STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

Honorable J. C. Buddy Nicholson, Circuit Court Judge

THE STATE,

PETITIONER,

V.

DAVID ALAN WHITE,

RESPONDENT

APPELLATE CASE NO 2019-000029

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. The Court of Appeals properly held that the trial judge erred in excluding the portion of the respondent's statement that contained information stated by the victim advising that he (victim) kept a gun and knife in his moped because this was relevant to the respondent's presentation of a full defense on his self-defense claim.

II. The Court of Appeals ruled properly in holding that the trial judge erred in failing to give a self-defense charge because such a charge was applicable based on the evidence presented at trial.

STATEMENT OF THE CASE

The respondent adopts the statement of case presented by the petitioner.

QUESTION I

The Court of Appeals properly held that the trial judge erred in excluding the portion of the respondent's statement that contained information stated by the victim advising that he (victim) kept a gun and knife in his moped because this was relevant to the respondent's presentation of a full defense on his self defense claim.

Respondent White did not dispute that he caused the injury to the alleged victim, Joseph Johnson. However, he testified that his actions were defensible because he was reacting to Johnson punching him in the side of the head as White was leaving the yard of their mutual friend and did not intend to cut Johnson with the knife. Rather, White's hand was in the pocket of his heavy jacket, along with his open pocket-knife, when he was struck. White immediately spun around and intentionally swung out his arm, but he did not realize that knife was in his hand or that Johnson was still so close to him. The knife cut Johnson's neck. R. 345, l. 9 – 349, l. 23. The solicitor argued that "this was no accident" and that White acted intentionally and aimed for Johnson's neck. R. 394, l. 6 – 395, l. 5. The treating physician testified that though surgery was required to repair the damaged muscle, there was no injury to the more serious parts of the neck. R. 296, l. 22 – 301, l. 6; R. 303, l. 6 – 304, l. 16; R. 306, l. 3 – 307, 19.

Varying Accounts of the Incident

On the night before Thanksgiving 2013, Spencer Washington (hereinafter "Spencer') had several men, including White, over to his house to smoke turkeys for the holiday. White arrived at Spencer's house at approximately 12:30 or 1:00 p.m. that day to help Spencer rake leaves. R. 322, l. 19 – 323, l. 4; R. 353, l. 11 – 354, l. 20. White had been fishing earlier in the day such that he had his pocketknife in the pocket of his thick Carhart jacket. He used the knife at

Spencer's house to cut the saran wrap off pallets so that they could be used in the fire pit. He put the knife back into his pocket, with the blade out. R. 261, ll. 6-14; R. 346, l. 5 – 347, l. 18.

Joseph Johnson was also over at Spencer's house that day. White had never met Johnson before that night. R. 323, ll. 5-15; R. 355, ll. 2-6. Johnson, who was a barber "on the side," cut several people's hair that evening. While he cut White's hair, Johnson told White about the shanks that he used to make when he was in prison. R. 323, l. 16 – 326, l. 12; R. 342, ll. 6-22. Johnson later told White that he had a gun and a knife underneath the seat of his moped.[1] While the comments struck White as odd, he just walked away and went to the fire pit. R. 326, l. 18 – 327, l. 4; 342, l. 23 – 343, l. 13. Later on in the evening, White went to the store with Kyle Green to get some beer. R. 343, l. 21 – 344, l. 5. When they returned and rejoined the other men at the fire pit, the conversation between all of the men turned to the subject of wrestling. They joked about who amongst them would have to "tap out" first. The men commented on how Johnson had been a champion wrestler in high school. R. 344, l. 6 – 345, l. 8.

