THE STATE OF SOUTH CAROLINA
In the Supreme Court

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.

FINAL BRIEF OF APPELLANT

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The Court of Appeals issued its decision on October 29, 2008. Dickey filed a Petition for Rehearing and Rehearing En Banc on November 5, 2008. The Court of Appeals denied the Petition by Order dated December 19, 2008.

QUESTIONS PRESENTED FOR REVIEW

I. The Court of Appeals erred in failing to reconcile that fear can constitute heat of passion under *Wiggins* with self defense as a matter of law under *Hendrix*, as recognized in Justice Toal's *Childers* concurrence. The Court of Appeals also mischaracterized the facts in finding "ample evidence" of heat of passion.

II. The Court of Appeals erred in holding that Dickey being outside and pointing his gun at Boot and Stroud could reasonably be calculated to bring on the difficulty and in construing Dickey's actions as mutual combat, barring self defense as a matter of law under *Hendrix*. The Court of Appeals also erred in holding that Dickey had no duty to retreat under the Castle Doctrine and in failing to address that Dickey had no duty to retreat under self defense where doing so would increase the danger.

III. The Court of Appeals erred in failing to address that a liter glass bottle should be considered a deadly weapon under South Carolina law.

IV. The Court of Appeals erred in holding that the right to act on appearances was adequately charged where the instruction did not explain what the proper test is, which is especially critical where Dickey could see Boot reaching under his shirt. The Court failed to recognize that the right to act on appearances is a separate issue from the second and third elements of self defense regarding actual danger and reasonable belief of danger.

V. The Court of Appeals erred in holding that the Cornell Arms doormat on a public sidewalk under its permanent concrete overhang, as authorized by an encroachment permit, cannot constitute curtilage where Cornell Arms maintains landscaping and always exercised control and excluded the general public. The Court of Appeals erred in holding that the duty to retreat was adequately charged based solely on its conclusion that the public sidewalk was not curtilage.

VI. The Court of Appeals erred in holding that the illustration in the jury charge of voluntary manslaughter did not require reversal where the judge impermissibly instructed that the exact facts of the case "will be" manslaughter, especially where the evidence was relatively undisputed and only the legal conclusion to be drawn remained.

VII. The Court of Appeals erred in holding that the Stand Your Ground Act should not be applied retroactively because it creates substantive rights rather than recognizing that it merely codifies the existing common law Castle Doctrine and procedurally changes what the State has to disprove for self defense.

STATEMENT OF THE CASE & FACTS

The shooting occurred on the front doormat of the Cornell Arms shortly after 9:00 p.m. on April 29, 2004. [R.329] After a week long trial at 6:50 p.m. on a Friday night, the jury was charged on murder, voluntary manslaughter, and self defense. The jury returned a compromise verdict of guilty on voluntary manslaughter. [R.Tr. cover, 827-28] Despite Dickey's having no prior record, the trial judge sentenced Dickey to sixteen years. [R. 858]

Josh Boot and Alex Stroud had been tailgating outside the Jimmy Buffett concert, getting drunk. [R. 91-93,114,224,249-50] They met Amanda McGariggle and Tara West, went back to the girls' Cornell Arms apartment, and continued drinking. [R.78-80,116-17,120,143-47,225] Stroud testified that Boot had twenty beers, several shots of tequila, and a substantial amount of liquor. [R.251-52] 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]

Finding Boot 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: "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. [R.104,129,162,178,196-97,584-86] Stroud,

realizing they were headed toward trouble, tried to diffuse the situation and urged Boot to 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 side parking lot. [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 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. [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 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 cooperated fully. [R.141-42,352-54,363-65,373,448,617-18,624,677] 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 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] Confronted with two drunk men ten years younger, security guard Jason Dickey—a disabled military veteran, unable to run, and obese—made a split second decision to protect himself when they attacked closing rapidly and was sentenced to sixteen years for voluntary manslaughter. Four seconds. Two lives changed forever. In a single tragedy.

