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STATE OF SOUTH CAROLINA
In the Court of Appeals

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Appeal from Charleston County
The Honorable J.C. Nicholson, Circuit Court Judge

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SC Court of Appeals

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THE STATE,

Respondent,

v.

HENRY JAMES FICKLING, JR.,

Appellant.

Appellate Case No. 2018-000515

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# INITIAL BRIEF OF RESPONDENT

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## APPELLANT'S STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in refusing appellant's requested jury instruction that he had no duty to retreat because appellant was inside his home when he was attacked by the decedent, a boarder in his house?

## RESPONDENT'S COUNTER STATEMENT OF ISSUE ON APPEAL

Whether the trial court abused its discretion in refusing to instruct the Appellant, who was an invited guest and landlord of the victim, had no duty to retreat from the premises of the victim when Appellant entered the rented bedroom of the victim to discuss the victim's eviction from the room.

## STATEMENT OF THE CASE

In February of 2017, a Charleston County Grand Jury indicted Appellant, Henry James Fickling, Jr., for murder. (Indictment.) Appellant proceeded to a jury trial on March 12, 2018, before the Honorable J.C. Nicholson. (Transcript, March 13, 2018.) Appellant was represented by Jason King, Esquire, and Nicholas D'Angelo, Esquire. (T. p. 1.) Assistant Solicitors Richard Waring and David Osborne, of the Ninth Circuit Solicitor's Office, represented the State. (T. p. 1.)

The jury found Appellant guilty of murder. (T. p. 606, lines 17-20.) Judge Nicholson sentenced Appellant to life imprisonment without the possibility of parole. (T. p. 615, lines 4-6.) This appeal follows.

## STATEMENT OF FACTS

Henry Fickling, Jr., and his common law wife Allura Boyd lived in a trailer in North Charleston. (T. p. 126, lines 10 – 24.) Fickling did not own the trailer outright, but paid $200 a month toward the purchase from a "lady" and performed services in exchange for rent. (T. p. 449, line 22 – p. 450, line 3.) Fickling rented out two of the rooms in the trailer to separate tenants – Jaime Lunney and the victim, Jeff Shiver. (T. p. 126, line 25 – p. 22.) Even though his own rent for the trailer was $200 a month, Fickling charged his tenants higher amounts of money for their rooms -- $250 - $350 a month for Shiver and $420 a month for Lunney. (T. p. 450, lines 6-18.) Shiver moved in the trailer in July of 2016. He was an alcoholic, who was intoxicated most of the time. (T. p. 127, line 4 – p. 128, line 13.) Shiver was usually unsteady on his feet and his speech was slurred. (T. p. 128, lines 11-24.) On some occasions Shiver would urinate on himself if he could not make it to the bathroom. (T. p. 129, lines 5-10.) Shiver's alcohol abuse also resulted in his having seizures. (T. p. 129, lines 11-20.)

Fickling would often obtain the alcohol for Shiver. Shiver would give Fickling money and the use of his car, and Fickling would buy liqueur, drink mixes, and cigarettes. Fickling was not, however, authorized to withdraw money from Shiver's account. (T. p. 130, line 11 – p. 131, line 14.) Surveillance videos captured Fickling using Shiver's card to withdraw cash from an ATM. (T. p. 131, line 15 – p. 132, line 25.) Fickling made some suspicious purchases before Shiver's death, buying a moped, a laptop, and large amounts of food for their pets. (T. p. 133, lines 1-6.) In the days before Shiver's death, Shiver asked his wife to change the Wi-Fi internet password so that Shiver could not go online to check his bank account balance. (T. p. 134, line 18 – p. 135, line 6.)

On the morning of the murder, Shiver was intoxicated again, according to Allura Boyd. (T. p. 136, lines 9-20.) Shiver asked Boyd what was wrong with the internet because he was unable to go online. (T. p. 136, lines 16-22.) Boyd told Fickling Shiver had asked about the internet, and Fickling told his wife "he would take care of it." (T. p. 137, lines 2-5.) Boyd stayed in her bedroom for most of the day, working and taking a nap. While she was napping, Fickling entered the bedroom and picked up a crowbar and a combination taser/flashlight tool, accidentally shining the light in Boyd's eyes and waking her. (T. p. 137, lines 15-24.) Fickling left the room and Boyd went back to sleep. (T. p. 139, line 7.)

