THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of General Sessions
James W. Johnson, Jr.
Circuit Court Judge

Case No. 2004-GS-40-3753

State of South Carolina

Respondent,

v.

Jason Michael Dickey

Appellant.

INITIAL BRIEF OF APPELLANT

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II. Did the trial judge err in not holding that Dickey was acting in self defense as a matter of law under *Hendrix* where he was attacked by two men ten years younger than himself, unable to physically repel the attack or retreat based on his obesity and leg disability; and where Boot's words indicated an imminent attack, he had a .203 blood alcohol level, was reaching for a glass bottle as a weapon, closed from fifteen feet to six or eight feet in two seconds, and continued to advance until the third shot was fired?

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V. Under the common law Castle Doctrine recently codified in the Stand Your Ground law, did the trial judge err in submitting the duty to retreat prong of self-defense to the jury rather than holding Dickey had no duty to retreat as a matter of law from the Cornell Arms front doormat where he was on the business premises of the apartment building where he lived and worked?

STATEMENT OF THE CASE

The shooting occurred on the front doormat of the Cornell Arms shortly after 9:00 p.m. on April 29, 2004. [R.329] Dickey was immediately taken into custody and then released on bond pending trial. [R. 355,360,366-70,435] He was indicted for murder, and the judge charged the jury on murder, voluntary manslaughter, and self defense. The week long trial was held September 12-15, 2006. [R.Tr. cover, 828] At 6:50 p.m. on a Friday night, the jury returned a verdict of guilty on voluntary manslaughter after hearing testimony for three days, rather than a verdict of murder or self defense. [R.827-28] Dickey appeared at the sentencing hearing in a wheelchair, due to a gout attack related to his disabled leg. [R. 838] Despite Dickey's having no prior record, the trial judge sentenced Dickey to sixteen years on September 18, 2006. [R. 858] Notice of appeal was timely filed. [R. Court File.]

FACTS

Josh Boot and Alex Stroud had been hanging out outside the Jimmy Buffett concert without tickets and no intention of going to the concert, getting drunk and partying. [R. 91-93,114,224,249-50] They met Amanda McGariggle and Tara West and went back to the girls' apartment at the Cornell Arms. [R.78-79,116-17,143,225] The drinking continued. [R.80,120,145-47] Stroud testified that Boot had twenty beers, several shots of tequila, and a substantial amount of liquor as well. [R.251-52] Amanda, Tara, Stroud, and MJ all agreed that Boot was extremely intoxicated, aggressive, enraged—looking for a fight. [R.99,103,122,153,157,192-93,209] Boot got out of hand—loud, aggressive, angry, sexually demanding. [R.97-98] Concerned about the noise and getting into trouble, Amanda went to the lobby and asked Jason Dickey, the security guard on duty, to evict Boot from her apartment and the building. [R.123-25,155-57,175-76,188-89,378-79,575-76] Boot had been randomly knocking on doors on other floors, enraged by a water balloon thrown in the window of the girls' apartment. [R.81-82,96,119,121,123-25,149-51,153-54,577-79]

Upon finding Boot on the fourth floor back in Amanda's apartment, Dickey asked him to leave or he would call the police. [R.82,125-28,158-60,178,581] Boot hurled obscenities at Dickey: begging the court's indulgence, "who the f___ are you?", "fat f___", "f___ you", and the like, in a stream, and slammed the door. [R.83,102,107,129,160-63,178,194,256,581,585,636,641] Dickey remained calm, never talked back to Boot, never touched Boot or got near him. [R.102-03,107,110,129,160-64,178,196-97,201,259,267,319,583] Dickey called 911 and requested police be dispatched. [R.104,129,162,178,196-97,584-86] Stroud, realizing they were headed

toward trouble, tried to diffuse the situation and urged Boot that they should just leave. [R.84,232,261,586-87] Boot took a glass liter vodka bottle with him. [R.87,95,108]

The pair got in the elevator and descended to the lobby. [R.86,132,233-34,267,588,644] Dickey, not wanting to be in close quarters, followed down the stairwell, using the dual handrails as he was accustomed so he would not be dependent on his disabled foot and leg. [R.86,267,589-90,631-33,645-46] Walking behind Boot and Stroud, Dickey thought he saw a Crown Vic pass the building and pull into the parking lot to the side of the building. [R.132,180,201-02,590-93] Thinking the police had arrived, Dickey followed Boot and Stroud out to see which direction they were headed and tell the police what had happened. [R.135,308,318,592-95,647-51,662]

Boot and Stroud walked to the corner of Sumter and Pendleton streets, still cursing, despite being headed back to their car at the Colonial Center that was in the other direction. [R.235,244,268,271-72,290-91,294,308,319-21,594,596-98,658,679] Dickey remained on the Cornell Arms front doormat under the overhang and never left that mat. [R.136,139,165,182,187,204-05,245,332,655] Stroud testified they suddenly decided to go back and get Dickey to "kick his ass" and began to close the distance rapidly. [R.238,246,274-75,297,309,324,330,338-39,344-45,596-98,654,658-59] Kristie Ann Murphy saw them turn and, scared that a fight was coming, hastened only halfway inside the doors of the Cornell Arms when she heard gunshots. [R.310-11,314,322-30] Dickey was terrified but calm, in fear of his life or serious injury and unable to physically repel an attack or retreat inside the doors without turning his back and increasing the danger. [R.322-24,370-71,600-02,605-06,609,653,660-61,674] Boot saw Dickey reach for his gun and said, "What, dog, you think you got something for me?" [R.604,666] Dickey

held the gun straight at arms' length in front of him and said "Stop". [R.240,312,316,336,492-93,603-04,613,626,664] Stroud stopped, fifteen feet away, still a threat. [R.279,291,296,605-07,622,655] Boot said, "Fuck it. Let's do it," and reached under his shirt. [R.312,336-37,341-43,345,605,610,666] Dickey did not know what he would pull from under his shirt. Four seconds. From the time the attackers turned, to decide. [R.601-02,661] Two seconds from the time he fired until Boot dropped, three shots later, closing from fifteen to six or eight feet. [R.280-81,334-35,362,404,473-74,480,608-09,612,625,664,670,673,680,CSI Sketch] As he fell, a liter glass bottle of vodka fell from his hand and broke into pieces. [R.614-15,667-68,671,673,682]

Dickey called 911 again. [R.183,315,337,615-16,671] When the police arrived seconds later, Dickey told the officer he had a concealed weapons permit and where his pistol was and allowed him to retrieve it from Dickey's pocket, as he was trained and required by law to do. [R.141-42,352-54,363-64,373,448,617-18,624,677] Dickey remained compliant throughout. [R.355,364-65] He said Boot came at him with a bottle and he had no choice but to shoot. [R.353-54,361,369,463-64,618,675] The bottle was kicked to the curbside from the sidewalk where it had fallen from Boot's hand and broken by a policeman to make way for the EMS gurney. [R.619,668,673,Court Ex.2] Dickey, locked in the squad car, tried to get their attention to get the bottle. [R.355,360,366-70,435,618-19,669] No one was listening. Much later, the thorough crime scene investigator bagged the bottle, which had a smear of Boot's blood on it. [R.412-14,423,430-31,672,Court Ex.2] Boot's autopsy showed a .203 blood alcohol level. [R.482,494-95, Court Ex.1]

Four seconds. Two lives changed forever. In a single tragedy.