White left the group to go call his wife to pick him up because he was tired of being out there and felt uncomfortable. R. 345, ll. 9-16; R. 365, ll. 3-7. As he was walking away, Johnson came up behind him and punched White in the side of the head. White testified that he reacted by spinning around quickly. R. 345, l. 16 – 346, l. 4; R. 347, ll. 22-25. White had several head injuries in the past and was concerned about the impact the punch to his head may have had. R. 348, l. 1-12. White said that he did not even realize that the knife was in his hand when he spun around and swung his arm. Though he thought that it was Johnson who had hit him, he did not

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[1] White testified that Johnson told him about the gun and knife on his moped during an *in camera* hearing. As will be discussed more fully *infra*, the trial judge excluded this testimony from being admitted before the jury, finding that it was hearsay. *See* R. 323, l. 25 – 341, l. 22.

realize that he was going to be that close when he turned. R. 351, ll. 7-14; R. 358, ll. 2-8; R. 360, ll. 8-20. He did not realize that Johnson was cut until he saw the blood. R. 349, ll. 8-19.

When asked why he did not run away when Johnson hit him, White said that he "was more scared than anything" and unsure if he could get away safely. He had felt threatened by the statements made by Johnson earlier in the night and was fearful of Johnson. R. 348, l. 13 – 349, l. 5; R. 351, ll. 15-17. White's intent when he swung his arm was "protecting" and "defending" himself. R. 349, ll. 6-7. He did not intend to cut Johnson or aim for his throat. R. 320, ll. 16-23. White dropped the knife and left because he was scared. R. 349, l. 22 – 350, l. 7. He considered going to the hospital to have his head checked, but after police contacted him he stayed at his mother's house until police arrived. White was cooperative with police and gave a statement. R. 350, ll. 8-25. While his statement to police was not admitted into evidence, White agreed with the solicitor that he "told the police that the victim snuck up on [him] and boxed [him]." R. 356, ll. 5-7. He also told police that he was scared that night, wanted to go to the hospital, and was praying for Johnson. R. 363, l. 10 – 364, l. 5.

Admissibility of Johnson's Statements

An *in camera* hearing was held during White's testimony to determine the admissibility of statements that the alleged victim, Johnson, made to him prior to the incident. R. 323, l. 25 – 341, l. 22. The solicitor objected based on "hearsay" when defense counsel asked White what Johnson told him while he was cutting his hair that night. Defense counsel argued that the testimony was not being offered for the truth of the matter asserted but to show state of mind. The trial judge initially overruled the objection. R. 323, l. 25 – 324, l. 12. When the solicitor objected based on "hearsay" again, the judge sent the jury out and defense counsel proffered the testimony. R. 324, l. 13 – 325, l. 12. White testified that Johnson "was talking about back when he was in

prison and the shanks he used to make when he was in prison" and told him "about his gun and knife he had underneath his moped seat." R. 326, l. 1 – 327, l. 13.

The solicitor argued that the testimony was hearsay because it was offered to show that Johnson was armed and does not fall under any exception. R. 328, ll. 1-15. The judge responded that it was being offered to show state of mind. R. 328, ll. 16-21. However, he then raised the issue of relevance, asking defense counsel how the defendant's state of mind was relevant to an accident defense. The judge reasoned that self-defense could not be applicable because White said he did not aim for Johnson's throat or cut him on purpose. R. 328, l. 22 – 330, l. 1. Defense counsel responded that White was acting lawful in self-defense based on Johnson hitting him in the head and his fear of him based on the comments about weapons Johnson made throughout the night, but that he did not intend to cut Johnson when he swung his arm. R. 330, ll. 2-21. The trial judge responded: "The accident and self-defense pretty well can't co-exist. Which is it you want to do?" R. 331, ll. 1-3. Defense counsel reiterated how self-defense and accident were both at play at the time of the incident and argued that the statements are not hearsay because they go to White's state of mind. R. 331, ll. 10-24. The trial judge responded: "I think it's relevant as to self-defense. I'm not buying into your argument hey its self-defense and then all of a sudden it's an accident. That's getting to the point of being absurd." R. 331, l. 25 – 332, l. 3.