Boyd awoke later that afternoon at 2:30 pm. Fickling had changed clothes and was doing laundry. (T. p. 139, lines 7-15.) Fickling then approached his wife and told her to concoct a story in which the two had left the trailer to go ride on the moped to go see the U.S.S. Hunley. The two would claim that as they were leaving the trailer, a visitor arrived to see Shiver, and the two left the men inside together. (T. p. 139, line 18 – p. 2.) Fickling told his wife to inform anyone suspicious that Shiver suffered from seizures. (T. p. 140, lines 19-22.) Fickling handed Boyd Shiver's debit card and instructed her to call the automated number to check the balance on the card. (T. p. 140, lines 1-8.) Fickling also handed Boyd Shiver's laptop. (T. p. 141, line 22 – p.142, line 6.) As Fickling was doing the laundry, Boyd heard him mumble, "I killed him" over and over again. (T. p. 140, lines 9-18.) Fickling did not say anything to his wife about Shiver attacking him or being afraid for his life and he had no visible injuries. (T. p. 141, lines 8-21.) Neither party called 911 until approximately 2:30 am. (T. p. 84, lines 5-20.)

Responding officers found the body of Jeff Shiver lying partially on the bed and partially on the floor. There was a lot of blood in the bedroom, and Shiver's body was cold to the touch and stiff. (T. p. 86, line 20 – p. 87, line 22.) Fickling told the responding officer Shiver had a

history of alcoholism and seizures and had possibly fallen to his death. (T. p. 89, lines 4-7.) When the coroner turned the body over, however, it was evident the injuries were not consistent with a fall. (T. p. 89, lines 20-25.)

Shiver's blood was found on the taser, the ceiling, and the walls of his bedroom. (T. p. 300, lines 13-23.) The bloodstains on the wall were consistent with Shiver being on the bed at the time of the attack, because of the proximity of the bed to the wall, and the place of impact being lower than the stains on the wall, because of the upward trajectory of the blood spatter. (T. p. 312, line 6 – p. 313, line 25.)

Shiver had significant injuries to his head and neck. He had a laceration over his left eyebrow, and fractures to the nasal bring and the bone around the eye. The orbit of his left eye had collapsed. (T. p. 389, lines 1 – 7.) Shiver had another laceration to his chin, and his neck and his larynx was cracked. The hyoid bone was fractured, and he had contusions on his chest, abdomen, and back. Shivers ribs on both the left and the right side were fractured. He also had contusions on his shoulder, forearm, and lower legs. (T. p. 389, line 8 – p. 390, line 6.) Shiver had defensive wounds to left forearm. (T. p. 393, lines 18-22.) The cause of death was blunt force trauma to the head and neck. (T. p. 391, lines 8-12.) Shiver's blood alcohol level at the time of autopsy was .026, and he was positive for benzodiazepines, an anticonvulsant sedative. (T. p. 405, line 16 – p. 406, line 16.)

**Fickling's Version of Events**

Fickling began the morning cleaning up his yard. (T. p. 471, lines 11-21.) Shiver came outside, and it appeared to Fickling he had slept in his clothes and urinated on himself. (T. p. 472, lines 1-4.) Shiver drove his car off the property, returned a short while later, and went into the house. (T. p. 472, line 5 – p. 473, line 25.) Fickling claimed he had the taser in his hand

because he intended to ride his bike to the scrap yard, and he kept a taser to ward off other dogs in the neighborhood that would attack him and his dog. (T. p. 474, line 7 – p. 475, line 18.) Fickling said he was using a tool called a cat's paw[1] to pull the nails out of a medicine cabinet he intended to scrap. (T. p. 476, line 4 – p. 477, line 7.)