ARGUMENT

I. The Court of Appeals erred in failing to reconcile that fear can constitute heat of passion under *Wiggins* with self defense as a matter of law under *Hendrix*, as recognized in *Starnes* and in Justice Toal's *Childers* concurrence. The Court of Appeals also mischaracterized the facts in finding "ample evidence" of heat of passion. [1]

If the Court of Appeals decision stands, then *Wiggins* cannot be reconciled with *Hendrix*. This conflict of precedents must be resolved by the Supreme Court. While the Court correctly points out that self defense and voluntary manslaughter are not mutually exclusive, the statement

[1] The Court erroneously cites law in footnote five that sufficient legal provocation, the first element of voluntary manslaughter, was abandoned on appeal. Instead, it was conceded in the brief, at oral argument, at trial, and was simply not an issue on appeal. It was not abandoned by counsel but rather, properly conceded.

in *Wiggins* that fear can constitute heat of passion has to be reconciled with *Hendrix*. Both *Hendrix* and *Wiggins* are the law in South Carolina. In *Hendrix*, self defense was not a jury question but a matter of law. *Wiggins* states that fear can provide a basis for a voluntary manslaughter verdict; but reasonable fear, either of one's life or of serious bodily injury is a necessary prong of self defense. So the fear required for manslaughter—rather than self defense—must be considerably greater in degree or kind than the rational fear of being attacked. It must be an irrational fear that causes a person to lose control of himself temporarily.

This Court recently extensively clarified how fear relates to voluntary manslaughter. *See State v. Starnes*, 388 S.C. 590, 698 S.E.2d 604 (2010).

> Trial courts often struggle with the difficult interplay between murder and the lesser-included offense of voluntary manslaughter, especially where a defendant claims he acted in self-defense. This struggle may be due to this Court's opinions which, when taken out of the evidentiary context, appear to set no boundaries as to what circumstances give rise to "sudden heat of passion upon sufficient legal provocation."

Id. at 597-98, 698 S.E.2d at 608. Canvassing the case law, especially *Pittman* and *Wiggins,* this Court held that "to warrant a voluntary manslaughter charge, the defendant's fear must manifest itself in an uncontrollable impulse to do violence." *Id.* at 599, 698 S.E.2d at 609.

> A person may act in a deliberate, controlled manner, notwithstanding the fact that he is afraid or in fear. Conversely, a person can be acting under an uncontrollable impulse to do violence and be incapable of cool reflection as a result of fear. The latter situation constitutes sudden heat of passion, but the former does not. Evidence that fear caused a person to kill another person in a sudden heat of passion will mitigate a homicide from murder to manslaughter—it will not justify it. This is the distinction between voluntary manslaughter and self-defense.

Id. Here, the only evidence is that Dickey remained in full control of his faculties, such that like Starnes, he either shot with malice or in self-defense.

Chief Justice Toal 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.

> *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, 373 S.C. 367, 376, 645 S.E.2d 233, 237-38 (2007) (Toal, C.J., concurring). *Penland* itself is strangely 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). Dickey's fear was nothing but rational. Likewise, the Court of Appeals recently held that while historically, the question of a cooling off period fell within the jury's province, recent jurisprudence places that determination within the Court's province. *See State v. Hernandez*, 386 S.C. 655, 662, 690 S.E.2d 582, 586 (Ct. App. 2010) (citing *State v. Pittman*, 373 S.C. 527, 575, 647 S.E.2d 144, 169 (2007)). Like Hernandez, Dickey's actions and demeanor support only a finding that Dickey acted without heat of passion.

Moreover, the Court of Appeals mischaracterizes the facts in finding "ample evidence" of heat of passion. To constitute voluntary manslaughter, the heat of passion must come from Dickey. There is no evidence that "Dickey and Boot engaged in a heated argument before the shooting." Rather, Boot got heated but Dickey remained calm and refused to retaliate or engage but kept repeating that the two just needed to leave. The Court states that West and McGariggle testified Dickey was angry, but West only once said Dickey looked angry but clarified her answer to "irritated" and McGariggle never testified that Dickey looked angry. The Court

further erred by relying on Boot's actions as evidence of heat of passion by Dickey, rather than evidence of the element of sufficient legal provocation. That "Boot verbally threatened Dickey" and Dickey's testimony of Boot's actions, threats, and words in attacking him are not evidence that Dickey exhibited heat of passion. Thus, none of the evidence marshaled by the Court in support of its holding is evidence of heat of passion on Dickey's part. South Carolina case law is clear that while sufficient legal provocation must come from Boot, heat of passion must come from Dickey. The one statement that could be evidence of heat of passion, that they engaged in a heated argument, mischaracterizes the facts and is simply unsupported by the testimony or any other evidence in the record. The Court erred in holding that voluntary manslaughter was properly submitted to the jury because there is no evidence of heat of passion by Dickey.