ARGUMENT

Confronted with two drunk men ten years younger than him, security guard Jason Dickey—a disabled military veteran, unable to run, and obese—made a split second decision to fire when they attacked him closing rapidly and was sentenced to sixteen years for voluntary manslaughter. We submit this was error for the reasons below.

I. The trial judge erred by charging voluntary manslaughter as a lesser included offense to murder over the defense's objection because manslaughter is not a valid verdict where Dickey was not acting in the heat of passion.

The jury returned a verdict of manslaughter at almost 7 p.m. on a Friday night after being in court all week. [R.827-28] This strongly suggests a compromise verdict of manslaughter, the middle ground between murder and self defense. But manslaughter was not validly submitted to the jury. [R.817,833]

> Voluntary manslaughter is the unlawful killing of a human being in the sudden heat of passion upon sufficient legal provocation. Both heat of passion and sufficient legal provocation must be present at the time of the killing. The provocation must be such as to render the mind of an ordinary person incapable of cool reflection and produce an uncontrollable impulse to do violence. The trial judge in this case should not have given a voluntary manslaughter jury charge because the record contained no evidence to support a finding of sufficient legal provocation.

State v. Cooley, 342 S.C. 63, 67, 536 S.E.2d 666, 668 (2000); *see also State v. Davis*, 278 S.C. 544, 298 S.E.2d 778 (1983); *State v. Gilliam*, 296 S.C. 395, 373 S.E.2d 596 (1988); *State v. Nichols*, 325 S.C. 111, 118, 481 S.E.2d 118, 122 (1997); *State v. Cole*, 338 S.C. 97, 525 S.E.2d 511 (2000).

Several cases have reversed voluntary manslaughter convictions upon finding no evidence either of sufficient legal provocation or heat of passion or both. The court in *State v. Cooley* rejected manslaughter as an invalid jury option and cautioned prosecutors not to request lesser included charges unsupported by the evidence. 342 S.C. 63, 67, 536

S.E.2d 666, 668 (2000). In *Cooley*, the defendant shot his wife after arguing all day. On many prior occasions, he would threaten to kill her and hold a knife to her throat. The state requested a voluntary manslaughter charge over the defense's objection, and the jury opted to convict of that charge. The court held submission to the jury of voluntary manslaughter was error requiring reversal because the defendant's own actions could not provide provocation and there was no evidence of sufficient legal provocation by his wife because the alleged adultery was too attenuated from the moment. *See id.* Similarly, our supreme court held it was not error to refuse voluntary manslaughter charge where the only legal provocation came from third party and could not be transferred to victim. *State v. Childers*, ____S.C. ___, 645 S.E.2d 233, 236 (2007). The *Cooley* court noted specifically that the verdict suggested a compromise between the two extremes of murder and involuntary manslaughter but that he was guilty only of murder or not. Due to the double jeopardy bar on the murder charge and the evidence not comporting with manslaughter, the court cautioned "solicitors as to the pitfalls of requesting a potential 'compromise' charge which is unsupported by the evidence." *Cooley*, 342 S.C. 63, 70, 536 S.E.2d 666, 670 (2000).

This court recently in *Smith* reversed the voluntary manslaughter verdict, finding no evidence of sudden heat of passion. *State v. Smith*, 363 S.C. 111, 609 S.E.2d 528 (Ct. App. 2005). In *Smith*, the father shot his mother's husband who had molested his daughter years earlier. Upon learning of the abuse, the father went to work, discussed the situation with his family and friends, did some target practice and acquired bullets, and upon arriving at the house told his mother he was going to shoot the man. The court held

the evidence was susceptible only of time enough, no matter how upset, for cool reflection, rendering the killing either murder or not.

Similarly, in *State v. Cole*, the court held there was no error in refusing to charge voluntary manslaughter where there was no evidence of sudden heat of passion and where defendant's actions indicated cool reflection. 338 S.C. 97, 525 S.E.2d 511 (2000). "[T]here was no evidence of sudden heat of passion or sufficient legal provocation." 338 S.C. 97, 102, 525 S.E.2d 511, 513.

> Furthermore, there was no evidence presented that Appellant was overcome by a sudden heat of passion as would produce an 'uncontrollable impulse to do violence.' On the contrary, by Appellant's own testimony, he shot at the men to scare them away. Appellant's testimony appears designed to support a charge of self defense, not heat of passion. . . . Far from passion, these actions indicate 'cool reflection.'

Id. "The provocation of the deceased must be such as naturally and instantly produces in the mind of a person ordinarily constituted the highest degree of exasperation, rage, anger, sudden resentment, or terror, rendering the mind incapable of cool reflection." *State v. Franklin*, 310 S.C. 122, 425 S.E.2d 758 (Ct. App. 1992), overruled on other grounds by *Brightman v. State*, 336 S.C. 348, 520 S.E.2d 614 (1999). In *Franklin*, instruction on manslaughter was not warranted where there was no evidence either of sufficient legal provocation or sudden heat of passion where he killed his abusive father and stepmother in cold blood and self defense was not an issue. *See id.*

Assuming sufficient legal provocation, voluntary manslaughter should not have been submitted to the jury because there is no evidence of heat of passion on Dickey's part. Dickey remained calm. [R.600-02,605-06,609,653,660-61,674.] All the witnesses agree that Dickey did not ever touch Boot or Stroud, did not mouth off in return, had no prior bad feelings or ill will. [R.322-24,370-71]There is no evidence that Dickey ever lost

control of his reason; rather, all the evidence of his actions corroborates his own testimony that he did what he calmly felt he had to do to avoid being injured or killed and then cooperated fully when the police arrived. [R. 620,671]

While fear can provide a basis for a voluntary manslaughter verdict, reasonable fear, either of one's life or of serious bodily injury is a necessary prong of self defense. So fear that would make one guilty of manslaughter rather than self defense must be more in degree or kind than the rational fear of being attacked. It must be fear that causes a person to lose control of himself temporarily. Chief Justice Toal recently in her concurrence in *Childers* criticized the Court of Appeals' reliance on *Penland* and noted that the defendant on his own version of the facts lacked the requisite intent to reduce the crime to voluntary manslaughter. Chief Justice Toal elucidated *Penland*'s holding thus:

> *Penland* cannot be so broad. Read literally, the opinion seems to impermissibly blend the concept of voluntary manslaughter with the defense of self-defense. . . . To the extent *Penland* stands for the proposition that a person who simply defends himself while in fear for his life is entitled to a voluntary manslaughter charge, the case should be overruled.

State v. Childers, __ S.C. __, 645 S.E.2d 233, 237-38 (2007) (Toal, C.J., concurring). *Penland* itself is strangely completely silent on the facts of the case and simply and succinctly held that voluntary manslaughter was properly charged "due to the evidence of the pointing of the gun at appellant and the subsequent struggle." 275 S.C. 537, 273 S.E.2d 765 (1981). Because the record is completely devoid of any evidence suggesting heat of passion by Dickey, the voluntary manslaughter conviction must be reversed.

II. Under *State v. Hendrix*, Dickey was acting in self defense as a matter of law where he was attacked by two men ten years younger than himself, was unable to physically repel the attack or retreat based on his obesity and leg disability; and where Boot's words indicated an imminent attack, he had a .203 blood alcohol level, was reaching under his shirt for a glass bottle as a weapon, closed from fifteen feet to six or eight feet in two seconds, and continued to advance until the third shot was fired.

