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THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM AIKEN COUNTY
Court of General Sessions
Doyet A. Early, III, Circuit Court Judge

Case No. 2013-GS-020-1664

State of South Carolina .... Respondent,

versus

Frank Muns .... Petitioner

PETITION FOR CERTIORARI

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CERTIFICATION

The undersigned certifies that a petition for rehearing was made by Mr. Frank Muns. The petition for rehearing was denied on August 22, 2016, by the Court of Appeals.

QUESTIONS FOR REVIEW

Mr. Muns raised two defenses which the trial court refused to charge. First, one may assert accident as a defense if, despite acting reasonably, he causes an unintentional injury. Second, one may assert self-defense if he reasonably believed he faced a serious danger and had no other way of protecting himself.

When Mr. Muns approached his ex-wife's car, he found himself in grave danger when she began lurching her car toward him, trapping him between her car and his own truck. After taking other steps to get her to stop, Mr. Muns beat on her window with a gun to get her to stop, and the gun unexpectedly discharged.

- As to the **accident** charge, did the Court of Appeals err when it refused to follow this Court's rulings that the reasonableness of a defendant's actions is a *jury issue* if there is *any* evidence and instead ruled *as a matter of law* that Mr. Muns unreasonably defended himself despite testimony that his ex-wife was engaged in a life-or-death attack against him?
- As to the **self-defense** charge, did the Court of Appeals err by excusing the State's failure to introduce even a single line of testimony that Mr. Muns had

other means of escape, shifting the burden to Mr. Muns to prove he did *not* have other avenues of escape, and then disregarding without explanation Mr. Muns' uncontradicted testimony that his ex-wife had "*pinn[ed] me between my truck and her car*"?

- As to the **self-defense** charge, did the Court of Appeals also err by even requiring Mr. Muns to retreat at all—given that the Castle Doctrine permitted him to stand his ground—only because of an issue preservation concern despite the fact that Mr. Muns specifically raised the Castle Doctrine to the trial court?

STATEMENT OF THE CASE

Mrs. Turner had been married to and divorced from Mr. Muns three times and had four children with him. (Sub. R. 88.) Mrs. Turner had later married Tony Turner (Sub. R. 94, 108-09), but she and Mr. Turner were separated in April 2013. (Sub. R. 73-74.)

On April 5, 2013, Mrs. Turner left her children at Mr. Muns' home at 107 Beard Road and joined her husband, Tony, spending the night with him at a motel. (Sub. R. 74-76.) In the morning, she drove back to Mr. Muns' home to check on her children and prepare for work. (Sub. R. 74.) Meanwhile, Mr. Muns was at home, preparing breakfast and getting things ready for work. (Sub. R. 138-39.) Mr. Muns got in his truck between 9:00 and 9:30 a.m. to run to the store. (Sub. R. 139.)

A cable ran across the entrance to the driveway off of Beard Road to keep people out, (Sub. R. 139), and Mr. Muns pulled his truck to the cable to lower it, (Sub. R. 139). Just then, Mr. Muns saw Mrs. Turner drive down the road, approach the cable barrier from the street-side, and then swerve around it. (Sub. R. 139.)

Mrs. Turner avoided the blocked entrance by instead going a little further along Beard Road and driving across a neighboring empty lot. (Sub. R. 79-80, 112-13.) Mrs. Turner's route had been used by their children as a go-kart path and was wide enough for only one car. (Sub. R. 113-14.) The path was a "chokepoint" with obstructions on both sides. (Sub. R. 114; 142.) Mr. Muns had taken down a damaged tree and stacked the cut sections to prevent people from using the go-kart path to circumvent the normal driveway. (Sub. R. 100, 112, 141, Ex. 17.)[1]

Mr. Muns was worried that Mrs. Turner would damage an underground septic tank on the property by driving across it. (Sub. R. 143; 154.) As Mrs. Turner was driving across the empty lot, Mr. Muns "came from nowhere and blocked [her]" with his truck. (Sub. R. 80, 100, 103 ("I [Mrs. Turner] was stopped right in here somewhere and his truck was pulled up in front blocking me from going any further.").) Mr. Muns exited his truck and told Mrs. Turner to stop. (Sub. R. 143.)

