was not reasonable. The jury was trying to determine if Petitioner had committed murder or voluntary manslaughter, i.e. which of those crimes Petitioner had committed.

The Respondent has previously refuted these claims in detail. The Court of Appeals addressed them and rejected them. The Court of Appeals was correct in affirming the conviction and in denying rehearing. [2]

CONCLUSION

For all the foregoing reasons, the judgment of conviction must be affirm and/or certiorari should be denied as improvidently granted.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

BARRY J. BARNETTE
Solicitor, Seventh Judicial Circuit

***RUSSELL D. GHENT**
Assistant Solicitor
Primary Counsel
S.C. Bar No.2439

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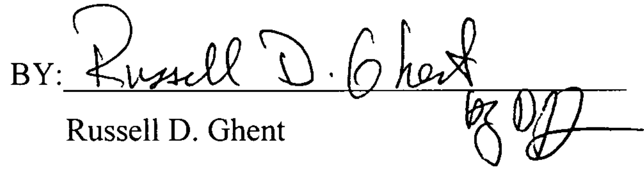
[2] Respondent submits that the redacted Record on Appeal before this Court may cause some lack of clarity as to the actual locations and distance due to the manner of the removal of the actual address of the victim pursuant to the August 13, 2007 "*RE: Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings*, Order (S.Ct. S.C. August 13, 2007) when the Record of Appeal was prepared before the Court of Appeals by Appellant Marin through his counsel on September 2012. **The Court may wish to review the original and unredacted specific portions of the original unredacted trial transcript pursuant to SCARCR Rule 212 (a) ("The appellate court may require copies of all or any part of the transcript of proceedings . . . to be sent up for its inspection and consideration . . .").** In particular, the Court may wish to consider and compare R. pp. 11-12 with Trial Tr. p. 72, l.23 – p. 73, l. 1; R. p. 79, ll. 9, 24 with Trial Tr. p. 142, ll 9, 24; R. p. 80, ll 1, 3-4, 8 with Trial Tr. p. 142, ll. 3-4, 8; R. p. 279, l. 16 with Trial Tr. p. 342, l. 16; and R. 288, ll. 7, 10, 12 with Trial Tr. 351, ll. 7, 10, 12. Respondent additionally notes that the particular manner of redaction in leaving a blank space rather than a black block may erroneously suggest that no answer was given by a witness rather than an address given. This clarification is necessary due to the malice argument now raised by Petitioner's counsel before this Court.

180 Magnolia Street
Spartanburg, SC 29306
(864) 596-2575

BY: 

Russell D. Ghent

January 12, 2015

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,

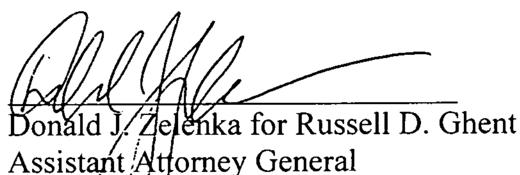
Petitioner

CERTIFICATE OF SERVICE

I, Donald J. Zelenka, certify that I have served the Brief of Respondent on Petitioner by depositing two (2) copies of same in the InterAgency mail addressed to his attorney of record:

David Alexander
Appellate Defender
Robert M. Dudek,
Chief Appellate Defender for Capital Appeals
South Carolina Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201

This 12th day of January 2015.



Donald J. Zelenka for Russell D. Ghent
Assistant Attorney General

ALAN WILSON
ATTORNEY GENERAL

January 16, 2015

RECEIVED
JAN 16 2015
S.C. Supreme Court

Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
P. O. Box 11330
Columbia, SC 29211

Re: The State v. Manuel Antonio Marin
Appellate Case No. 2013-002001

Dear Mr. Shearouse:

Enclosed please find an additional five (5) copies of the Brief of Respondent in the above-captioned matter for filing in your office.

Sincerely,

Lauren Meara

Lauren Meara
Paralegal to Donald J. Zelenka
Senior Assistant Deputy Attorney General

/lm
Enclosures

cc: Robert M. Dudek, Esquire
David Alexander, Esquire
Barry J. Barnette, Solicitor
Trisha Allen, Victims Assistance