This is classic self-defense. [R.504-12,712-13,833-35] If this case does not fall within the holding of *Hendrix*, then *Hendrix* is a dead letter. The facts were relatively undisputed, and only the legal conclusions to be drawn from them remained. Legal conclusions are for the courts, and the trial judge erroneously declined to limit the jury to its proper role of determining facts and permissible inferences from facts. Because South Carolina courts are bound by precedent, Dickey was acting in self-defense as a matter of law under *Hendrix*.

> [T]o establish self-defense, a defendant must ordinarily show: (1) That he was without fault in bringing on the difficulty, (2) That he actually believed he was in imminent danger of losing his life or of sustaining serious bodily injury or he actually was in imminent danger of losing his life or sustaining serious bodily injury, (3) If his defense is based on his actual belief of imminent danger, that a reasonable prudent man of ordinary firmness and courage would have entertained the same belief or if his defense is based on his being in actual and imminent danger, that 'the circumstances were such as would warrant a man of ordinary prudence, firmness, and courage to strike the fatal blow in order to save himself from serious bodily harm, or losing his own life,' (4) That he had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in the particular instance.

State v. Hendrix, 270 S.C. 653, 657-59, 244 S.E.2d 503, 505-06 (1978); *see also State v. Wiggins*, 330 S.C. 538, 546, 500 S.E.2d 489, 494 (1998); *State v. Long*, 325 S.C. 59, 480 S.E.2d 62 (1997); *State v. Sullivan*, 345 S.C. 169, 173, 547 S.E.2d 183, 184 (2001). In *Hendrix*, our supreme court held self defense established as a matter of law where

Cherry's blood alcohol level was stipulated to be .208, where Hendrix warned him to back off and was on his own property near the road, where Cherry was armed with a shotgun, and where Hendrix fired when Cherry was distracted and turned away. Dickey's case has stronger facts than *Hendrix*.

As to element one, in *Hendrix*, there were prior incidents and ill feelings between Hendrix and Cherry that would have suggested mutual combat and both deliberately armed themselves with shotguns. Here, the uncontroverted testimony and circumstances were that Dickey and Boot were strangers and that Dickey bore no ill will but simply wanted Boot and Stroud to leave. Here, Dickey carried a weapon for protection lawfully pursuant to his concealed weapon permit. [R.448,558-60,638] Dickey was carrying his concealed personal defense handgun as was his habit and did not deliberately arm himself in anticipation of the conflict or remember when he put on his gun that day. [R.623,638] Even where Hendrix armed himself after being threatened by victim, the court held that "A man arming himself on his own land in a legal manner after he has been threatened is not evidence of his being at fault in bringing on the difficulty." *Id.* Hendrix told the victim to "back off" three times. Here, within four seconds, Dickey pointed the gun and said "Stop" as corroborated by the fact that Stroud actually stopped. The prosecution made much of the fact that Kristie Ann Murphy did not hear him say that. [R.312,626-27,781] But she admitted she was not listening for it and was instead worried about getting inside because a fight was about to start. [R.333-34]

Other cases that have declined to apply *Hendrix* are sharply and easily distinguishable on the facts. *See State v. Long*, 325 S.C. 59, 480 S.E.2d 62 (1997); *State v. Wiggins*, 330 S.C. 538, 500 S.E.2d 489 (1998); *State v. Santiago*, 370 S.C. 153, 634

S.E.2d 23 (Ct. App. 2006). The court rejected Wiggins' argument that he was without fault in bringing about the confrontation because he was ejecting trespassers from his business premises based on the highly conflicting testimony as to what occurred.

> [I]f in the exercise of the right by a proprietor to eject a trespasser from his premises, the proprietor is assaulted by the trespasser and subjected to the danger of losing his life or of receiving serious bodily harm as would justify the killing of the assailant under the right of self-defense, obviously, he would have the right to stand on that defense and if, in fact, engaged in the legitimate exercise in good faith of his right to eject, he would in such case be without fault in bringing on the difficulty.

State v. Brooks, 252 S.C. 504, 510, 167 S.E.2d 307, 310 (1969). Here, there is no conflict in the testimony. All witnesses, including the deceased's friend, testified that the two turned back to attack Dickey and that he was attempting to eject trespassers from the business premises where he worked and just wanted them to leave. The fact witnesses and forensic crime scene evidence all corroborate that Dickey was without fault in bringing on the difficulty.

As to elements two and three, "Under any version of the evidence it is clear that an actual, imminent danger confronted the appellant, a danger which, unless met with an immediate response, held the promise of death for the appellant." *Hendrix,* 270 S.C. at 660, 244 S.E.2d at 506. The court in *Hendrix* found compelling that appellant was 65, 15-20 years older than the victim and that the victim was clearly intoxicated and intended to do battle armed with a deadly weapon. Dickey was ten years older than the two men rushing him, obese, and disabled with a leg injury so that he could not run at all or walk fast. [R.554-56] Boot was 6' or 6'1" and 200-210 pounds. [R.497,554] Boot was inebriated to approximately the same level as the victim in *Hendrix;* Boot's blood alcohol was stipulated to be .203. He evidenced no signs of being falling down drunk and thus

easier to subdue, but rather was irrational, uninhibited, and enraged—less stoppable than he would have been sober. His words made clear his intent to attack and Stroud corroborated that they were coming to kick Dickey's butt. Boot was armed with a large glass bottle, which many other jurisdictions have held is a deadly weapon, but at the time, he was reaching under his shirt for what could just as easily have been a gun. [R.312,336-37,341-45,605,610,666.] The *Hendrix* court also considered prior threats; Boot had been threatening and belligerent ever since his first encounter with Dickey on the fourth floor when Dickey tried to peaceably evict them from the building. Hendrix warned Cherry to "back off" three times and was on his own property near the roadside; Dickey warned him to stop, repeatedly told them to just leave, and was in the curtilage of the property where he worked and lived. [R.Ct'sEx.1, 377-78,482, 494-95, 557,561-63,603-04,613, 626] Unlike Hendrix, Dickey fired only while the victim was coming at him.

"'One of the things a defendant has to affirmatively prove in a plea of self-defense is that the defendant believed that he was in danger of losing his own life or suffering serious bodily harm. It is difficult, if not impossible, to prove what a defendant "believes" unless he does take the stand and testify." *Hendrix*, 270 S.C. at 663, 244 S.E.2d at 508 (Gregory, J., dissenting). The two judge dissent was unconvinced because Hendrix did not take the stand. Here, Dickey took the stand and testified consistently that he was in actual fear of his life or serious bodily injury. Under these circumstances, the only logical conclusion is that his fear was both reasonable and the threat was real.

The *Wiggins* court similarly declined to find the second and third elements present because appellant testified he was not afraid of victim and did not think anything would happen. Here, Dickey was afraid and thought he was about to be killed or sustain

substantial bodily injury, being outnumbered two to one by younger men in substantially better physical shape. [R.497,605-06,609,614-15,674] This was corroborated by Kristie Ann Murphy, who was so fearful when they began to advance that she hurried inside. The *Wiggins* court found the victim's blood alcohol level unpersuasive because appellant never testified he thought victim was drunk or under the influence. Here, Dickey and all the fact witnesses testified that Boot was severely drunk, and the defense presented expert testimony of the effects of a .203 blood alcohol level, which were in keeping with the behaviors Boot exhibited. [R.495-97,582] In this aggressive, belligerent, angry state, Dickey was in actual danger, and Stroud testified as much—that they were going to kick Dickey's butt. Moreover, Dickey's subjective fear that he was in danger is reasonable under the circumstances, especially where Boot was continuing to advance and reaching under his shirt for a liter glass vodka bottle to use as a weapon.