After defense counsel persisted in her argument that the defenses were not mutually exclusive, the trial judge asked the solicitor for her response. R. 332, l. 4 – 333, l. 13. The solicitor argued that the statement about the shank was irrelevant because Johnson did not say that he had a shank on him that night. R. 333, ll. 14 – 334, l. 1. Regarding the gun and knife on Johnson's moped, the solicitor argued that "it can't be both ways for both an accident and self-

defense." R. 334, ll. 1-13. As such, she averred that if the defense is accident that state of mind is irrelevant, and that if the defense is self-defense that it is hearsay and "too prejudicial." R. 334, ll. 13-20. In response, defense counsel argued that Johnson's discussion of making shanks was strange to bring up and part of why White felt threatened by Johnson that night. R. 334, l. 21 – 335, l. 11.

The trial judge initially ruled that the statement regarding shanks was not relevant to self-defense or accident and would be excluded. R. 335, ll. 18-24. Defense counsel presented an alternate theory of admissibility for impeachment because Johnson denied telling White about making shanks during his cross-examination. R. 337, l. 22 – 338, l. 22. The trial judge agreed that the shank statement would be admissible, but for purposes of impeachment only. R. 338, l. 23 – 339, l. 24.

Regarding Johnson's statement that he had a gun and knife under his moped seat, defense counsel reiterated that she was not trying to show that the weapons were actually there, but that White believed that Johnson had access to them because they were in close proximity. R. 335, l. 25 – 336, l. 16. The solicitor admitted that there was a moped, but averred: "[T]his is going to boil down to I just don't think it's an appropriate -- I just don't think it falls under the hearsay exception or the non hearsay rules." R. 336, ll. 17-25. She further argued that the statement was irrelevant because Johnson never threatened to use the weapons on White. R. 337, ll. 1-9. Defense counsel reiterated her position that the statement is not hearsay and went to White's state of mind. R. 337, ll. 19-22. She further argued that due process requires that White be able to express his state of mind. R. 338, ll. 11-22. The trial judge ruled that defense counsel was not allowed to go into the gun and knife on the moped, ruling: "I don't think that has any bearing on

the case and its hearsay. And I think it's being offered for that purpose, okay." R. 339, l. 24 – 340, l. 3.

After the trial judge indicated his rulings, defense said that she strongly object[ed] "for the record." R. 340, ll. 4-5. The judge told her that she had already objected and did not need to object any further. R. 340, ll. 6-11. When defense counsel asked if she could go into White's state of mind and how he felt as a result of Johnson's comments, the judge responded: "He can talk about his state of mind but we're not going to specifically go into statements that the victim made. He can testify to what he thought all day long [a]s a result of it. I'm not trying to prohibit that." R. 340, l. 25 – 341, l. 10. At the close of the defendant's case, defense counsel renewed her prior motions and moved for a mistrial, citing the judge's prior ruling limiting White's testimony, which hampered their ability to present a complete defense. R. 368, ll. 11-16. The trial judge denied the motions. R. 368, ll. 17-18.

Request for Additional Jury Charges

The charge conference took place off-the-record, but the trial judge indicated that he would let defense counsel place her objections on the record after he gave the jury charge. R. 369, ll. 14-20; R. 414, ll. 11-12. Following the charge, defense counsel renewed her request for charges on self-defense and assault and battery second degree. R. 413, ll. 6-10. The trial judge ruled: "The court finds as a matter of law there was no moderate injury. It was a severe injury based upon the medical testimony." R. 413, l. 23 – 414, l. 4.

Regarding self-defense, the judge gave the solicitor an opportunity to put her argument on the record. R. 414, ll. 4-12. The solicitor argued that the defendant said that he did not feel threatened by Johnson and had brushed off some of the statements that Johnson made that night. She also pointed to testimony from the defendant that whoever was behind him was "going to get

it." R. 414, ll. 13-23. The trial judge ruled that he did not charge self-defense because he did not think that the facts justif[ied] self-defense based upon the statements made." R. 414, l. 24 – R. 415, l. 1. He explained:

> The first statement made I believe by Spencer Washington he said the defendant said he was going to get this. But the major problem that the court had with self-defense was the defendant's testimony itself. He said he did not mean to cut him, did not cut him on purpose. Then he also said when he pulled the knife out of his pocket and swung it around whoever he hit -- whoever hit him was going to get it. He said he did not know who hit him; did not know it was Mr. Johnson. And I just don't think the elements of self-defense are applicable under the facts of this case.