Fickling said he was intoxicated from crack cocaine he ingested that morning. (T. p. 477, line 14—p. 478, line 6.) Shiver called out to Fickling, telling him he wanted to use the house phone, but Fickling instead threw his wife's cellular phone to Shiver to use. (T. p. 478, line 19 – p. 479, line 15.) Fickling said Shiver called his bank to check his balance, but then the phone stopped working. (T. p. 479, lines 15 – 23.) Shiver was sitting on the bed cross-legged, and his hands were wet and sticky from a drink he had been drinking that morning. (T. p. 479, line 23 – p. 480, line 12.) Fickling grabbed the phone from Shiver, wiped it off, and put it in his pocket, telling Shiver he was not allowing him to drink in his room anymore. (T. p. 480, lines 13-25.) Ficklinig told Shiver he had spoken to his father and Shiver needed to move out of the trailer. (T. p 481, lines 3-14.) Specifically, Fickling testified, "And then I told him I said you're going to have to go someplace else because this has got to stop. I said I like you but I can't have this ambulance come and collect you. I said you're going to get drunk and then the ambulance is going to come." (T. p. 481, lines 8-12.)

Fickling claims the next thing he knew, Shiver hit him in the mouth, choked him, and put his knee in Fickling's groin. (T. p. 481, lines 15-19.) Fickling used the cat's paw to strike Shiver in the back. Fickling explained, "I have a lot of boxing training and all this pow, pow, pow, pow, pow, pow, pow, pow, pow and the next thing I know I hit—I guess I meant to hit him but I was

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[1] A cat's paw is a standard carpenter's tool, consisting of a round or hexagonal bar that curves at one end to form a pointed, cup-shaped tip with a V-shaped cleft for gripping nailheads. Source: https://en.wikipedia.org/wiki/Cat%27s_paw_(nail_puller)

boxing him." Fickling said he "grabbed his chin and that's where the gash in the chin came from." (T. p. 482, lines 3-6.) Shiver fell back on the bed and stopped breathing. (T. p. 482, lines 7-10.)

Fickling said he left the bedroom, closed the door and changed his clothes. (T. p. 485, lines 2-6.) He tossed the cat's paw into the yard and asked his wife to put the taser back on the charger. (T. p. 485, lines 10-15.) Fickling washed the blood off his arm, and admitted he then created a story to deceive law enforcement. (T. p. 485, lines 16-23.) Fickling claimed he moved Shiver's laptop because it was in the way. (T. p. 487, lines 6-9.) Fickling aloes removed a television form Shiver's room before calling 911. (T. p. 487, lines 11-14.) Fickling said he was not stealing from the victim, he was just preparing for help to come later. (T. p. 487, lines 11-18.) Fickling said he "coached" his wife about an alibi for the time of death. (T. p. 488, lines 21-25.)

After the beating, Fickling left the house on his moped to pick up a dolly. (T. p. 490, lines 4-9.) Fickling was pulled over by an officer, and he declined to tell the officer about the dead man in his home. (T. p. 490, line 17 – p. 491, line 10.) When he returned home, Fickling smoked some marijuana. (T. p. 491, lines 11-23.) Later that evening, a friend called Fickling and asked to use Shiver's car in exchange for cocaine. Fickling agreed to the exchange and smoked $100 worth of crack cocaine that night. (T. p. 492, line 3 – p. 494, line 3.) After he came down from his cocaine high, he realized he had to do something about the dead body in his house, so he called 911 and lied to the police. (T. p. 494, line 20- p. 495, line 8.)

**How the Issue Arose at Trial**

Following the defense's case, the court asked whether Fickling would request a charge on voluntary manslaughter, and Fickling indicated he did not want the charge. (T. p. 535, lines 1-19.) The State, however, argued the evidence supported the charge. (T. p. 536, lines 3-25.) The

following morning, before closing arguments, Fickling cited to *State v. Osbourne*, 202 S.C. 473, 25 S.E.2d 561 (1943), and argued that because Fickling was in his own home, he had no duty to retreat. Moreover, Fickling argued that even if he were an invited guest into Shiver's room, he had no duty to retreat because he was not asked to leave the room by Shiver. (T. p. 543, line 8 – p. 544, line 4.)