South Carolina frequently has looked to other jurisdictions when defining a deadly weapon. For example, this court recently held in *Davis* that a sledgehammer wrapped in a towel was a deadly weapon when used to inflict a mortal bludgeon injury. *State v. Davis*, Op. No. 4267 (S.C. Ct. App. filed June 28, 2007) (Shearouse Adv. Sh. No. 27 at 58, 63). The court cited *Bennett* and a Pennsylvania case, *Marks*, in support of its holding. "*See State v. Bennett*, 328 S.C. 251, 262, 493 S.E.2d 845, 850-51 (1997) ('A deadly weapon is generally defined as any article, instrument or substance which is likely to produce death or great bodily harm.'); *Commonwealth v. Marks*, 704 A.2d 1095, 1100 (Pa. Super. Ct. 1997) (categorizing a sledgehammer as a deadly weapon when used upon a vital part of the body such as the head)." *Davis*, at 63 n. 15.

As the Fourth Circuit and several other jurisdictions have recognized, a glass bottle (particularly a liquor, wine, or beer bottle) is a weapon. *See, e.g., Slattery v. Rizzo*, 939 F.2d 213 (4th Cir. 1991) (police officer entitled to qualified immunity where he shot subject he believed was coming at him with a weapon later determined to be a beer bottle). Where defendant attacked a correctional officer, the Fourth Circuit similarly held "an object need not be inherently dangerous to be a dangerous weapon. Rather, innocuous objects or instruments may become capable of inflicting serious injury when put to assaultive use." *U.S. v. Sturgis*, 48 F.3d 784, 787-88 (4th Cir. 1995). The court cited, among others, an Oklahoma case which held that a beer bottle could be a dangerous weapon when used to hit the victim on the head. *Id.* (*citing Bald Eagle v. State*, 355 P.2d 1015, 1017 (Okla. Crim. App. 1960)). "While it might not be a dangerous weapon per se, almost any object 'which is used or attempted to be used may endanger life or inflict great bodily harm' . . . or which, as it is sometimes expressed, 'is likely to produce death or great bodily harm,' can in certain circumstances be a dangerous weapon. Illustrating this principle, courts have held that a wine bottle can be a dangerous weapon. . . ." *U.S. v. Hamilton*, 626 F.2d 348 (4th Cir. 1980) (*citing with approval Thornton v. U.S.*, 268 F.2d 583 (D.C. Cir. 1959)) (some citations omitted).

"[O]rdinary objects also may become deadly weapons when the facts indicate that they have been used to inflict serious bodily harm or death." *State v. Davis*, 309 S.C. 326, 343, 422 S.E.2d 133, 144 (1992), overruled on other grounds by *Brightman v. State*, 336 S.C. 348, 520 S.E.2d 614 (1999). "A full listing of objects that could be so used is, of course, potentially limitless." William Shepard McAninch & W. Gaston Fairey, *Criminal Law of South Carolina*, at 356 (4th ed. 2002).

> In determining whether something is a deadly weapon 'regard should be had to the character of the weapon, the mode of its use, and the strength of the person against whom it was used. . . .' 'Deadly weapon means any firearm or other weapon, device, instrument, material or substance, whether animate or inanimate, which in the manner it is used or is intended to be used is known to be capable of producing death or serious bodily harm.' Model Penal Code §210.0(4) (1962). The *Coleman* approach appears to suggest an objective standard, 'death was a consequence *reasonably to be apprehended*,' while the Model Penal Code leans toward a subjective standard, '*known* to be capable of producing death or serious bodily injury.'

McAninch & Fairey, *Criminal Law of South Carolina*, at 126-27 (4th ed. 2002). Even a hand, a fist, or gasoline have been held to be deadly weapons, considering the mode of use that resulted in death or serious injury. *See id.* A liter glass bottle fits squarely within this framework.

Even if the court decides that a glass bottle is not a weapon, Dickey could not tell what Boot was reaching under his shirt for but his intent was clear that he was attacking Dickey. [R.671-72,678] It could have easily been a gun. Our supreme court in *Jackson* held the defendant had the right to act on appearances where he was trying to repel a night intruder in his home and was blinded by a flashlight and could not see anything even where the intruder turned out not to be armed at all. *State v. Jackson*, 227 S.C. 271, 278-79, 87 S.E.2d 681, 684-85 (1955).

> The test is not whether there was testimony of an *intended* attack but whether or not the appellant *believed* he was in imminent danger of death or serious bodily harm, and he is not required to show that such danger actually existed because he had a right to act upon such appearances as would cause a reasonable and prudent man of ordinary firmness and courage to entertain the same belief.

State v. Jackson, 227 S.C. 271, 87 S.E.2d 681, 684 (1955). "[H]e must show that he *believed* that he was in imminent danger, not that he was *actually* in such danger, because he had the right to act upon appearances. . . ." *Id.* at 684-85. Under *Rash*, he did not

have to wait for Boot to get the drop on him but was entitled to act on appearances. *State v. Rash*, 182 S.C. 42, 50, 188 S.E. 435, 438 (1936). Here, Dickey could clearly see Boot reaching for something. The only logical inference from his words and actions was that he was arming himself preparatory to attack. Based on Boot's threatening words, his enraged and drunken state that had continued since the fourth floor, his turning around and coming rapidly back to attack Dickey, Dickey was justified in using deadly force to defend the very real threat to himself.

As to element four, "The law is well settled that 'one attacked, without fault on his own part, on his own premises, has the right in establishing his plea of self-defense, to claim immunity from the law of retreat, which ordinarily is an essential element of that defense.' *State v. Hewitt*, 205 S.C. 207, 31 S.E.2d 257, 258 (1944)." *Hendrix,* 270 S.C. at 658-59, 244 S.E.2d at 506. The *Wiggins* court agreed no duty to retreat existed under the fourth element because the incident occurred in a business parking lot. "There is no duty to retreat where an attack occurs in one's home or place of business. We have followed the general rule that the absence of a duty to retreat also extends to the curtilage of a home. *See also* 40 Am. Jur. 2d § 168 ('curtilage' includes outbuildings, yard around dwelling, garden)." *State v. Wiggins*, 330 S.C. 538, 548 n.15, 500 S.E.2d 489, 494 n.15 (1998). "Since appellant was threatened in his own home, he had no duty to retreat. *State v. Long*, 325 S.C. 59, 480 S.E.2d 62 (1997)." *Sullivan*, 345 S.C. 169, 173 n.2, 547 S.E.2d 183, 184 n.2. Here, Dickey stayed on the Cornell Arms front doormat, just outside the front door under the awning. The extent of the curtilage is not nearly so attenuated as *Wiggins*. Dickey was a Cornell Arms security guard and lived within, so he was within the curtilage of his place of business and his home.

Moreover, he had no duty to retreat because attempting to retreat through the locked doors would have increased the danger of being attacked from behind. Kristie Ann Murphy was able to get only halfway inside the doors and only because Dickey was between her and Boot and Stroud. The uncontroverted evidence is that the attack was directly solely at Dickey. If he had attempted to retreat inside, he would have been trapped in an enclosed space between the first door and the locked door, increasing the danger from his attackers. Under the fourth element, he had no duty to retreat.