R. 415, ll. 2-12. Thus, he denied the defense's request to charge self-defense. R. 416, l. 1.

On appeal, the respondent raised the following:

> The trial court erred in (1) excluding Respondent's proffered testimony that the alleged victim told Respondent that he had a gun and a knife on his moped, which was located in close proximity to the incident, and (2) restricting the admission of testimony that the victim told Respondent about his history of making shanks in prison to impeachment only, where such evidence not hearsay and integral to Respondent's defense.

The Court of Appeals ruled that the weapons and moped part of the statement was not hearsay and was respondent's self-defense claim. The Court held that the statement was "relevant to explain why he believed he was in imminent danger and if that belief was reasonable," and expanded on the matter as follows:

> We disagree with the State's position that the statement was not relevant because White testified he did not know if Johnson was armed or whether it was Johnson who punched him. Although White did at times testify he did not know who hit him, he also testified he knew it was Johnson who hit him. Furthermore, although White admitted he did not know whether Johnson was armed and never testified he saw Johnson with a weapon, Johnson testified he accessed his moped directly before the incident. Therefore, it would be a jury question whether White intended to stab Johnson in self-defense and whether that was reasonable. White testified Johnson said he kept a gun and a knife on his moped, and Johnson accessed his moped before the incident. Because white had reason to believe

> Johnson stored weapons on his moped and accessed his moped prior to the stabbing, we find Johnson's statement was relevant to White's self-defense claim. We find the statement was not introduced to prove the truth of the matter asserted, i.e. that Johnson actually had a gun and knife on his moped. Instead White offered the statement to show he believed Johnson had weapons on his moped. It was relevant White thought Johnson was armed or could be armed, not whether Johnson was actually armed. Johnson's statement was, therefore, admissible to explain to the jury why White believed he was in imminent danger and to help it evaluate whether such a belief was reasonable.

Here, the State objected to the testimony regarding Johnson's statements on the grounds of relevance and hearsay. Contrary to the trial judge's ruling, both statements were relevant to White's assertion of self-defense and neither statement was hearsay. Their preclusion prevented White from presenting a complete defense.

Relevance

"'Relevant evidence' means evidence having **any tendency** to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE (emphasis added). "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina." Rule 402, SCRE.

As discussed *supra* in Issue I, the trial judge's perception of relevance was colored by his misunderstanding that self-defense and accident cannot co-exist. R. 330, l. 22 – 331, l. 20. The solicitor's argument fed into that misconception. R. 334, ll. 10-18. Self-defense was relevant because there was evidence in this case to support both a theory that White acted in self-defense and that he was armed in self-defense. *See Burriss*, 334 S.C. at 265 n. 10, 513 S.E.2d at 109 n. 10 (noting that "[t]here is a difference between being lawfully *armed* in self-defense and *acting* in self-defense." (emphasis in original)). Under both applications of self-defense, the imminence

and reasonableness of Johnson's fear had to be ascertained by the jury, making Johnson's statements about his history of making shanks and his present access to a gun and knife relevant for their consideration.

In *State v. Washington*, 367 S.C. 76, 623 S.E.2d 836 (Ct. App. 2005), *affirmed as modified by*, 379 S.C. 120 (2008), this Court affirmed the trial court's exclusion of evidence that the victim had a gun and knife in his locked trunk at the time of the murder. This Court agreed that the items were not relevant to Washington's claim of self-defense because there was no evidence in the record indicating that Washington knew the victim had weapons in his trunk on the day of the stabbing, nor was there evidence that Washington was aware that the victim ever carried a weapon in his trunk. 367 S.C. at 81-82, 623 S.E.2d at 839. There was likewise no evidence that the victim approached his trunk prior to being stabbed. *Id.* at 82, 623 S.E.2d at 839. This Court further noted that Washington "presented his claim of self-defense" by testifying to his own experience regarding where weapons are customarily kept in vehicles and his belief that, at the time of the incident, the victim might have had a weapon in the car. *Id.* The trial judge charged the jury on the law of self-defense. *Id.* Thus, this Court ruled that under the facts of Washington's case, there was no prejudicial error by the trial court in excluding evidence regarding weapons found in the victim's trunk. *Id.*