The Court said, "I think the fourth element of self-defense you have to prove. And I don't think stand your ground modifies that element of self-defense." (T. p. 544, lines 16-20.) The Court said it did not view the evidence as "stand your ground situation," so he would not change his instructions to the jury. (T. p. 544, lines 16-24.)

During the charge to the jury, the court instructed on self-defense, including the fourth element – "the defendant had no other probable way to avoid the danger of death or serious bodily injury than to act as the defendant did in the particular instance." (T. pp. 595-598; p. 597, lines 18-22.) The substance of the charge is as follows:

> Self-defense. The defendant has raised the defense of self-defense. Self-defense is a complete defense and if it is established you must find the defendant not guilty. The State has the burden of disproving self-defense by proof beyond a reasonable doubt. That does not mean the State must disprove each element of self-defense beyond a reasonable doubt. It needs only to disprove one of the elements beyond a reasonable doubt in order to satisfy this burden.
>
> Nevertheless, if you have a reasonable doubt of the defendant's guilt after considering all the evidence including the evidence of self-defense then you must find the defendant not guilty. On the other hand if you have no reasonable doubt of the defendant's guilt after considering all the evidence including the evidence of self-defense then you must find the defendant guilty. The following elements are required to establish self-defense:
>
> 1) First the defendant must be without fault in bringing on the difficulty. If the defendant's conduct was the type which was reasonably calculated to and did provoke a deadly assault the defendant would be at fault in bringing on the difficulty and would not be entitled to an acquittal based on self-defense.
>
> 2) The second element of self-defense is that the defendant was actually in imminent danger of death or serious bodily injury or that the defendant actually believed he was in imminent danger of death or serious bodily injury.

If the defendant was actually in imminent danger it must be shown that the circumstances would have warranted a person of ordinary firmness and courage to strike the fatal blow to prevent death or serious bodily injury. If the defendant believed that he was in imminent danger of death or serious bodily injury it must be shown that a reasonably prudent person of ordinary firmness and courage would have had the same belief. In deciding whether the defendant actually was or believed he was in imminent danger of death or serious bodily injury you should consider all the facts and circumstances surrounding the crime, including the physical condition and characteristics of the defendant and the victim.

This does not require the defendant to show that he was actually in danger. It is enough if the defendant believed he was in imminent danger and a reasonably prudent person of ordinary firmness and courage would have had the same belief.

The defendant has the right to act on appearances even through the defendant's beliefs may have been mistaken. It is for you to decide whether the defendant's fear of immediate danger of death or serious bodily harm was reasonable and would have been felt by an ordinary person in the same situation.

Evidence of prior difficulties between the defendant and the victim may be considered in deciding whether a threat existed, whether the defendant had a reason to believe a threat existed and how serious that threat was. The relative sizes, ages, and weights of the defendant and the victim may also be considered in deciding the apparent or actual need for force in self-defense and the amount of force needed.

No other probable means of avoiding danger. The final element of self-defense is that the defendant had no other probable way to avoid the danger of death or serious bodily injury than to act as the defendant did in this particular instance.

A person cannot be required to make an exact calculation as to the degree or amount of force which may be needed to avoid death or serious bodily harm. Therefore, in self-defense the defendant has the right to use the force needed to avoid death or serious bodily harm. The force used in self-defense does not have to be limited to the degree or amount of force used by the victim.

The defendant has the right to use so much force as appeared to be necessary for complete self-protection and which a person of ordinary reason and firmness would have believed to be needed to prevent death or serious bodily harm. The rule is that ordinarily one is not justified in employing a deadly weapon after the adversary has been disarmed or disabled. However the rule is also that when a person is justified in using a deadly weapon he is justified in continuing to use such force until it is apparent that the danger to his life and body has ceased.

(T. pp. 595-598.) The court did not instruct the jury that the defendant had no duty to retreat because he was in his own home, nor did he instruct on the invited guest doctrine.