Like *Hendrix*, the prosecution made much of the fact that Dickey fired three shots. [R.664,669]They tried unsuccessfully to establish that the deceased had started falling when Dickey continued to fire. [R.239,280-82] However, all the forensic evidence established that the shots entered and exited from a standing position. [R.492-93,612,614] In *Wiggins*, as to the fourth element, he continued shooting even when the victim was falling and had turned away. Here, all the forensic evidence shows that Dickey fired straight on at a ninety degree angle and that the victim continued to advance until the third shot was fired. [R.492-93,498-503] As soon as he dropped, Dickey ceased firing. [R.612,614,673] Because the deceased did not begin to fall and did not cease to advance until the third shot, the force used was not excessive. "'[W]hen a person is justified in firing the first shot, he is justified in continuing to shoot until it is apparent that the danger to his life and body has ceased.'" *Hendrix,* 270 S.C. at 661, 244 S.E.2d at 507.

The *Hendrix* court concluded, "While this was a tragic homicide, the death of Cherry was precipitated by his own actions. . . . [by his] hostile entrance upon the scene. The events that followed have not only brought sorrow to the Cherry family, but have brought to the Hendrix family a traumatic experience not soon forgotten." Likewise,

Boot's death was caused by his own actions, his decision to turn back and attack Dickey. Under these facts and the precedent of *Hendrix*, this court must hold that Dickey acted in self-defense as a matter of law.

III. The trial judge erred by refusing to charge curtilage and refusing to adequately charge appearances, which the defense requested and was entitled to, where the shooting occurred on the Cornell Arms front doormat as part of the business premises where Dickey lived and worked as a security guard and where he could not see the glass bottle Josh reached for under his shirt to use as a weapon.

The defense requested the following instructions, which the trial judge declined to charge. Defense counsel objected at the close of the charge in accordance with the judge's instructions and moved for a new trial, citing in part the failure to issue these instructions.

(21) Duty to Retreat—[Curtilage] [R.820,837]: The absence of a duty to retreat extends to the curtilage of the dwelling or place of business. The curtilage is the area of land adjoining a dwelling or business, which includes porches, outbuildings, yards, gardens and parking lots.

(7) Imminent Danger—Appearances [R.810,818-19,820]: In determining whether a defendant had a right to self-defense, it is sufficient that he believed he was in imminent danger. The defendant has the legal right to act on appearances. The law relating to appearances does not require that the danger actually existed because a person has a right to act upon such appearances as would cause a reasonable and prudent man of ordinary firmness and courage to entertain the same belief. A defendant has the right to interpret the conduct of the deceased and others present in the light of all the circumstances, those preceding the incident as well as those at the time of the incident.

A reasonable mistake of fact does not deprive the defendant of self-defense. In other words, you may look at the circumstances in which the defendant found himself to see if they were sufficient to convince a man of ordinary firmness and courage that it appeared to be necessary to arm himself in order to save himself from imminent danger of serious bodily harm or death, and if it later is determined that the defendant was mistaken in his belief that fact would not deprive the defendant of the right of self-defense. The law does not demand perfect judgment in such situations, only reasonable judgment.

(8) Appearances—Perspective of Defendant [R.819]: In the consideration of whether the defendant acted in self-defense, you should try as near as you can to put yourself in defendant's situation at the time of the shooting. You should consider the circumstances by which he was surrounded, and take into consideration the person with whom he was

dealing, and all of the facts which surrounded him, as you obtained the same from the testimony, and as near as you can, view the situation from defendant's standpoint You are not to determine if the defendant made the wisest choice possible, but only a reasonable one under the circumstances as he perceived them.

(22) Continuing Threat [R.819]: In determining whether the defendant had a right to use force in self-defense against others, the continuing nature of the threat by defendant's assailant, who is still a threat despite action by the defendant to wound or threaten him, may be relevant to the apparent or actual need for force in self-defense and to the amount of force needed.

[R.713,821] "A trial court has a duty to give a requested instruction that is supported by the evidence and correctly states the law applicable to the issues." *State v. Peer*, 320 S.C. 546, 553, 466 S.E.2d 375, 380 (Ct. App. 1996); *see also State v. Austin*, 299 S.C. 456, 458, 385 S.E.2d 830, 831 (1989) (acknowledging that a defendant is generally entitled to a requested jury instruction if it is a correct statement of the law on an issue raised by the indictment); *State v. West*, 138 S.C. 421, 136 S.E.2d 736, 737 (1927) (finding the court has a duty to charge jury as to law applicable to facts brought out in testimony). "A trial court commits reversible error if it fails to give a requested charge on an issue raised by the evidence." *State v. White*, 361 S.C. 407, 412, 605 S.E.2d 540, 542 (2004); *see also State v. Burriss*, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999); *State v. Harrison*, 343 S.C. 165, 172, 539 S.E.2d 71, 74 (Ct. App. 2000); *State v. Peay*, 321 S.C. 405, 410, 468 S.E.2d 669, 672 (Ct. App. 1996). "Where there is evidence in the record to support a defense, it is reversible error to refuse a request to charge the jury that defense." *State v. Sullivan*, 345 S.C. 169, 173, 547 S.E.2d 183, 184 (2001).

The *Fuller* court held that it was error to exclusively charge the *Davis* self-defense charge where additional instructions were repeatedly requested. "In charging self-defense, we instruct the trial court to consider the facts and circumstances of the case at bar in order to fashion an appropriate charge." *State v. Fuller*, 297 S.C. 440, 377

S.E.2d 328 (1989); *see also State v. Nichols*, 325 S.C. 111, 117, 481 S.E.2d 118, 121 (1997); *State v. Day*, 341 S.C. 410, 416-19, 520 S.E.2d 431, 434-36 (2000). The court held that the trial judge "particularly erred in not charging several elements of self-defense . . . [including] the right to act on appearances" under *Jackson* and "that 'words accompanied by hostile acts may, depending on the circumstances, establish a plea of self-defense'" under *Harvey*. *Fuller*, 297 S.C. at 443-44, 377 S.E.2d at 331. The court further erred "in not properly instructing that Fuller did not have a duty to retreat." The court remanded for new trial with Fuller entitled to the additional charges.

Similarly in *Nichols*, where the appellant did not deny the shooting but claimed it was done in self-defense where he saw a shiny object in victim's hand and thought it was a gun, the court held it was error not to charge requested instructions on the right to act on appearances, the relevance of prior difficulties, and that a person does not have to wait for the other party to get the drop on him before acting in self defense. *State v. Nichols*, 325 S.C. 111, 481 S.E.2d 118 (1997). The court held the refusal to charge self-defense, habitation, and necessity constituted reversible error where the appellant was threatened by the deceased after inviting him into his home where he was not responsible for the deceased's aggressive conduct and retreated even though he was under no duty to do so. *See id.* The defense is "entitled to a charge on the defense of self-defense, defense of habitation, and/or the defense of necessity when the facts adduced at trial support such a charge." *Id.* "The defense of habitation is analogous to self-defense and should be charged when the defendant presents evidence that he was 'defending himself from imminent attack on his own premises.'" *Sullivan,* 345 S.C. at 173, 547 S.E.2d at 185.