Mr. Muns was standing next to the driver's side window. (Sub. R. 84.) Mr. Muns was "trying to bang the window out of the car." (R. 81; *see also* Sub. R. 84-

[1] Although designated for the record by Appellant, the photographic exhibits were omitted from the Substituted Record prepared by Respondent because the black-and-white photocopies are very difficult to read. The original exhibits are being submitted separately to the Court by the Respondent.

85.) Mrs. Turner testified that, during the argument with Mr. Muns, she "didn't think he was going to shoot me." (Sub. R. 88)

There was not much space between the vehicles: "I [Mrs. Turner] could have moved forward, but I would have run him over and hit his car door because he had his truck door open." (Sub. R. 115.) Mrs. Turner would have run over Mr. Muns if she moved forward. (Sub. R. 115 ("Q. But there was an issue about you [Mrs. Turner] might be running him over? A. Exactly."). Mr. Muns kept telling her to stop, but Mrs. Turner continued cursing at him and driving to navigate her car forward. (Sub. R. 144.) Mr. Muns was positioned in a small space – about three feet -- between Mrs. Turner's car and his own truck's door. (Sub. R. 144-45.)

Mr. Muns was afraid that he was going to be struck by Mrs. Turner. (Sub. R. 145 ("Q. What were you afraid was going to happen, if anything? A. That she [Mrs. Turner] was going to smush me between the two vehicles."). Mrs. Turner would not stop rolling forward and back. (Sub. R. 145 ("She won't stop. She keeps putting it in forward and reverse maybe three or four times.").) Mr. Muns hit on her window a couple of times, but she still would not stop. (Sub. R. 145.) Mrs. Turner was "pinning [him] between [his] truck and her car." (Sub. R. 145.)

Despite Mr. Muns' repeated requests that Mrs. Turner stop, she would not. When asked what Mr. Muns did next, he explained his reaction and the resulting accident:

> I had a gun – I had my revolver with me and I pulled it out and hit her window. I was trying to break her window to make her stop. I hit the window – I hit the window one time and she backed up some more, I hit it again and she stopped, put the car in forward, and I hit it again and the gun discharged.

(Sub. R. 146.) Mr. Muns testified very clearly that he was not trying to kill Mrs. Turner; he was simply beating on her window to get her to stop. (Sub. R. 146-47, 83 ("I was trying to get her to stop the vehicle. I was trying to keep from getting smushed in between two vehicles.").) He had beaten on the window with his fist before starting to use his gun and hit the window several times before the weapon discharged. (Sub. R. 153-54.)

Mrs. Turner shifted into reverse and then forward before racing forward over the debris that had hemmed her in along the edge of the go-kart path: "And then before [Mrs. Turner's car] hit him and the car door, I jumped – I just kept flooring it. And I floored it and I jumped over – there was a power pole in the yard right in front of a burn pile." (Sub. R. 82; *see also* Sub. R. 117.)

Mrs. Turner sped onward to Mr. Muns' trailer and yelled for someone to call the police. (Sub. R. 82, 93.) Then, she took off again, exiting onto Oak Drive along the rear of the property. (Sub. R. 82, 86, 89-91, 94, Ex. 28.) The bleeding had already stopped by the time a medic arrived at Mrs. Turner's location (Sub. R. 108), but the medic still treated Mrs. Turner's wound (Sub. R. 40-41).

On October 3, 2014, Appellant Frank Muns was indicted for (1) attempted murder and (2) possession of a firearm during the commission of or attempt to commit a violent crime. (Sub. R. 1-2.) Mr. Muns was tried in the Court of General Sessions of Aiken County before Judge Doyet Early and a jury on February 4 and 5, 2014. (Sub. R. at 8.)