The jury returned a compromise verdict of manslaughter, the middle ground between murder and self defense, at almost 7 p.m. on a Friday night after being in court all week. [R.827-28] 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.

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 court held submission of voluntary manslaughter required 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, this court held the refusal to charge voluntary manslaughter was not error where the only legal provocation came from a third party and could not be transferred to victim. *State v. Childers*, 373 S.C. 367, 373-74, 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 murder 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).

The court in *State v. Smith* reversed the voluntary manslaughter verdict, finding no evidence of sudden heat of passion. 363 S.C. 111, 609 S.E.2d 528 (Ct. App. 2005). 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 where self defense was not an issue. *See id.*

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, and had no prior bad feelings or ill will. [R.322-24,370-71] Voluntary manslaughter should not have been submitted to the jury because there is no evidence of heat of passion on Dickey's part. Rather, his actions corroborate his testimony that he did what he calmly had to do to avoid being injured or killed and cooperated fully when the police arrived. [R. 620,671]

II. The Court of Appeals erred in holding that Dickey being outside and pointing his gun at Boot and Stroud could reasonably be calculated to bring on the difficulty and in construing Dickey's actions as mutual combat, barring self defense as a matter of law under *Hendrix*. The Court of Appeals also erred in holding that Dickey had no duty to retreat under the Castle Doctrine and in failing to address that Dickey had no duty to retreat under self defense where doing so would increase the danger.

This is classic self-defense. [R.504-12,712-13,833-35] If the Court of Appeals' opinion stands, then *Hendrix* is a dead letter. Dickey being outside and pointing his gun after Boot and Stroud rushed toward him could not *reasonably* be calculated to bring on the difficulty. If it could, Hendrix would certainly have been similarly barred. Moreover, there is no evidence of mutual combat. Mutual combat was not raised at trial. If Dickey's actions could be construed as

mutual combat, Hendrix's actions of arming himself specifically in preparation for the conflict with Cherry most certainly would have been mutual combat. However, Hendrix's actions were held to constitute self defense as a matter of law. *Hendrix* is the controlling law in South Carolina. Because Dickey's actions could not be reasonably calculated to bring on the difficulty nor is there any evidence of mutual combat, Dickey's case falls squarely within the ambit of *Hendrix* and self defense was established as a matter of law.

> [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*, this court held self defense established as a matter of law where Cherry's blood alcohol level was .208, where Hendrix warned him to back off and was on his own property near the road, where Cherry had 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.[2] [R.623,638] Hendrix armed himself after being threatened, but 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. Dickey simply acted to eject Boot and Stroud, and Dickey called the police several times. Within four seconds, Dickey pointed the gun and said "Stop" as corroborated by the fact that Stroud actually stopped. The prosecution emphasized 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. [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.

[2] The Court of Appeals stated that Dickey was not required to carry a weapon for his Cornell Arms duties. However, any reliance was misplaced because that disputed fact was not relevant to whether the shooting was voluntary manslaughter or self defense.

State v. Brooks, 252 S.C. 504, 510, 167 S.E.2d 307, 310 (1969). The Court of Appeals mischaracterizes the evidence to say that Dickey followed Boot and Stroud when the testimony is consistent that they were at the end of the block while Dickey remained just outside the doors; while he may have left the building just behind him, they did not realize he was outside until they turned to attack at the end of the block. The Court mischaracterizes the evidence as "var[ying] substantially" when the testimony was consistent that Boot and Stroud walked back toward Dickey and closed the distance rapidly, that Stroud was right beside Boot as they advanced but both stopped when they saw the gun but then Boot resumed his advance; that threats and insults were hurled at Dickey. 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 Dickey was attempting to eject trespassers from the business premises where he worked and just wanted them to leave. The eyewitnesses 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 the difference in age between the defendant and 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's blood alcohol was .203, approximately the same level as the victim in *Hendrix*. 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] 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] ass." 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 them 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."[3] *Hendrix*, 270 S.C. at 663, 244 S.E.2d at 508 (Gregory, J., dissenting). The dissent was unconvinced because Hendrix did not take the stand. 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 took the stand

[3] The defendant no longer bears the burden of proof on self defense. Rather, the state must disprove each element of self defense. *See Wiggins*, 330 S.C. at 544, 500 S.E.2d at 492-93.

and testified consistently that he was in actual fear of his life or serious 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. In Boot's 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 was 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. Under these circumstances, the only logical conclusion is that his fear was both reasonable and the threat was real.