Unlike *Washington*, the defense was not attempting to present evidence that Johnson was actually armed but rather that White believed that he was armed. Notably, by Johnson's own admission, he accessed his moped just prior to the incident. R. 106, ll. 8-17; R. 107, l. 21 – 108, l. 2. State's Exhibit 9 shows the close proximity of the moped to the scene of the incident.[2] (State's Ex. 9, non-color copy). While the defendant in *Washington* was able to explain the

[2] State's Exhibit 9 is on file with this Court.

reason behind his fear and the jury was charged on self-defense, White was prevented from explaining both that he thought Johnson had weapons on his moped and why. Though the trial judge allowed White to testify as to how he felt as a result of the statements, without testimony regarding the statements themselves, the jury could not properly determine the imminence of the threat or the reasonable of White's fear. R. 339, l. 24 – 340, l. 10; R. 342, l. 23 – 343, l. 13; R. 344, l. 21 – 345, l. 8; R. 348, l. 13 – 349, l. 7. Thus, Johnson's earlier statement that he had weapons on his moped, which was just feet away from the incident location and which Johnson had just accessed, were relevant to White's claim of self-defense.

Johnson's statement regarding shanks he made in prison was likewise relevant to White's fear of Johnson. Both White and Johnson denied having ever met before the night of the incident. White had no criminal history and while he tried to ignore Johnson's comments, he ultimately became uncomfortable enough to leave Spencer's house. It was on his way out of the yard that Johnson attacked White, punching White in the side of head. In *State v. Williams*, 400 S.C. 308, 315-16, 733 S.E.2d 605, 609 (Ct. App. 2012), discussed at length *supra* in Issue I, this Court cited the defendant's testimony that the victim had shot others in the past as evidence of the reasonableness of his fear of the victim. Because it was relevant to self-defense, the trial judge improperly limited the admission of the shanking statement to impeachment only.

Non-Hearsay

In addition to being relevant, the testimony regarding Johnson's statements were not hearsay. To be hearsay, the statement must be offered into evidence for the truth of the matter asserted. Rule 801(c), SCRE. "If the out-of-court statement is being offered for a purpose other than proving the truth of the matter asserted, it is not hearsay." 29 Am. Jur. 2d Evidence § 671. "[T]estimony is not hearsay where it relates to what the witness himself did in reliance on, or in

response to, a statement, facts upon which action was taken, personal observations, explanation of conduct, the effect of statements on the listener, the fact that something was said, or identifying what was said." 31A C.J.S. *Evidence* 259 (1996). "Words offered to prove the effect on the hearer are admissible when they are offered to show their effect on one whose conduct is at issue." 29 Am. Jur. 2d Evidence § 676.

In *People v. Kline*, 414 N.E.2d 141, 145 (Ill. App. Ct. 1980), the Illinois Court of Appeals held that the trial court erroneously excluded non-hearsay testimony that was "highly relevant evidence pertaining to defendant's claim of self-defense." The Court ruled that "[i]t was relevant that defendant reasonably thought decedents were armed and dangerous, not whether they in fact were armed and dangerous." 414 N.E.2d at 145. In explaining it's ruling, the *Kline* Court wrote: "Most importantly, we are mindful that a claim of self-defense requires an inquiry into **who was the first aggressor**, as well as a determination **whether a reasonable belief existed that a certain degree of force, even deadly, was necessary to defend.**" *Id.* (emphasis added). The Court likewise ruled that the trial court erred in improperly restricting the defense's presentation of evidence regarding the **reasonableness of defendant's belief** that he had to shoot in self-defense. *Id.* at 146. The Court reasoned that the "[d]efendant's reasonable belief that such force was necessary to prevent imminent death or great bodily harm to himself is an essential element of his claim of self-defense." *Id.* "Thus, defendant's state of mind at the time of the occurrence is a material issue and is a proper subject of examination. Failure to permit defendant to directly testify as to his state of mind and the circumstances surrounding his acts is reversible error in self-defense cases." *Id.* Kline's conviction was reversed and his case was remanded for a new trial. *Id.* at 147.

