STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

ORIGINAL

---

Certiorari to Bamberg County

James R. Barber, III, Circuit Court Judge

RECEIVED

MAY 05 2017

S.C. SUPREME COURT

---

FRANKIE LEE BRYANT, III,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2016-000876

---

# REPLY BRIEF OF PETITIONER

---

LARA M. CAUDY
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
P.O. Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

**TABLE OF CONTENTS**

TABLE OF CONTENTS .................... i

TABLE OF AUTHORITIES .................... ii

ARGUMENT IN REPLY

The state's reliance on cases concerning the amount of force permitted when an individual is resisting an unlawful arrest, such as State v. McGowan, 347 S.C. 618, 557 S.E.2d 657 (2001), is misplaced. While an individual may not use force disproportionate to the injury threatened while resisting an unlawful arrest, an individual acting in self-defense is not limited to the degree or amount of opposing force. The trial court's instruction limiting Petitioner to the use of proportional force was an incorrect statement of law as well as an impermissible charge on the facts. Therefore, there was ample evidence to support the PCR court's findings that counsel was ineffective for failing to object to the erroneous jury instruction and that Petitioner was prejudiced by counsel's deficient performance .................... 1

CONCLUSION .................... 5

## TABLE OF AUTHORITIES

**Cases**

Douglas v. State, 332 S.C. 67, 504 S.E.2d 307 (1998) ... 3

State v. Bethune, 112 S.C. 100, 99 S.E. 753 (1919) ... 1, 2

State v. Campbell, 111 S.C. 112, 96 S.E. 543 (1918) ... 3

State v. Francis, 152 S.C. 17, 149 S.E. 348 (1929) ... 2, 3

State v. Hartley, 307 S.C. 239, 414 S.E.2d 182 (Ct. App. 1992) ... 3

State v. Marin, 415 S.C. 475, 783 S.E.2d 808 (2016) ... 3

State v. McGowan, 347 S.C. 618, 557 S.E.2d 657 (2001) ... 1, 2, 3

Bailey v. State, 392 S.C. 422, 709 S.E.2d 671 (2011) ... 4

State v. Taylor, 256 S.C. 277, 589 S.E.2d 1 (2003) ... 4

**Constitutional Provisions**

S.C. Const. art. V, § 21 ... 3

## ARGUMENT IN REPLY

The state's reliance on cases concerning the amount of force permitted when an individual is resisting an unlawful arrest, such as *State v. McGowan*, 347 S.C. 618, 557 S.E.2d 657 (2001), is misplaced. While an individual may not use force disproportionate to the injury threatened while resisting an unlawful arrest, an individual acting in self-defense is not limited to the degree or amount of opposing force. The trial court's instruction limiting Petitioner to the use of proportional force was an incorrect statement of law as well as an impermissible charge on the facts. Therefore, there was ample evidence to support the PCR court's findings that counsel was ineffective for failing to object to the erroneous jury instruction and that Petitioner was prejudiced by counsel's deficient performance.

The trial court gave the following erroneous instruction at the conclusion of its charge on self-defense, which limited the amount of force an individual acting in self-defense is allowed to use:

> And finally, in self-defense ***the degree of resistance ought to be in proportion to the nature of the injury offered***; **that is, that it should be sufficient to ward off such injury and do no more.** In other words, **the moment a man disarms or puts himself out of the power of the aggressor to do him further injury, then he should cease from further violence.** But if he does commit any further outrage, then he becomes the aggressor.

App. 198, ll. 4-12 (emphasis added).

The state has repeatedly relied on this Court's cases addressing the amount of force an individual may use while *resisting an unlawful arrest* to support its argument that the above instruction is a correct statement of the law.

In State v. Bethune, 112 S.C. 100, 99 S.E. 753 (1919), this Court upheld the following charge concerning the right to resist an unlawful arrest:

> I charge you that, where one is ***defending his person from an unlawful arrest,*** **he had the right to use just so much force as is apparently necessary to accomplish his deliverance and no more**. He has not the right to use excessive force unless excessive force not only be apparently necessary to him, but would have been to a man of ordinary courage so situated.

Id. (emphasis added).

Thereafter, in State v. Francis, 152 S.C. 17, 149 S.E. 348, 356 (1929), this Court stated:

> The person who is so unlawfully arrested, or against whom such an unlawful attempt is directed, is not bound to yield, and may resist force with force, **but he is not authorized to go beyond the line of force proportioned to the character of the assault, or he in turn becomes a wrongdoer.**
>
> A mere trespass on one's person or liberty is no reason for the taking of life, **and if one commits a homicide while resisting an arrest, even though it is unlawful, he cannot justify on the ground of self-defense unless he can show that the killing was apparently necessary to protect himself from death or great bodily harm. . .**
>
> **But such person should use no more force than is necessary to resist the unlawful arrest, and is justified in using or offering to use a deadly weapon only where he has reason to apprehend an injury greater than the mere unlawful arrest, as danger of death or great bodily harm. . .**
>
> It not infrequently has been reasoned that an unlawful attempt to restrain a person's liberty is such an aggression as to furnish a complete excuse for slaying the aggressor. The contention, however, has met with little or no favor in the eyes of the courts. **On the contrary, it is generally held that the slayer is not excused unless he can show that the homicidal act was done in his necessary defense. While there can be no doubt of the right of the citizen to resist an attempt illegally to restrain his freedom, yet his resistance must not be in enormous disproportion to the injury threatened.** He has no right, according to the better view, to take human life to prevent a mere trespass upon his person or liberty, when unaccompanied by any imminent danger of great bodily harm or felony.