After the jury instruction, and outside the presence of the jury, the court asked if the State or the defense took any exception to the charge. (T. p. 601, lines 1-6.) The following exchange occurred:

> MR. KING: ... I would also request a charge of that he has no duty to retreat if he is on his own premises or if he is an invited guest into the victim's room according to the –
> THE COURT: -- as we said before the victim rented the room and it was his premises; even though he didn't -- it was his premises and the defendant had no right to enter that room without permission.
> Mr. King: Right. I think the jury should be charged ---
> THE COURT: Pardon?
> MR. KING: That if he was invited into the room as Mr. Fickling testified ---
> THE COURT: --- do you have a particular charge on invitee you would like to offer to the court? If you don't have it please put it in writing and I will mark it as a court's exhibit, okay?

(T. p. 601, line 13 – p. 602, line 4.) The then court denied the defense's motion to charge the requested language. (T. p. 602, lines 1-5; p. 603, lines 6-7.)

## STANDARD OF REVIEW

In reviewing jury charges for error, this Court considers the trial court's jury charge as a whole and in light of the evidence and issues presented at trial. *State v. Brandt*, 393 S.C. 526, 549, 713 S.E.2d 591, 604 (2011). A jury charge is correct if, when read as a whole, the charge adequately covers the law. *Id.* "A jury charge that is substantially correct and covers the law does not require reversal." *Id.* (citing *State v. Foust*, 325 S.C. 12, 16, 479 S.E.2d 50, 52 (1996)).

## ARGUMENT

**The trial court did not abuse its discretion in refusing to instruct the Appellant, who was an invited guest and landlord of the victim, had no duty to retreat from the premises of the victim when Appellant entered the rented bedroom of the victim to discuss the victim's eviction from the room.**

The relevant facts are undisputed: Shiver was Fickling's tenant, renting one bedroom in Fickling's home. The attack occurred in Shiver's bedroom, and Fickling argued he was invited into the room by Shiver. Thus, there are two questions before the court: Whether Fickling's role as an invited guest absolved him of his duty to retreat and whether Fickling was entitled to instruct the jury he had no duty to retreat from his "premises" (referring to his tenant's bedroom) before using deadly force. The first question has been addressed by the courts. The latter question appears to be unsettled law in South Carolina.

Ordinarily, under the law of self-defense known as the Castle Doctrine, one who is attacked on his own premises is immune from the duty to retreat. *State v. Curry*, 406 S.C. 364, 373, 752 S.E.2d 263, 267 (2013); *State v. Merriman*, 287 S.C. 74, 337 S.E.2d 218 (1985); *State v. Sales*, 285 S.C. 113, 328 S.E.2d 619 (1985). Likewise, a lawful guest attacked in the owner's home has no duty to retreat where the attacker is an intruder. *State v. Osborne*, 202 S.C. 473, 25 S.E.2d 561 (1943); *State v. Osborne*, 200 S.C. 504, 21 S.E.2d 178 (1942). Conversely, where the attacker is the homeowner, a lawful guest has a duty to retreat before a claim of self-defense will stand. *State v. Chambers*, 310 S.C. 43, 425 S.E.2d 45 (Ct.App.1992); *State v. Brown*, 321 S.C. 184, 187–88, 467 S.E.2d 922, 924 (1996).

Fickling conceded he was an "invited guest" in to Shiver's room, erroneously relying on *State v. Osborne*, 202 S.C. 473, 25 S.E.2d 561 (1943) for the proposition that a lawful guest attacked in the home of another person has no duty to retreat. As the *Chambers* court pointed

out, however, this principle is inapplicable where the attacker is the homeowner. *Chambers*, 310 S.C. at 44, 425 S.E.2d at 46. As applied to the facts at hand, and as proposed by Fickling, Shiver was the homeowner of the bedroom and Fickling was the invited guest when he entered the room. According to Fickling's testimony, he, as the guest, was attacked by the homeowner, his tenant. Pursuant to *Chambers*, Fickling had a duty to retreat.

Even if Fickling's concession he was an invited guest into Shiver's premises is not taken into consideration, Fickling's requested charge[2] was erroneous. If Fickling is not a guest of Shiver in Shiver's bedroom, then the question before the court becomes whether the bedroom rented by Shiver was the premises of Shiver or Fickling. Respondent submits Fickling was not entitled to instruct the jury he had no duty to retreat from his **tenant's** premises before using deadly force. This precise question appears to be unsettled law in South Carolina.