At the conclusion of the evidence, Mr. Muns' lawyer requested jury charges on the defenses of accident and self-defense. (Sub. R. 164 ("In addition, Your Honor, I think we've elicited testimony from Mr. Muns, if the jury believes it, that this was either an accident or self-defense, Your Honor, or both.").) Mr. Muns' lawyer specifically requested both a charge on accident and self-defense. (R. Sub. 164-65.) When the State objected, Mr. Muns' lawyer explained:

> I guess the argument would run like this, Your Honor: He's doing this act out of self-defense. He's testified that he felt like he was going to be crushed, but he's not intending to shoot her, that that part of it was accidental. So it's somewhat nested inside – one inside the other. He intends to break the window, he's testified to that, but he did not intend for the gunshot (sic) to go off.

(Sub. R. 165.) The judge took the matter under advisement and the next day denied both jury charges. (Sub. R. 165-67.)

After the judge charged the jury, Mr. Muns' lawyer renewed his earlier motion for a directed verdict. The judge denied that motion and added, "And also, you're protected on the record as far as the request for charges on accident and

self-defense." (Sub. R. 200-01.) The jury then began deliberations, returning with a guilty verdict on both charges on February 6, 2014. (Sub. R. 202-03.)

The judge sentenced Mr. Muns to fifteen years on the offense of attempted murder. (Sub. R. 207.) The judge also sentenced Mr. Muns to five years (to run concurrently) for possessing a firearm during the commission of or attempt to commit a violent crime. (Sub. R. 207.)

ARGUMENT

I. The Court should hear this case to correct the Court of Appeal's misunderstandings of law and facts.

A. The Court of Appeals misunderstood its role in resolving the classic jury issue of reasonableness and improperly took the issue from the jury based on a "least favorable" view of the evidence.

"[T]o be excusable on the ground of accident, it must be shown the [attempted murder] was unintentional, the defendant was acting lawfully, and due care was exercised in the handling of the weapon." *State v. Smith*, 391 S.C. 408, 415, 706 S.E.2d 12, 16 (2011).

Reasonableness is the textbook example of a jury issue. Neither the trial court nor the Court of Appeals gets to decide whether a defendant's conduct was reasonable if there is *any* evidence even *suggesting* that a reasonable person would have acted in the same way. *State v. Shuler*, 344 S.C. 604, 632, 545 S.E.2d 805, 819 (2001); *State v. Lee*, 298 S.C. 362, 364, 380 S.E.2d 834, 835 (1989). A court

commits reversible error when it fails to give a requested charge on an issue raised by the evidence presented. *Lee*, 298 S.C. at 364, 380 S.E.2d at 835.

The Court of Appeals misstated the lesson from the one case it cited for the notion that courts, not juries, get to decide reasonableness. In *State v. Smith*, 391 S.C. 408, 706 S.E.2d 12 (2011), a drug dealer took a gun to meet with an unarmed buyer. The two men got into a fight, and the gun went off. At trial the court refused to charge accident, *not because the defendant had been acting unreasonably*, but "because [the trial court] found there was no evidence [the defendant] was acting lawfully," a completely different element of the defense. *Id.* at 412, 706 S.E.2d at 14. Likewise, on appeal, this Court decided the case, not based on the unreasonableness of the conduct, but "[b]ecause [the defendant] was acting unlawfully." *Id.* at 415, 706 S.E.2d at 16.

In a footnote, the Supreme Court also noted, in dicta, that "there is no evidence Smith exercised due care in the handling of the gun." *Id.* at 415 n.3; 706 S.E.2d at 16 n.3. Quite obviously, when the party bearing a burden fails to present *any* evidence on it, the court can enter a decision without submitting the case to a jury just to go through the motions. For instance, a trial court may enter summary judgment even in negligence cases but only if there is *no evidence* for the jury to even weigh; even if the court might reach a different outcome than the jury, the jury gets to make the decision. The trial court (and the Court of Appeals) commits

reversible error by taking the matter from the jury and making a decision on its own.