> The refusal to charge the jury with her requested instruction is subject to harmless error analysis. No definite rule of law governs finding an error

> harmless; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case. For the error to be harmless, we must determine 'beyond a reasonable doubt the error complained of did not contribute to the verdict obtained.' To warrant reversal based on the trial court's failure to give a requested jury instruction, the failure must be both erroneous and prejudicial.

State v. Lee-Grigg, Op. No. 4237 (S.C. Ct. App. filed April 16, 2007) (Shearouse Adv. Sh. No. 15 at 54, 73-75). (citations omitted). While refusal to charge a requested instruction is subject to harmless error analysis, the state has a high burden to meet. The appellate court must be convinced beyond a reasonable doubt that the erroneously omitted instruction did not contribute to the jury's verdict. This court in *State v. Lee-Grigg* held that the refusal to issue a good character charge where the linchpin of her defense was that she lacked intent could not be considered harmless error.

Dickey admitted the shooting. The linchpin of his defense was that he acted in self defense. The prosecution made much of the fact that Dickey went outside and did not retreat. Thus, the state's burden to disprove the elements of self-defense including whether Dickey had a duty to retreat in the curtilage and his right to act on appearances became pivotal. On this testimony and these facts, the refusal to charge curtilage is not harmless beyond a reasonable doubt nor in light of the entire jury charge would it have been cumulative. Thus the error requires reversal.

The jury may well have considered it critical in weighing manslaughter versus self defense that Dickey proceeded outside the building. The defense presented extensive expert testimony from law professor Dave Whitener regarding the curtilage of the Cornell Arms premises. [R.514-535; 522,525,533-34] The state failed to present any evidence that the doormat was a public sidewalk but relied in the jury charge on the statutory definition and in its closing argument on "common sense". [R.778-80] The jury also

heard factual testimony from the building manager, Judy Broome, and from Jason Dickey and Lincoln Mickens, both security guards at the Cornell Arms that the business owned the doormat and the overhang and maintained the flower beds out front and the benches and surrounding areas. [R.388-93,566-69,689-92] The security guards were required to and routinely did patrol outside the perimeter of the building. [R.388-93,566-69,689-92]

Because Dickey proceeded outside the building to alert the police which way the two had left, the charge of curtilage became critical. The duty to retreat does not apply when defending one's dwelling or its curtilage. The trial judge's error in refusing to charge it cannot be considered harmless. Moreover, Boot was reaching under his oversized polo shirt for a liter vodka bottle, which can be used as a deadly weapon. But it could as easily been a knife or a gun. Thus, the jury's understanding of the law in their assessment of whether the use of deadly force was warranted may have been dramatically different based on the requested defense instructions on appearances, the defendant's perspective, and the right to continue firing until the threat is mitigated. The failure to give these instructions cannot be considered harmless error.

IV. The trial judge charged the jury on voluntary manslaughter using an illustration on all fours with the facts of this case, thereby charging them on the facts and essentially issuing a directive to return a verdict of manslaughter.

In charging manslaughter as a lesser included offense, the judge said, "By way of illustration and I would point out this is by illustration alone, that if an unjustifiable assault is made with violence with the circumstances of indignity upon a man's person and the party so assaulted kills the aggressor the crime *will be* reduced to manslaughter." [R.807] The defense objected that the illustration was identical to the facts of the case at

hand and moved for a new trial, but the trial judge refused to further charge the jury or retract the illustration. [R.817-18,820-21,836]

The South Carolina Constitution provides, "Judges shall not charge juries in respect to matters of fact, but shall declare the law." Art. V § 21 (Rev. 1985). This rule is deeply rooted in South Carolina jurisprudence, stemming from English common law. While the prohibition has moved section numbers during revisions, the 1868 Constitution contained similar provisions. Here, the judge took the exact facts where Boot attacked Dickey and told the jury that scenario would be manslaughter. Because we presume juries follow the law as charged, the court cannot hold that they would have ignored this or that its inclusion is harmless error. Judges are vested with authority that jurors would look to for answers in determining their verdict.

Criminal cases have held that specifically requested charges structured around specific examples that paralleled the facts of the instant case could not be issued because they would constitute a charge on the facts. This court held in *Patterson* that the trial court did not err in refusing to give a *Telfaire* charge that would focus the jury's attention on the one witness identification to minimize the risk of mistaken conviction where such instruction had been previously rejected by our supreme court and giving it would constitute an unconstitutional charge on the facts. "The trial judge must refrain from intimating 'to the jury his opinion of the case, what weight or credence should be given to the evidence and participating in any manner with the jury's findings of fact.'" *State v. Robinson*, 274 S.C. 198, 203, 262 S.E.2d 729, 731 (1980) (*quoting State v. Pruitt*, 187 S.C. 58, 64, 196 S.E. 371, 374 (1938)). "The charge Patterson requested is essentially a charge on the facts which is contrary to our constitutional prohibition against charges to

the juries on the facts." *State v. Patterson*, 337 S.C. 215, 235, 522 S.E.2d 845, 855 (Ct. App. 1999). Similarly, our supreme court held that examples of sufficient legal provocation for voluntary manslaughter that were the exact facts of the case would have been impermissible charge on the facts. *State v. Hughey*, 339 S.C. 439, 529 S.E.2d 721 (2000).

In holding that the trial judge charged the facts by expressing an opinion on testimony, our supreme court in *Cash* quoted extensively from the earlier case of *Smalls*:

> "The intention of this section was intended clearly to leave to the jury all questions of fact and to prevent the judges from forcing upon juries their own convictions as regards matters of fact. The force and effect of any evidence is for the jury; it is for them to determine what credence they will give to it and what weight it will have with them. The juries are the judges in all matters of fact and cannot look to the court for a controlling view, they are to form their own conclusions from the facts submitted to them, and the court cannot employ its influence over the minds of the jurors to force upon them its conclusions in any case. The court is not at liberty to give its conclusions in any particular portions of the testimony. The real object of this clause in the Constitution is to leave the decision of all questions of fact to the jury exclusively uninfluenced by any expressions of opinion he might express upon any question of fact arising in a case, and for this reason he should carefully refrain and avoid expressing any opinion that he may have formed from the facts as to the force, weight, and effect, and not impress upon them any impression that the testimony may have made in the mind of the judge. The juries are to determine all questions of fact uninfluenced by the judge and unbiased by his impressions."

State v. Cash, 209 S.C. 391, 40 S.E.2d 498, 498-99 (1946) (quoting *State v. Smalls*, 98 S.C. 297, 82S.E.2d 421 (1914)). "It is therefore clear that while a charge must be considered as a whole, an erroneous charge will not be cured by it being stated that all questions of facts are exclusively for the jury, as the real objective of the constitutional provision against charging on the facts is to leave all questions of fact to the jury to be decided according to their own judgment, unbiased by an expression or even intimation

of any opinion from the judge." *State v. Smith*, 227 S.C. 400, 88 S.E.2d 345, 351 (1955). "Oftentimes juries can be made to understand the law of the case easier if they are given helpful illustrations. In giving such illustrations, however, a trial judge should avoid the facts of the case on trial." *State v. Quick*, 141 S.C. 442, 140 S.E. 97, 99 (1927).