In 2016, the Supreme Court clarified the necessity of the duty to retreat in circumstances involving cohabitants under the same roof. In *State v. Jones*, 416 S.C. 283, 786 S.E.2d 132 (2016), the Court said a person who uses deadly force in response to an attack in his or her own home by a cohabitant can seek immunity from prosecution under provision of Protection of Persons and Property Act ("ACT"), which codified the Castle doctrine by allowing immunity for use of deadly force by a person who is not engaged in an unlawful activity and who is attacked in "another place" where he has a right to be, provided the person can establish his reasonable fear of the attacker. *See* S.C. Code 1976, § 16–11–440(C). The Act requires a defendant seeking immunity to meet the same elements of a claim of self-defense, absent the duty to retreat. Though *Jones* addressed cohabitants, the attack in *Jones* occurred in common areas of an

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[2] The requested instruction read, "If the defendant was on his own premises, the defendant had no duty to retreat before acting in self-defense." (Court's Exhibit 5.)

apartment between domestic partners who presumably had no limitations on their access to all areas of the home. *Jones*, at 289, 786 S.E.2d at 135. Though at first blush *Jones,* and its progeny, may seem controlling, they do not address the particular issue at hand, in which the bedrooms were distinct, money making properties for one of the parties.

In *State v. Rochester*, 72 S.C. 194, 51 S.E. 685 (1905), the Court addressed the question of whether a defendant, who was standing in his own premises, had a duty to retreat when he shot his attacker, who was standing on a public road. At the time, the Court declared, "If the defendant was attacked while on his own premises by the deceased, who was at that time on the public highway, or where he had a right to be, then the defendant was bound to retreat before taking the life of his adversary, if there was a probability of his being able to escape without losing his life or suffering grievous bodily harm. *Rochester*, 72 S.C. at 194, 51 S.E. at 688 (1905). The Court reasoned that under this scenario, the defendant does not have the right to "eject his adversary from the place where he had a right to be." *Id.*

Twenty years later in *State v. Gordon*, 128 S.C. 422, 122 S.E. 501, 503 (1924), the Court again addressed the "right to eject" reasoning in determining whether a worker had a duty to retreat when the attack occurred at the place of business by another co-worker. In finding neither party had the duty to retreat when both were in their place of business, the Court noted the holding in *Rochester*, and explained the rational of the seemingly inconsistent holdings:

> **If the deceased was where he had a right to be and the accused wrongfully brought on the difficulty by attempting to eject him, accused would not be relieved of the duty to retreat by the fact he was on his own premises, for the reason that he would not have been without fault in bringing on the difficulty.** Where the accused relies on the right to eject to establish the first element of self-defense, that he was without fault in bringing on the difficulty, he must also rely on this "right to eject" his assailant to relieve him from the duty of retreating on his own premises. That, as we apprehend, is the proposition for which the *Rochester* Case stands. But where one on his own premises, without

> fault on his part, is attacked by another, he is not bound to retreat because he may have no legal right to eject his assailant from the place where the assailant happens to be. Thus, in *State v. Gibbs, supra*, where "both combatants were charged with being assailant, and each was on his own place," the defendant was properly held entitled to the instruction that he was not bound to retreat if assaulted, but could stand his ground and "meet such attacks even to killing his assailant." Obviously, the defendant in that case had no right to eject his adversary from the adversary's own premises. The right to eject test was not applicable there and for the same reason it is not applicable here.

*Gordon*, 128 S.C. 422, 122 S.E. at 503 (emphasis added). Reading *Gordon* and *Rochester* together, the law recognizes the limitations on the claim of self-defense by a defendant who purports to remove a lawful guest, or tenant, from a place the tenant has a right to be. That nuance, the right to eject, necessarily distinguishes the parties, and the holding, from the category of cases in which an attack occurs between co-habitants and under the same roof. In considering a scenario involving a landlord and a tenant, *Gordon* also suggests the accused landlord, if wrongfully ejecting a lawful tenant, loses the benefit of the Castle doctrine because he has previously relinquished his claim to the premises to the tenant.