Id. (emphasis in original).

Finally, in State v. McGowan, 347 S.C. 618, 624, 557 S.E.2d 657, 660 (2001), this Court concluded that Bethune and Francis "stand for the proposition that a defendant has the right to **resist an arrest** to the point of deadly force only if necessary, and **may not use force disproportionate to the injury threatened.**" Id. (emphasis added).

The state cited to McGowan and Francis in support of its argument that "necessity, reasonableness, and *proportionality* all remain essential to justifying a homicide allegedly committed in self-defense." BOR at 9 (emphasis added). However, the state's reliance on McGowan and Francis is misplaced since these cases concern the amount of force permitted when an individual is *resisting an unlawful arrest* not when one is acting in self-defense.

As this Court stated in Francis, "A mere trespass on one's person or liberty is no reason for the taking of life." Francis, 152 S.C. at 17, 149 S.E. at 356. This is why an individual who is resisting an unlawful arrest is limited to using proportional force and is only permitted to use deadly force to protect himself from death or great bodily injury. See Id.

However, an individual acting in self-defense is not limited to the degree or amount of opposing force. See State v. Campbell, 111 S.C. 112, 96 S.E. 543, 544 (1918) (holding the defendant "was *not limited to use the same force and no more than that with which he was threatened.* The defendant, if without fault, had the right to use such necessary force as required for his complete protection from loss of life or serious bodily harm, and *could not be limited to the degree or quantity of attacking opposing force.*") (emphasis added); Douglas v. State, 332 S.C. 67, 72-73, 504 S.E.2d 307, 309-310 (1998). Consequently, the trial court's charge that "in self-defense the degree of resistance ought to be in proportion to the nature of the injury offered . . ." was erroneous.

Moreover, the state wholly ignores Petitioner's argument that not only was the instruction an incorrect statement of law, but that it was also an unconstitutional comment on the facts. See State v. Marin, 415 S.C. 475, 486, 783 S.E.2d 808, 814 (2016); State v. Hartley, 307 S.C. 239, 241, 414 S.E.2d 182, 183-184 (Ct. App. 1992); S.C. Const. art. V, § 21 ("Judges shall not charge juries in respect to matters of fact, but shall declare the law."). The court's instruction that "the

moment a man disarms or puts himself out of the power of the aggressor to do him further injury, then he should cease from further violence. But if he does commit any further outrage, then he becomes the aggressor" is alarmingly identical to the facts of this case. See App. 198, ll. 4-12. The evidence showed Wright, the decedent, was still choking Petitioner at the time Petitioner got the knife from Wright and stabbed him. This erroneous instruction likely misled the jury to believe that Petitioner was required to stop resisting once he got the knife from Wright, and that when he stabbed Wright he became the aggressor. However, again, the evidence showed that at the time Petitioner stabbed Wright, Wright was still choking Petitioner. Petitioner testified that the only reason he stabbed Wright was to "try to get loose from him . . . He was choking me." App. 133, 23-25.

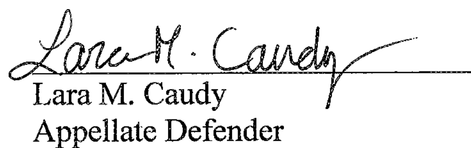
Trial counsel was ineffective for failing to object to the court's proportional force instruction because it was an incorrect statement of law and not supported by modern case law. Counsel's deficient performance prejudiced Petitioner because the erroneous instruction limited his right to claim self-defense and improperly shifted the burden of proof from the state to disprove self-defense to Petitioner. See State v. Taylor, 256 S.C. 277, 235, 589 S.E.2d 1, 5 (2003)

Because there was evidence to support the PCR court's findings and no error of law was made, the Court of Appeals erred by reversing the order of the PCR court. See Bailey v. State, 392 S.C. 422, 432, 709 S.E.2d 671, 676 (2011). Respectfully, this Court should reverse the decision of the Court of Appeals and grant Petitioner a new trial.

## CONCLUSION

Based on these additional arguments, Petitioner respectfully requests this Court reverse his convictions and sentence and remand for a new trial.

Respectfully submitted,



Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 5th day of May, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

---

Certiorari to Bamberg County

James R. Barber, III, Circuit Court Judge

---

FRANKIE LEE BRYANT, III,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

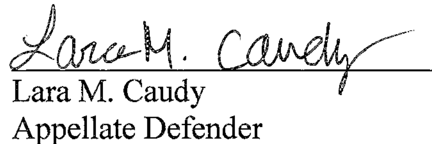
RESPONDENT.

---

CERTIFICATE OF SERVICE

---

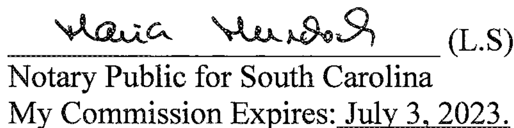
The undersigned hereby certifies that a true copy of the Reply Brief of Petitioner in the above referenced case has been served upon David Spencer, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Reply Brief of Petitioner has been served upon Frankie Lee Bryant, #244187, at Allendale Correctional Institution, P.O. Box 1151, Highway 47, Fairfax, SC 29827, this 5th day of May, 2017.



Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me this 5th day of May, 2017.



(L.S)

Notary Public for South Carolina
My Commission Expires: July 3, 2023.