PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS

RECEIVED

MAY 0 3 2018

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LAURENS COUNTY
Eugene C. Griffith, Jr., Circuit Judge

Unpublished Opinion No. 2017-UP-442 (S.C. Ct. App. filed Nov. 29, 2017)

STATE OF SOUTH CAROLINA

Respondent,

v.

BRAD BERNARD DAWKINS

Petitioner.

REPLY TO THE RETURN FOR PETITION TO WRIT OF CERTIORARI

Miller W. Shealy. Jr.
81 Mary Street
Charleston, S.C. 29403
(843) 437-9925
Attorney for Petitoner

Other counsel:
V. Henry Gunter, Jr.
Assistant Attorney General
Post Office Box 11549
Columbia, S.C. 29211
(803) 734-3727
Attorney for Respondent

ARGUMENT

The standard of review concerning whether a lesser included offense should be charged is confusing, contradictory, and likely a violation of due process under the United States Constitution; and the Court of General Sessions in this case improperly failed to charge the lesser offense of ABHAN.

A. Confusion in the law over the proper standard for determining when to charge a lesser offense.

> "When I use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean—neither more nor less." "The question is," said Alice, "whether you can make words mean so many different things." "The question is," said Humpty Dumpty, "which is to be master—that's all."

Lewis Carroll (Charles L. Dodgson), *Through the Looking-Glass,* chapter 6, p. 205 (Macmillan, 1934), first published in 1872. Basic literacy, common sense, and due process demand that this Court should reject both the Respondent's and Humpty Dumpty's view of language.

The current state of the law on the standard to be used by trial and appellate courts to determine when lesser-offenses should be charged can only be described as confusing, contradictory, and chaotic. Petition, pp. 13-15. On careful examination, the Return filed by the Respondent actually supports this conclusion. Return, pp. 5-7. First, the Respondent notes as follows:

> The trial judge found, "I think the age parameter in the element prohibits it from being a lesser included. It eliminates it from being lesser included, and I'm going to stick to my ruling and decline to charge that as a lesser included of either one." [App.] p. 188. The trial judge later reiterated, "I'll tell you what I'm going to do, decline to charge the lesser included, but your record is complete." [App.] p. 189.

Return p. 5. One must keep firmly in mind the words of the trial judge,[1] as offered to us by the Respondent in its Return, as one reads the alleged standard of review set forth by the Respondent immediately below. One struggles to determine exactly what the trial court thought the standard was when one compares the words of the trial court with the law cited below. The Respondent sets forth what it considers to be the standard of review in its Return:

> In instructing the jury on the law, "[a] trial judge is required to charge the jury on a lesser-included offense if there is **evidence from which it could be inferred the lesser, rather than the greater, offense was committed.**" State v. Green, [ ] 724 S.E.2d 664, 674 (2012). The trial court only commits reversible error if it fails to give a requested charge on an issue **raised by the evidence.** State v. Hill, [ ] 433 S.E.2d 838, 849 (1993). Importantly though, even if an offense is a lesser-included offense of another offense, the trial judge is only required to instruct the jury on the lesser-included offense **when the evidence could support an inference the defendant is guilty on only the lesser-offense and not the greater offense.** State v. Lambright, [ ] 309 S.E.2d 8, 9 (1983). "It is well settled that a jury instruction on a lesser included offense is required **only when the evidence warrants such an instruction.**" State v. Coleman, [ ] 536 S.E.2d 387, 389 (Ct. App. 2000). "**The mere contention that the jury might accept the State's evidence in part and reject it in part is insufficient to satisfy the requirement that some evidence tends to show that defendant was guilty only of the lesser offense.**" State v. Geiger, [ ] 635 S.E.2d 669, 674 (Ct. App. 2006).

Return, pp. 6-7. The trial court does not clearly reference any of this language. As the Petitioner has argued (App. Petition, pp. 13-15), there are at least four or five different standards referenced in this statement of the law cited by the Respondent. To disagree that there are multiple inconsistent

[1] One should also note that there is certainly a clear possibility that the trial judge here was terribly confused. It must be remembered that this crime took place in November 2009. App. 3-8. It wasn't tried until 2015. App. p. 9. In the interim – in 2010 – the law on assault in this state changed substantially. The old common law of ABHAN was abrogated in its entirety and replaced by a new statutory ABHAN statute and assault by degrees. Petition, p. 4, n. 1. See generally S. C. Code §16-3-600, which did not go into effect until June 2010. If one reads the trial judge's comments carefully he seems to be referring NOT to the common law of ABHAN as it existed in 2009, but to the new 2010 statute. This, no doubt, is why he says, "the element prohibits it from being a lesser included." App. p. 188. Thus, the trial judge not only does not refer to the right standard for charging a lesser-offense, but is referring to the wrong law entirely!

standards, as Respondent does, is not a disagreement over the law but a clear failure of basic literacy. Further, as Petitioner pointed out in his Petition (App. pp. 8-9), the standard of review is the "any evidence" standard. *State v. White*, 605 S.E.2d 540, 542 (S.C. 2004). It is worthwhile to note that the "any evidence" standard of this Court's opinion in *White* is not even referenced by the Respondent above in its statement of the standard of review. Why? Because under the standard of review annunciated in *White* is the correct standard, and had the Court of Appeals adhered to it the Petitioner's conviction would have been reversed. The *White* Standard was clearly argued in the Court of appeals. App. p. 265.