Here, the statements were not offered to prove that Johnson actually made shanks in prison or that he actually had weapons on his moped, as for purposes of self-defense it did not matter whether the statements were true. Rather, the statements were offered to show the effect on the hearer, i.e. White's state of mind. White testified that the statements made by Johnson throughout the night made him feel threatened and that he was not sure that he could get away safely. R. 348, l. 13 – 349, l. 5. However, without being able to repeat the statements themselves, White could not explain **why** he felt that way. The trial judge's erroneous exclusion of this relevant evidence prejudiced White in that he was unable to present a complete defense. Specifically, the excluded evidence would have shown that White's fear was imminent and that his response was reasonable. White is accordingly entitled to a new trial.

QUESTION II

The Court of Appeals ruled properly in holding that the trial judge erred in failing to give a self-defense charge because such a charge was applicable based on the evidence presented at trial

The respondent argued the following on direct appeal.

> **The trial court erred in denying the respondent's request to charge self-defense where there was evidence in the record that the respondent was armed in self-defense and acted in self-defense.**

A jury can only properly perform its fact-finding function if properly instructed. *See State v. Lee-Grigg*, 387 S.C. 310, 692 S.E.2d 895 (2010) (noting that though character evidence was admitted at defendant's trial, "without an instruction the jury was not aware that it could consider this evidence in determining her credibility and her culpability"). "If there is **any evidence** in the record from which it could reasonably be inferred that the defendant acted in self-defense, the defendant is entitled to instructions on the defense, and the trial judge's refusal to do so is

reversible error." *State v. Light*, 378 S.C. 641, 650, 664 S.E.2d 465, 469 (2008) (emphasis added). **"In determining the issues to be submitted to the jury . . . all of the testimony, both for the State and the defense, must be considered."** *State v. Moore*, 245 S.C. 416, 420, 140 S.E.2d 779, 781 (1965) (emphasis added).

In explaining his refusal to charge self-defense in the present case, the trial judge said:

> I did not charge the self-defense primarily because I did not think the facts justify self-defense based upon the statements made. The first statement made I believe by Spencer Washington he said the defendant said he was going to get this.
>
> But the major problem that the court had with self-defense was the defendant's testimony itself. He said he did not mean to cut him, did not cut him on purpose. Then he also said when he pulled the knife out of his pocket and swung it around whoever he hit -- whoever hit him was going to get it. He said he did not know who hit him; did not know it was Mr. Johnson. And I just don't think the elements of self-defense are applicable under the facts of this case.

R. 414, l. 24 – 415, l. 12. The trial judge's statements reveal that he engaged in weighing the evidence rather than applying the proper "any evidence" standard. Additionally, as discussed *supra* in Issue I, the trial judge misunderstood the ability of self-defense and accident to overlap or present reasonable alternative defenses.

Our Supreme Court's decisions in *State v. McCaskill,* 300 S.C. 256, 387 S.E.2d 268 (1990), is instructive on the interplay between self-defense and accident. In *McCaskill*, the defendant armed herself with a gun when she became afraid during a domestic dispute. 300 S.C. at 256-58, 387 S.E.2d at 268-69. McCaskill claimed that she was lawfully entitled to arm herself in self-defense but that the lethal charge was fired accidentally. *Id.* at 258, 387 S.E.2d at 269. While the trial judge charged both self-defense and accident separately, his "failure to instruct the jury that respondent had the right to have the gun in her possession to protect herself in the situation where the shooting occurred accidentally conveyed to the jury that her willful act of arming herself foreclosed the defense of an accidental shooting." *Id.* "Where a defendant claims

that he armed himself in self-defense, while also claiming that the actual shooting was accidental, this combination of events can place the shooting in the context of self-defense." *Id.* (internal quotations omitted). Thus, in light of the evidence supporting McCaskill's claim that she lawfully armed herself in self-defense, the *McCaskill* Court held that the jury charges were inadequate and remanded the case for a new trial. *Id.* at 259, 387 S.E.2d at 270.