Unlike *Smith*, this was not a case in which there was "no evidence" about the reasonableness of Mr. Muns' behavior. To the contrary, certainly at least *some* evidence showed that Mr. Muns was acting in a reasonable way when he withdrew a handgun (which he did not know was loaded) and began using it as a hammer to beat on Mrs. Turner's car. According to the Court of Appeals's view of the evidence, Mr. Muns simply decided to mindlessly attack his ex-wife's car with a loaded gun. The Court of Appeals did not even nod to the overwhelming evidence that Mr. Muns was acting only to protect himself in a life-and-death situation and that he escalated his response only after a series of other responses had failed to stop his ex-wife's attack on him.

Mr. Muns found himself stuck between his truck and his ex-wife's car, which she was lurching forward and back, nearly striking Mr. Muns. Even Mrs. Turner admitted that he was in danger by her car's forward movement: "I [Mrs. Turner] could have moved forward, but I would have run him over and hit his car door because he had his truck door open." (Sub. R. 115.) Mrs. Turner would have run over Mr. Muns if she moved forward. (Sub. R. 115 ("Q. But there was an issue about you [Mrs. Turner] might be running him over? A. Exactly."). Mr. Muns tried repeatedly to get her to stop, but Mrs. Turner continued cursing at him and driving

to navigate her car forward. (Sub. R. 144.) Mr. Muns was in a space only about three feet wide between the two vehicles. (Sub. R. 144-45.)

Mr. Muns was afraid that he was going to be struck by Mrs. Turner. (Sub. R. 145 ("Q. What were you afraid was going to happen, if anything? A. That she [Mrs. Turner] was going to smush me between the two vehicles."). Mrs. Turner would not stop rolling forward and back. (Sub. R. 145 ("She won't stop. She keeps putting it in forward and reverse maybe three or four times.").) Mr. Muns hit on her window a couple of times, but she still would not stop. (Sub. R. 145.) Mrs. Turner was "pinning [him] between [his] truck and her car." (Sub. R. 145-46.)

Despite Mr. Muns' repeated requests that Mrs. Turner stop, she would not. When asked what Mr. Muns did next, he explained his reaction and the resulting accident:

> I had a gun – I had my revolver with me and I pulled it out and hit her window. I was trying to break her window to make her stop. I hit the window – I hit the window one time and she backed up some more, I hit it again and she stopped, put the car in forward, and I hit it again and the gun discharged.

(Sub. R. 145-46.) He had beaten on the window with his fist before starting to use his gun. (Sub. R. 154.)

Those are the facts presented to the jury. The test for charging the jury was a simple one: Would *any* reasonable person, when attacked by his ex-wife with her car, use the only tool available to strike his ex-wife's car to get her to stop lurching

the car at him? The obvious answer to that is "Yes!" and the trial court (and the Court of Appeals) erred in deciding that no reasonable person would ever react in such a way *as a matter of law*.

Since there was at least some evidence supporting that choice, it was wrong for the trial court and the Court of Appeals to exclude the jury from the process and decide for itself that Mr. Muns' behavior had been unreasonable. This Court should hear this case to address the undeniable fact that a reasonable person might have behaved exactly as Mr. Muns did.

B. Because the Court of Appeals misread the invocation of the Castle Doctrine, misunderstood the shifting burden analysis, and overlooked undisputed testimony that Mr. Muns was trapped during the altercation, this Court should grant certiorari.

One may assert self-defense when (1) the defendant was without fault in bringing on the difficulty, (2) he actually believed he was in imminent danger of sustaining serious bodily injury, (3) a reasonably prudent person of ordinary firmness and courage would have entertained the belief that he was actually in imminent danger and the circumstances would have warranted such a person to act to save himself from serious bodily harm, and (4) the defendant had no other probable means of avoiding the danger. *See State v. Light*, 378 S.C. 641, 650, 664 S.E.2d 465, 469 (2008).

The Court of Appeals ruled that Mr. Muns could not assert self-defense because he had failed to contest the fourth element of the defense at trial and that

there had been no evidence even suggesting that he had been trapped. Both rulings are wrong.