Cases that have upheld general illustrations in jury charges using the exact facts of the case but correctly setting forth general principles of law are distinguishable. Most are civil cases where less stringent standards and protections apply than criminal cases. The older criminal cases that have not been overruled are largely old Prohibition, whiskey bootlegging cases lost in the dustbin of history and not since cited in support of any proposition of law. Thus, they seem to be anomalies. *See, e.g., State v. Steadman*, 257 S.C. 528, 541, 186 S.E.2d 712, 716 (1972) ("Neither is the charge subject to a valid criticism, as claimed, that it constituted a comment on the facts. The trial judge prefaced a comment with the statement that it was by way of illustration. . . . While it was designated by the trial judge as an illustration, it was nothing more than a general statement of the law and did not constitute a comment on the facts."); *Harrelson v. Reaves*, 219 S.C. 394, 65 S.E.2d 478, 482 (1951) ("[T]hese instructions do not infringe upon the facts. The Court merely used said hypothetical statements in an effort to clarify the applicable law without expressing or intimating any opinion as to the weigh to of the evidence. This is permissible. *Norris v. Clinkscales*, 47 S.C. 488, 25 S.E. 797 (1896); *Jenkins v. Charleston Street Railway Co.*, 58 S.C. 373, 36 S.E. 703 (1900); *Battle v. DeVane*, 140 S.C. 305, 138 S.E. 821 (1927). Moreover, it has been held 'that a charge stating the legal conclusions which would result from the establishment of certain facts is not necessarily subject to objection as a charge on the facts, or as assuming the truth of

the facts as stated.' *Williams v. Southeastern Life Insurance Co.*, 197 S.C. 171, 14 S.E.2d 895, 897 (1941)."). In *State v. Higgins*, our supreme court found no reversible error where an illustration closely paralleled the facts of the case considering the correctness of the instructions as a whole because it made no reference to any disputed fact, except in a hypothetical way. The court stated "illustrations of one subject by another are generally faulty in some particular if subjected to minute examination; but the effect of the charge, fairly construed, was simply that, if the circumstances pointed to the guilt of the defendant beyond a reasonable doubt, the jury should convict, otherwise they should acquit." *Higgins*, 215 S.C. 153, 54 S.E.2d 553 (1949). The court reasoned that the judge made no reference to any disputed or issuable fact except in a hypothetical way and further that there was no reasonable ground for supposing the jury was prejudicially influenced by the instructions.

The dissent in *Higgins* held the "trial judge was unfortunate in his selection of a hypothetical case" where substituting a few words and "you practically have the case at bar." "It has long been recognized that even a slight remark apparently innocent in its language may, when uttered by the Court, have a decided weight in shaping the opinion of the jury. Vested as a trial Judge is within superior authority, disinterested and possessing experience not available to the ordinary layman, juries, as a rule, are anxious to catch his view upon which to found their conclusions." *Higgins*, 215 S.C. 153, 54 S.E.2d 553 (1949) (Taylor, J., dissenting). Similar language that directs the jury what the verdict would be, rather than giving permissible inferences has been held an improper charge on the facts not cured by stating that all questions of fact were for the jury. *See,*

e.g., cases under S.C. Const. Art. V § 21 annotated; *State v. Fuller,* 227 S.C. 138, 87 S.E.2d 287, 293 (1955); *State v. Smith*, 227 S.C. 400, 88 S.E.2d 345, 348-50 (1955).

Most importantly, here the relevant facts were largely undisputed—the shooting admitted, the attack clearly proven, the sequence of events all corroborated by remarkably consistent testimony and forensic evidence, except in minor particulars where we would expect recollections to vary slightly. Only the legal conclusions to be drawn from those facts remained, and the lynchpin was whether the actions constituted self-defense or manslaughter. In light of the undisputed nature of the facts and the judge's directive as to the legal conclusion, which "will be" manslaughter, the trial judge improperly charged on the facts and directed the jury's verdict. Here, the judge charged that under the exact facts of the case, the crime "will be" manslaughter. [R.807] Thus, the charge directly resolved the central legal issue for the jury to decide and was clearly prejudicial to appellant, where the jury was deciding between voluntary manslaughter and self-defense. Because the facts were undisputed, the use of an illustration using the exact facts of the instant case became a critical error necessitating reversal.

V. The trial judge should have applied the common law Castle Doctrine recently codified under the Stand Your Ground law to hold Dickey had no duty to retreat from the Cornell Arms front doormat, the business premises of the apartment building where he lived and worked.

> [A] man's home is his castle where if he or a member of his family is assaulted in the home, he is not required to retreat but may use such force as is reasonably necessary to protect himself or a member of his family from death or serious bodily harm and may combine such force as is reasonably necessary to eject the assailant even to the extent of taking his life. The slaying . . . occurred on the porch of the house occupied by appellant and his mother and . . . in the bedroom. It is therefore apparent that it was under either contention within the curtilage and that portion of the law of self-defense which requires one to retreat unless it is reasonably apparent that in doing so he would increase the danger is not applicable under the facts of the instant case.

State v. Jackson, 227 S.C. 271, 87 S.E.2d 681, 685 (1955). Under the Castle Doctrine, the trial court should have held Dickey had no duty to retreat as a matter of law, rather than submitting the issue for the jury to determine because he remained on the front door mat under the awning just in front of the door of the Cornell Arms, where he both lived and was employed. [R.557]

Our supreme court has long ago laid out "essentially different situations which call for the application of the law of habitation, curtilage, and premises; they should not be confounded, as the law differs in the application to the several situations." *State v. Bradley*, 126 S.C. 528, 120 S.E. 240, 242 (1923). The case then lays out clearly and at some length the distinctions and similarities among the three, and their relation to the law of self defense. "[I]n ancient days habitations were necessarily converted into strongholds of defense, and the dwelling became a castle." *Id.* at 242. Under the second scenario: "When the occupant is also the slayer and stands upon his right of self-defense, claiming, not the right to protect his habitation, but immunity from the law of retreat, which ordinarily is an essential element of the plea" and is worth quoting at length.

> If one is violently attacked in his home, or any member of his family, without retreating, he may not only instantly use such force as may be necessary to protect himself, or family, from the loss of life or serious bodily injury, or against the perpetration of a felony, but he may in addition thereto combine such force as is necessary to eject the assailant, whom he may kill if this extreme measure appears unavoidable.' *Bishop's New Cr. Law* (8th Ed.) § 859, subd. 3.
>
> If one is violently attacked at some other place on his premises, where the rights pertaining to the habitation do not enter into consideration, he, of course, has no such rights, but he has the right, in establishing his plea of self-defense, to claim immunity from the law of retreat, which ordinarily is an essential element of that defense. . . . 'A person on his own premises and outside of his dwelling, but within the curtilage, if assaulted by a deadly weapon, is not bound to retreat, but may stand on his own ground

> and meet such attacks even to killing his assailant.' The words 'within the curtilage'. . . were intended to apply to the particular facts of that case, and not as a limitation upon the rule that the immunity extended to an attack made anywhere upon the defendant's premises.
>
> . . . [A] person on his premises, outside his home, if assaulted by another with a deadly weapon is not bound to retreat, but may stand his ground, and meet such attack even to the killing of his assailant, if in other respects he brings himself within the ordinary rules of self-defense. . . . "The defendant was where he had the right to be, when the deceased advanced upon him in a threatening manner, and with a deadly weapon; and if the accused did not provoke the assault and had at the time reasonable grounds to believe and in good faith believed, that the deceased intended to take his life or do him great bodily harm, he was not obliged to retreat, nor to consider whether he could safely retreat, but was entitled to stand his ground and meet any attack made upon him with a deadly weapon, in such way and with such force as, under all the circumstances, he, at the moment, honestly believed, and had reasonable grounds to believe, was necessary to save his own life or to protect himself from great bodily injury.