In *State v. Burriss*, 334 S.C. 256, 258-59, 513 S.E.2d 104, 105-06 (1999), the defendant similarly armed himself after being attacked by the victim but claimed that the discharge of the gun was accidental. There, the trial judge charged only self-defense but not accident. 334 S.C. at 259, 267 n. 2, 513 S.E.2d at 107, 110 n. 2. In finding that the failure to charge accident was error, the *Burriss* Court reviewed both its decisions in *McCaskill* and *State v. Goodson*, 312 S.C. 278, 440 S.E.2d 370 (1994) (holding Goodson not entitled to a charge of accident because there was no evidence he was acting lawfully in self-defense when the shooting occurred). *Id.* at 260-63, 513 S.E.2d at 106-08. The *Burriss* Court determined that there was evidence in the record to support the defendant's claim he armed himself in self-defense at the time of the fatal shooting. *Id.* at 262-63, 513 S.E.2d at 108. Thus, the trial court erred in failing to charge accident. *Id.*

The *Burriss* Court noted that "[t]here is a difference between being lawfully *armed* in self-defense and *acting* in self-defense." 334 S.C. at 265 n. 10, 513 S.E.2d at 109 n. 10. In *Burriss*, the defendant's self-defense theory only related to his right to be armed, not his actions in shooting at the victim because he claimed that the shooting was not intentional. *Id.* In the present case, the theory of self-defense was arguably applicable both as it related to accident and as an independent defense.

White's testimony on direct examination was that the use of the knife was unintentional, as he did not even realize that it was in his hand or that Johnson would be so close when he

turned around. R. 320, ll. 16-23. On cross-examination White said: "I did not intentionally mean to swing out the knife at him. I mean I just swung out the knife. I just swung out." R. 357, ll. 11-13. If believed by the jury, the self-defense theory was applicable to whether White was lawfully armed in self-defense to support, as required for accident, as explained in *McCaskill* and *Burriss*. Thus, the trial judge erred in failing to charge self-defense as it related to White's being lawfully armed with the knife as required to prove accident. White is accordingly entitled to a new trial.

Additionally, there was evidence that White acted intentionally through testimony elicited by the State that White said "you're about to get this" before White swung at Johnson. R. 72, l. 7 – 73, l. 10; R. 88, l. 15 – 89, l. 21. If the jury believed that testimony, which the solicitor argued indicated that White intentionally wielded the knife, then self-defense came into play as a defense in its own right. Even without the excluded testimony regarding Johnson's statements, there was evidence to support self-defense. White testified that he was walking out of the yard when Johnson struck him in the side of the head, evidencing that White was without fault in bring on the difficulty. While he could not tell the jury about the content of Johnson's prior statements, he said that they made him feel scared and threatened once coupled with the punch from Johnson. White further testified that he had prior head injuries, causing him added concern about the damage that a blow to the head could cause. White explained that he did not think that he could safely run away based upon Johnson's prior statements, i.e. Johnson's access to weapons.

Unfortunately, the trial judge prevented White from putting "meat on the bone" of much of his testimony. Even so, the standard for whether to give the self-defense charge was not whether the trial judge was convinced of that White acted in self-defense, but whether there was any evidence in the record, considering all of the testimony, from which it could reasonably be

inferred that the defendant acted in self-defense. *See Light*, 378 S.C. at 650, 664 S.E.2d at 469; *Moore*, 245 S.C. at 420, 140 S.E.2d at 781. Thus, the trial judge erred in failing to charge self-defense as it related to White having lawfully acted in self-defense. White is accordingly entitled to a new trial.