In the instant case, Fickling placed an ad on Craigslist to advertise the rent of a room in his trailer. T. p. 201, lines 15-21.) Shiver paid Fickling a considerable amount of money, an amount over and above Fickling's own housing cost, to rent one of the bedrooms. (T. p. 449, line 22 – p. 450, line 18.) Another, unrelated tenant occupied the other bedroom. (T. p. 126, line 25 – p. 22.) The residents shared the bathroom, but there is no testimony that the residents all shared access to all parts of the home. (T. p. 209, line 22 – p. 210, line 5.) By all appearances, the occupancy of the trailer was a business arrangement among the unrelated parties, as opposed to a communal living arrangement amongst friends or family members. Moreover, the crime did not happen in a common area, nor did the crime happen in an area distinctly occupied by Fickling or Lunney. Instead, the crime occurred in the tenant's bedroom, a room for which he paid a

significant amount of money. By virtue of that arrangement, the bedroom was Shiver's premises, not Fickling's.

Further, Fickling admitted he sought to eject Shiver from the trailer. Fickling testified he told Shiver he wanted him to move out of the trailer just before Shiver hit him. (T. p 481, lines 3-14.) As *Gordon* and *Rochester* recognized, Fickling was possibly at fault in bringing about the difficulty by wrongfully attempting to eject Shiver from the rented bedroom – the jury was charged on that element. However, if Fickling, as the landlord, has the ability to eject someone from a property, then he has implicitly relinquished his claim to the premises in exchange for his financial gain. This concept, that Fickling waived his claim of premises, for purposes of the Castle doctrine, by renting out the room to Shiver was what the trial court alluded to in his decision to decline to charge.[3] Even Fickling's counsel acknowledged the room was the premises of Shiver, not Fickling. (T. p. 601, lines 21-25.)

Appellant argues the Court should not draw lines between tenants, subtenants, and roommates when everyone lives under one roof. (IBOA, p. 9.) Respectfully, the more reasoned approach, particularly suited to the facts of this case, is to draw lines exactly where the business arrangement among the residents delineated them. Because Fickling viewed Shiver as a tenant he could remove from the bedroom, when Fickling walked into Shiver's room he was not, for purposes of the Castle doctrine, within his own premises -- he was on Shiver's premises. The Castle doctrine, with its absolution of the duty to retreat, holds that if someone invades another's private space, that person need not retreat outside of that private space, before standing his ground and meeting force with force. Had the crime occurred in the living room, in the

[3] "THE COURT: --- as we said before the victim rented the room and it was his premises; even though he didn't -- it was his premises and the defendant had no right to enter that room without permission." (T. p. 601, lines 17-20.)

bathroom, or certainly in Fickling's bedroom, Fickling would have had no duty to retreat. Instead, the crime occurred in one of the two rooms that were distinctly NOT the premises of Fickling. As the landlord, Fickling could expect no safety or refuge in the clearly delineated, inhabited rental property, which in this case was Shiver's bedroom.

**Harmless Error**

Even assuming Fickling's testimony to be true, Fickling's liability did not turn on the fourth element of self-defense, or whether he had no other probable way to avoid the danger. Fickling testified Shiver hit him in the face unexpectedly, and Fickling relied on his boxing training to fight back. (T. p. 481, lines 15-19.) Thus, it was not Fickling's immediate reaction to being struck that was seriously in dispute. Instead, assuming the jury believed Shiver did actually strike Fickling, it was the amount of force Fickling used when he fought back with the cat's paw tool and the taser. This case turns not on the duty to retreat, but whether Fickling was without fault in bringing on the difficulty when he entered Shiver's room and whether his use of deadly force was reasonable. No party disputed that the jury was thoroughly charged on the elements of self-defense. Even if the trial court erred by refusing to also charge the jury Fickling had no duty to retreat, any error was harmless beyond a reasonable doubt.

**CONCLUSION**

For all of the foregoing reasons, it is respectfully submitted that the appeal must be dismissed as untimely, or, in the alternative, the judgment, conviction, and sentence of the trial court should be affirmed.

Respectfully submitted,

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