State v. Bradley, 126 S.C. 528, 120 S.E. 240, 243 (1923).

The legislature felt this deeply rooted principle was so important that it codified the common law to buttress and strengthen the preexisting Castle Doctrine. [R.42-47] The General Assembly's stated legislative intent was "to codify the common law Castle Doctrine which recognizes that a person's home is his castle and to extend the doctrine to include an occupied vehicle and the person's place of business." S.C. Code Ann. § 16-11-420 (A) (Supp. 2006). "[N]or should a person or victim be required to needlessly retreat in the face of intrusion or attack." S.C. Code Ann. § 16-11-420 (E) (Supp. 2006). "Dwelling" means a building . . . including an attached porch." S.C. Code Ann. § 16-11-430 (1) (Supp. 2006).

> A person is presumed to have a reasonable fear of imminent peril of death of great bodily injury to himself or another person when using deadly force that is intended or likely to cause death or great bodily injury to another person if the person: (1) against whom the deadly force is used is in the process of unlawfully or forcefully entering, or has unlawfully and

> forcibly entered a dwelling, residence, or occupied vehicle, or if he removes or is attempting to remove another person against his will from the dwelling, residence, or occupied vehicle. . . .

S.C. Code Ann. § 16-11-440(A) (Supp. 2006).

> A person who is not engaged in an unlawful activity and who is attacked in another place where he has a right to be, including, but not limited to, his place of business, has no duty to retreat and has the right to stand his ground and meet force with force, including deadly force, if he reasonably believes it is necessary to prevent death or great bodily injury to himself. . . .

S.C. Code Ann. § 16-11-440(C) (Supp. 2006).

The act states it takes effect upon approval of the Governor on June 9, 2006. The shooting occurred in April 29, 2004, but the trial did not take place until September 12-15, 2006. [R.113,173,223] One of this state's earliest decisions on whether the law to be applied should be that in effect at the time of the crime or at the time of trial held that the crime committed prior to the change in constitutions had to be prosecuted under the later law at the time of trial and that the accused had to be given the benefit of procedural laws that reduced punishment or mollified the underlying crime. *State v. Richardson*, 35 L.R.A. 238, 47 S.C. 166, 25 S.E. 220, 223-24 (1896).

> "Remedies must always be under the control of the legislature, and it would create endless confusion in legal proceedings if every case was to be conducted only in accordance with the rules of practice, and heard only by the courts in existence when its facts arose. The legislature may abolish courts, and create new ones; and it may prescribe altogether different modes of procedure in its discretion, though it cannot lawfully, we think, in so doing, dispense with any of those substantial protections with which the existing law surrounds the person accused of crime.' We must conclude that the plea interposed by defendant should be tested by the provisions of the present constitution, and those provisions, being couched in terms familiar in the common law, should received the same construction and be given the same signification, as has been well settled at the common law."

State v. Richardson, 35 L.R.A. 238, 25 S.E. 220, 223-24 (1897) (quoting Cooley, *Const. Lim.* 272). In considering "[t]he crucial question . . . whether the Legislature repealed or amended" the section under which prosecution was sought, the court held

> The longstanding common law view is that a continued prosecution necessarily depend[s] upon the continued life of the statute which the prosecution seeks to apply. In case a statute is repealed or rendered inoperative, no further proceedings can be had to enforce it in pending prosecutions unless competent authority has kept the statute alive for that purpose. . . . Prosecution for crimes is but an application or enforcement of the law, and if the prosecution continues the law must continue to vivify it.

Pierce v. State, 338 S.C. 139, 145-46, 526 S.E.2d 222, 225 (2000). It is the flip side of an ex post facto claim.

The Stand Your Ground bill essentially repealed the duty to retreat element under the law of self defense in certain circumstances and extended the protection of the common law. The Stand Your Ground law is procedural because it changes what the State has to disprove beyond a reasonable doubt under the elements of self defense. In such circumstances as here, where Dickey remained within the curtilage of the building, the fourth element of duty to retreat is removed. There is no duty to retreat. As such, the legislature has changed and extended the protection of when one may avail himself of the law of self defense.

Moreover, if the court construes it to be substantive, this remedial act codifies existing self defense law, and the defendant is given the benefit of remedial changes in the law that affect his punishment. Thus, the trial judge erred in not applying the law in effect at the time of trial and in not holding as a matter of law that Dickey was under no duty to retreat where he remained on the front doormat of the Cornell Arms under the

overhang—part of the legal premises and within the curtilage of the building where he lived and worked.

It is undisputed that he (1) was employed as a security guard, (2) lived in the apartment building, and (3) never left the front doormat under the awning. [R.557] The defense presented expert testimony, unrefuted by the state, that it would legally be considered part of the premises. Under these facts, Dickey had no duty to retreat as a matter of law, and the court erred in submitting the issue to the jury as a prong of self-defense. Thus, the judge erred in submitting the duty to retreat under self-defense to the jury rather than holding under the Stand Your Ground law and the preexisting common law Castle Doctrine that Dickey was under no duty to retreat from the curtilage of his place of business and home.

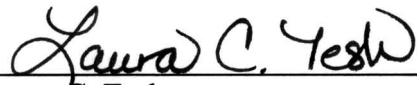
CONCLUSION

Jason Dickey has no prior record. He has served in the military three times, in Korea, Mogadishu in Somalia, and Egypt and received several commendations. [R.549-554] He was not in combat but served in quartermaster motor vehicle pool and food supply units. [R.551-52] He has met the highest level of scrutiny by the state as a concealed weapon permit instructor and was highly trained in the safe and proper use of weapons. [R.559-60,569-70]

Because of a poor decision by Joshua Boot—intoxicated, enraged, aggressive, belligerent—Dickey had no choice but to fire or face severe bodily injury or death. He had a split second to act, and he was sentenced to sixteen years. The confrontation that night ended in tragedy. That tragedy has now been compounded by Dickey's imprisonment. Two lives have been lost. And it is incumbent on this court to reverse that error.

Therefore, for the reasons stated herein— (1) the voluntary manslaughter option erroneously given to the jury, (2) self defense that should have been decided as a matter of law, (3) the curtilage and right to act on appearances charges that the defense requested and was entitled to but not given, (4) the illustration on all fours with the facts that the judge said "will be" manslaughter, and (5) the common law Castle Doctrine as codified in the Stand Your Ground law which the judge failed to apply—Appellant requests that this court reverse his manslaughter conviction, hold that he acted in self defense as a matter of law, or at minimum remand for a new trial based on the jury charge errors.

Respectfully Submitted,



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July 17, 2007
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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of General Sessions
James W. Johnson, Jr.
Circuit Court Judge

Case No. 2004-GS-40-3753

State of South Carolina

Respondent,

v.

Jason Michael Dickey

Appellant.

PROOF OF SERVICE

The undersigned as counsel for appellant hereby certifies that the Attorney General's Office has been served by hand delivery to its office of record in Columbia, South Carolina on July 17, 2007.

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PROOF OF COMPLIANCE

The undersigned, as attorney for the Appellant, hereby certifies that this Initial Brief of Appellant complies with Rule 208(b), SCACR.

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