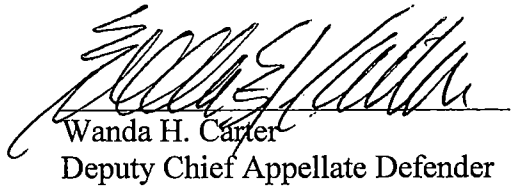
The Court of Appeals ruled in the respondent's favor as follows on this issue:

> In this case, the trial court believed White did not have a valid self-defense case because he testified he stabbed Johnson unintentionally. The trial court went further to state that "accident and self-defense pretty well can't co-exist" and asked White which he would like to pursue. The trial court subsequently denied White's request to charge self-defense. While it is true accident and self-defense "are often mutually exclusive," a trial court should charge both when there is evidence in the record to support both charges. See *Williams*, 400 S.C. at 317, 733 S.E.2d at 610. In Williams, the defendant's "testimony at trial vacillated as to whether he acted intentionally or unintentionally when he shot the victim" which created a jury question "as to whether [he] shot the victim accidentally." *Id.* at 316-17, 733 S.E.2d at 610. Here there was evidence White unintentionally stabbed Johnson and also evidence he intentionally stabbed Johnson.
>
> Viewing the evidence in the light most favorable to White, we find there was some evidence to support each element of self-defense. See id. at 314, 733 S.E.2d at 608-09 ("When reviewing the [trial] court's refusal to deliver a requested jury instruction, appellate courts must consider the evidence in a light most favorable to the defendant."). As to the first element, White's testimony he was attempting to leave Washington's house when he was punched in the head from behind shows he was not at fault in bringing on the difficulty. As to the second element, White testified he felt threatened by his conversation with Johnson, and he "was more scared than anything" after he was hit. We note at times White's testimony was contradictory regarding whether he felt threated and whether he knew it was Johnson who hit him. However, we find there was some evidence White believed he was in imminent danger. Likewise, it was a jury question whether White's belief was reasonable under the third element of self-defense. We note Johnson's statement that he kept a gun and knife on his moped and the fact that Johnson assessed the moped before the incident are evidence the jury could consider to find White's belief was reasonable. Finally, White's testimony he previously suffered multiple head injuries, had a brain aneurysm, and did not know if he could safely escape was some evidence tending to show that he had no other probably means of avoiding the danger. Therefore, we find the trial court abused its discretion in refusing to charge self-defense where there was at least some evidence to support each element of self-defense and a jury could have believed White acted in self-defense when he stabbed Johnson. *See State v. Day*, 341 S.C. 410, 416-17, 535 S.E.2d 431, 434 (2000) ("If there is *any evidence* in the record

from which it could reasonably be inferred that the defendant acted in self-defense, the defendant is entitled to instructions on the defense, and the trial [court's] refusal to do so is reversible error." (emphasis added) (quoting *State v. Muller*, 282 S.C. 10, 316 S.E.2d 409 (1984)).

CONCLUSION

Based on the foregoing arguments, counsel for the respondent would request that this court deny the petitioner's petition for writ of certiorari and that the Court of Appeals' decision in the case be affirmed.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR RESPONDENT

This 4th day of March, 2019.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Charleston County

Honorable J. C. Buddy Nicholson, Circuit Court Judge

THE STATE,

PETITIONER,

V.

DAVID ALAN WHITE,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Return to Petition for Writ of Certiorari 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 David Alan White, #367427, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 4th day of March, 2019.

Wanda H. Carter
Deputy Chief Appellate Defender

SUBSCRIBED AND SWORN TO before me
this 4th day of March, 2019.

(L.S)
Notary Public for South Carolina
My Commission Expires: July 5, 2027.

ATTORNEY FOR RESPONDENT

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Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

March 4, 2019

David Spencer, Esquire
Senior Assistant Attorney General
Rembert Dennis Building
1000 Assembly Street, Room 519
Columbia, SC 29201

Re: The State v. David Alan White

Dear Mr. Spencer:

Enclosed are two copies of the Return to Petition for Writ of Certiorari in the above entitled case, which I have filed today with the South Carolina Supreme Court.

Please call me if you have any questions.

Sincerely,

Wanda H. Carter
Deputy Chief Appellate Defender

WHC/ls

Enclosure

cc: Court of Appeals