As an initial matter, the Court of Appeals was wrong concerning the Castle Doctrine. According to the Court of Appeals, Mr. Muns failed to preserve the use of the Castle Doctrine because he did not specifically mention it by name for a particular purpose. However, at the charge conference, Mr. Muns asked for the jury to be instructed on self-defense. (Sub. R. 164.) Judge Early refused, citing the requirement that the defendant had no other way to avoid the danger. (Sub. R. 167.) Mr. Muns' lawyer responded that Mr. Muns *was on his own property and was not required by law to retreat.* (Sub. R. 169-70.) That is undeniably an invocation of the Castle Doctrine.

But, even if Mr. Muns should have used some more specific language to preserve the issue, the Court of Appeal's opinion is nevertheless flawed. Although the correct use of the Castle Doctrine would have completely removed the duty to retreat from the equation, the Court of Appeals misunderstood the shifting burdens used in a self-defense charge. Once the defendant has asserted self-defense, the burden falls on the State to *disprove* self-defense beyond a reasonable doubt. *State v. Wiggins*, 330 S.C. 538, 544, 500 S.E.2d 489, 492-93 (1998). Self-defense is not an affirmative defense; instead, once raised by a defendant, the burden falls

squarely on the State to affirmatively *disprove* its application. *Id.* at 544-45, 500 S.E.2d at 492-93.

The Court of Appeals did not cite even a single word of testimony that Mr. Muns could have escaped the assault otherwise. *No one* testified that such avenues were open to Mr. Muns. In fact, at no point did the State even *ask* whether other options were open. Rather, the Court of Appeals offered its own unvarnished speculation about other means of escape that have not even a line of testimony in support.

Regardless, even though he had no obligation to retreat and certainly no obligation to prove he could *not* retreat, Mr. Muns did, in fact, go above and beyond his obligations and actually showed with uncontradicted testimony that he could not have retreated. Mr. Muns testified that he was trapped by Mrs. Turner's car. Mr. Muns said that Mrs. Turner began lurching her car forward and back and that Mr. Muns felt trapped and in danger of being crushed. (Sub. R. 115, 144-46.)

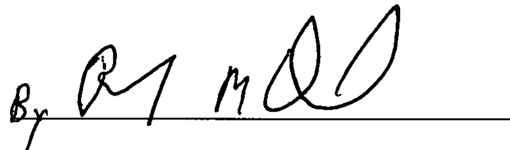
The Court of Appeals overlooked the testimony quoted by Mr. Muns in his Reply Brief showing that he did not have another means of escape. Mr. Muns testified, "Once she – she comes back around and the front of her car was coming around and *pinning me between my truck and her car*." (Sub. R. 145 (emphasis added).)

That testimony alone raised a jury issue as to whether other avenues existed. *State v. Williams*, 400 S.C. 308, 733 S.E.2d 605 (2012). Although the Court of Appeals clearly decided not to believe Mr. Muns, neither the Court of Appeals nor the trial judge was in a position to decide whether Mr. Muns had another avenue of escape. Having introduced at least some testimony on the point, it was up to the jury to decide whether to believe Mr. Muns.

CONCLUSION

For all these reasons, this Court should grant certiorari and reverse the decision of the trial court.

Respectfully submitted,



Kevin Eberle

Robert Dudek

September 21, 2016

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APPEAL FROM AIKEN COUNTY
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CERTIFICATE OF SERVICE

I certify that a copy of the Petition for Writ of Certiorari and a copy of the Appendix in this case has been served on J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Frank Muns, #358883, at Kirkland Correctional Institution, 4344 Broad River Road, Columbia, SC 29210, this 21st day of September, 2016.

By: [signature]

Kevin Eberle

Robert Dudek

ATTORNEYS FOR PETITIONER

SWORN TO BEFORE ME this 21st day of September, 2016.

[signature] (L.S)
Notary Public for South Carolina
My Commission Expires: April 27, 2026.