As noted in his Petition, the failure to adhere to a clear standard and particularly the "any evidence" standard, raises serious federal constitutional due process problems. Petition, pp. 16-17. The Respondent suggests, in a footnote (Return, p. 7, n. 3), that this issue is not properly before this Court. This suggestion is false. The standard of review was clearly only an issue when the Court of Appeals failed to adhere to the "any evidence" standard and cited in its opinion the case of *State v. Forbes*, 372 S.E.2d 591, 592 (S.C. 1988). Respectfully, the standard of review set forth in *Forbes* is confusing and contradictory; it also predates the clearer "any evidence" standard of *White*, *supra*. This issue is properly before this Court.

B. The trial court was legally bound to charge ABHAN under the facts presented at trial.

First, the Respondent simply continues to ignore the full import of the trial court's charge on credibility and the fact that the Petitioner actually testified in this case. Both the Petitioner's and the victim's credibility were subject to substantial challenge. In such a situation, the jury not the

court should make the ultimate decision on the Petitioner's guilt. The correctness of the trial court's charge on credibility is not challenged by the Respondent. The Petitioner respectfully requests this Court to read it very carefully. App. pp. 226-228 and Petition, pp. 10-11. Petitioner took pains to highlight certain portions of this charge in his Petition. *Id.* Of crucial, but not sole importance, is the last line of the credibility charge. It tells the jury to "make findings of fact." *Id.* The jury needs a correct charge on the possible crimes to do so. The jury did not have such a charge as ABHAN was not charged. The cases relied on by the Court of Appeals and the Respondent deal with situations where is appears the defendant did not testify. It must be kept in mind that the Petitioner actually testified in this case.

Second, the Respondent's reliance on *Dempsey v. State*, 610 S.E.2d 812 (S.C. 2005), *abrogated by Smalls v. State*, 810 S.E.2d 836 (S.C. 2018), is completely misplaced. Return pp. 9-10. It is important, especially in this case, to note that Dempsey does not seem to have testified in his case. *State v. Dempsey*, 532 S.E.2d 306 (S.C. Ct. App. 2000) and *Dempsey v. State*, *supra*. However, the Petitioner testified and offered his own version of events in the present case. The Petitioner argued strenuously before the Court of Appeals that where the accused actually takes the stand and testifies in a case such as this that it is highly improper for an appellate court find harmless error when the jury is not given a full and complete choice of crimes. App. p. 300. Where a defendant actually testifies and the jury, as here, is properly charged to make factual findings, an appellate court must not put itself in the place of the jury and assume what the jury could or could not have believed. In addition, *Dempsey v. State*, *supra.*, actually works against the Respondent and requires reversal in this case. In *Dempsey v. State*, this Court got the standard of review exactly right. This Court used the "any evidence" standard:

> A judge must charge the jury on material issues raised by the evidence. *Frasier v. State,* 306 S.C. 158, 162, 410 S.E.2d 572, 574 (1991). Nevertheless, a judge

> is required to charge a jury on a lesser-included offense "if there is **any evidence** from which it could be inferred the lesser, *rather than the greater,* offense was committed." *State v. Gourdine,* 322 S.C. 396, 398, 472 S.E.2d 241, 242 (1996) (emphasis supplied).

Dempsey v. State, 610 S.E.2d at 815. Why has the Respondent not noticed that *Dempsey v. State* got this point right in complete contradiction to the standard of review cited by the Respondent in its Return? *Dempsey v. State* not only cites the true and correct standard for determining when a lesser-charge should be given, it is further evidence that on more than one occasion the appellate courts of this state have, very respectfully, not spoken consistently or clearly on this issue. *Dempsey v. State* is helpful to the Petitioner, not the Respondent!

CONCLUSION

Based on the foregoing, the Petitioner respectfully requests that this Court grant the Petition for Writ of Certiorari to the Court of Appeals.

Respectfully submitted,

Miller W. Shealy, Jr.
Miller Shealy Law Firm
Charleston School of Law
81 Mary Street
Charleston, South Carolina 29403
Phone: (843) 437-9925
E-mail: mshealy@charlestonlaw.edu
Web: www.MillerShealy.com
S.C. Bar Number: 5045

Attorney for Petitioner/Defendant

Charleston, South Carolina
April 30, 2018

CERTIFICATON OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEEALS

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LAURENS COUNTY
Eugene C. Griffith, Jr., Circuit Judge

Unpublished Opinion No. 2017-UP-442 (S.C. Ct. App. filed Nov. 29, 2017)

STATE OF SOUTH CAROLINA

Respondent,

v.

BRAD BERNARD DAWKINS

Petitioner.

I hereby certify, pursuant to Rule 267(b), SCACR, that I have read this document and to the best of my knowledge, information, and belief this document conforms to the SCACR and there are good grounds to support it. Furthermore, it is not interposed for delay.

Miller W. Shealy, Jr.
Attorney for Petitioner

CERTIFICATE OF SERVICE

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
MAY 0 3 2018
S.C. SUPREME COURT

APPEAL FROM LAURENS COUNTY
Eugene C. Griffith, Jr., Circuit Judge

Unpublished Opinion No. 2017-UP-442 (S.C. Ct. App. filed Nov. 29, 2017)

STATE OF SOUTH CAROLINA

Respondent,

v.

BRAD BERNARD DAWKINS

Petitioner.

I, Miller W. Shealy, Jr., hereby certify and affirm that on April 30, 2018, this **Reply to the Return To The Petition for Writ of Certiorari to the Court of Appeals** (an original and 6 copies to the Supreme Court) has been mailed via USPS to the South Carolina Supreme Court and 1 copy to opposing counsel, V. Henry Gunter at the addresses referenced below:

V. Henry Gunter
Assistant Attorney General
Rembert C. Dennis Bldg., 5th Floor
1000 Assembly Street
Columbia, S.C. 29201

Clerk of Court
S.C. Supreme Court
Supreme Court Building
1231 Gervais Street
Columbia, S.C. 29201

Miller W. Shealy, Jr.
Attorney for Petitioner