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 doormat, just outside the front door under the concrete overhang. The extent of the curtilage is not nearly so attenuated as

Wiggins. Dickey was a Cornell Arms security guard and lived there, so he was within the curtilage of his place of business and his home.[4]

The Court of Appeals' analysis of the fourth element of self defense is incomplete because it failed to address that Dickey had no duty to retreat through the locked doors where it would have increased the danger of being attacked from behind. The Court states that Dickey was not immune from the duty to retreat under the Castle Doctrine because he was on the Cornell Arms doormat on a public sidewalk. However, the analysis does not end there. As the Court states in discussing the jury charge, one also has no duty to retreat where doing so would put one in greater danger. However, the Court fails to apply that analysis here. The Court makes no mention of Dickey's obesity nor of his leg disability, which rendered him unable to walk fast or run at all. He was rushed by two assailants, ten years younger than himself, both in substantially better physical shape, Boot being 6'1" and 210 pounds, and Stroud similarly large. These facts are critical, especially in combination with where Dickey was located. 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. He could not retreat the other way down the sidewalk nor could he turn his back and be trapped against locked doors while trying to get inside without increasing the danger. Thus, he was not required to retreat. As to the fourth element, self defense is established as a matter of law even if the Court holds that Dickey was not within the building's curtilage because he could not retreat without increasing the danger to himself. Under the fourth element, he had no duty to retreat.

[4] The Court misheard or mischaracterized counsel's statement at oral argument that the doormat is partially in an indentation in the building but not completely off the sidewalk, and relied on this statement in error, because the location of the doormat is not so relevant to the duty to retreat as Dickey's being trapped against locked doors.

Like *Hendrix*, the prosecution emphasized 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*, he continued shooting even when the victim was falling and had turned away. 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 Court of Appeals erred in failing to address that a liter glass bottle should be considered a deadly weapon under South Carolina law.

Whether a glass bottle is a deadly weapon is a novel issue in South Carolina. South Carolina frequently has looked to other jurisdictions when defining a deadly weapon. For example, the 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*, 374 S.C. 581, 649 S.E.2d 132 (Ct. App. 2007). 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*, 374 S.C. at 586, 649 S.E.2d at 134 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.'

Id. 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.

IV. The Court of Appeals erred in holding that the right to act on appearances was adequately charged where the instruction did not explain what the proper test is, which is especially critical where Dickey could see Boot reaching under his shirt. The Court failed to recognize that the right to act on appearances is a separate issue from the second and third elements of self defense regarding actual danger and reasonable belief of danger.

The defense requested instructions on the Duty to Retreat/Curtilage [21R.820,837], Imminent Danger/Appearances [7R.810,818-20], Appearances/Defendant's Perspective [8R.819], and Continuing Threat [22R.819], 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.

The charge on the second and third elements of self defense regarding actual or reasonably believed danger is a separate issue from the right to act on appearances. The instruction ends on the right to act on appearances but stops short and does not explain what the

proper test is. The requested instruction may well have proved pivotal where Dickey saw Boot reach under his shirt, presumably for a weapon, but could not see what it was. Boot was armed with a glass liter bottle that could have easily been a gun and clearly intended to attack Dickey. [R.671-72,678] As such, the Court erred in holding that the charge as given adequately covered the law. The trial judge erred as a matter of law in declining the requested charge on Dickey's right to act on appearances.

This court held Jackson had the right to act on appearances where he was trying to repel a night intruder in his home and was completely blinded by a flashlight, even where the intruder turned out to be unarmed. *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 *State v. Rash*, he did not have to wait for Boot to get the drop on him but was entitled to act on appearances. 182 S.C. 42, 50, 188 S.E. 435, 438 (1936). 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 was justified in using deadly force to defend the very real threat to himself. [R.713,821]

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). 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 additional jury charges. Similarly in *Nichols*, where appellant did not deny the shooting but claimed it was 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 the right to act on appearances.

> The refusal to charge the jury with [the] 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, 374 S.C. 388, 414-15, 649 S.E.2d 41, 55 (Ct. App. 2007) (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. The court in *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. Boot was reaching under his oversized polo shirt for a liter glass bottle, which can be used as a deadly weapon. But it could as easily have 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.

V. The Court of Appeals erred in holding that the Cornell Arms doormat on a public sidewalk under its permanent concrete overhang, as authorized by an encroachment permit, cannot constitute curtilage where Cornell Arms maintains landscaping and always exercised control and excluded the general public. The Court of Appeals erred in holding that the duty to retreat was adequately charged based solely on its conclusion that the public sidewalk was not curtilage.

The cases cited by the Court for the proposition that a public sidewalk cannot constitute curtilage are distinguishable. The other cases address a public highway or decline to extend the Castle Doctrine to the middle of the street. Here, the area in question is the Cornell Arms doormat under its overhang.[5] The Cornell Arms has an encroachment permit and maintains the landscaping on the street-ward side of the doormat where Dickey was standing. The Cornell Arms has always exercised control and excluded the general public. This was not the street in front of and adjacent to the Cornell Arms but an area over which it has exercised rights, assumed responsibility, and excluded the general public as a matter of course. Thus, the Court erred in construing these cases broadly to hold that Dickey was not within the curtilage of the Cornell Arms. As such, he was entitled to a jury charge on curtilage, and the trial judge erred as a matter of law in declining to do so.

This court held the refusal to charge self-defense, habitation, and necessity was reversible error where the appellant was threatened by the deceased, was not responsible for the deceased's aggressive conduct, and retreated even though under no duty to do so. *See State v. Nichols*, 325 S.C. 111, 481 S.E.2d 118 (1997). 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 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 and both security guards that the Cornell Arms owned the doormat and 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 the outside perimeter of the building and evict vagrants and homeless people both from the side parking lot and from the benches and area in front of the Cornell Arms entrance. [R.388-93,566-69,689-92]

Dickey admitted the shooting. The linchpin of his defense was that he acted in self defense and only out of a reasonable fear. The prosecution emphasized that Dickey went outside and did not retreat. Thus, the state's burden to disprove each specific element of self-defense beyond a reasonable doubt, including whether Dickey had a duty to retreat in the curtilage became pivotal. Because he proceeded outside the building to tell the police which way the two went, the charge of curtilage became critical. The duty to retreat does not apply when defending one's dwelling or its curtilage. On these facts, the refusal to charge curtilage is not harmless

[5] Since this case, that doormat has been removed after having been there for years.

beyond a reasonable doubt nor cumulative in light of the entire jury charge. Thus the error requires reversal.

VI. The Court of Appeals erred in holding that the illustration in the jury charge of voluntary manslaughter did not require reversal where the judge impermissibly instructed that the exact facts of the case "will be" manslaughter, especially where the evidence was relatively undisputed and only the legal conclusion to be drawn remained.

The judge's use of an illustration that set forth the exact facts of this case and telling the jury that "will be" manslaughter is extremely problematic and requires reversal. 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 tracked the evidence 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] Where the facts were relatively undisputed and only the legal conclusion remained whether the shooting was voluntary manslaughter or self defense, jurors would very likely single out the illustration as the court's opinion on the facts. The use of the exact facts of the case cannot be harmless beyond a reasonable doubt and was not cured by stating all questions of fact were for the jury nor by stating it was an illustration. 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. Thus, the Court erred in holding the voluntary manslaughter illustration did not require reversal.

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. The 1868 Constitution

contained similar provisions. Criminal cases have held that specifically requested charges structured around specific examples paralleling the evidence 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 where such instruction had been previously rejected by this 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, this court held that examples of sufficient legal provocation for voluntary manslaughter that were the exact facts of the case would have been an impermissible charge on the facts. *State v. Hughey*, 339 S.C. 439, 529 S.E.2d 721 (2000).

> "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 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 in 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.

The dissent in *State v. Higgins* held the "trial judge was unfortunate in his selection of a hypothetical case" where, substituting a few words, "you practically have the case at bar." *Higgins*, 215 S.C. 153, 54 S.E.2d 553 (1949). "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 with 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).

Citing similar concerns, this Court last year made a watershed change in South Carolina jury charges in criminal cases. Under *State v. Belcher*, 385 S.C. 597, 600, 685 S.E.2d 802, 803-04 (2009), "a jury charge instructing that malice may be inferred from the use of a deadly weapon is no longer good law in South Carolina where evidence is presented that would reduce, mitigate, excuse or justify the homicide."[6] That trial judge expressed concern about the charge rising to a charge on the facts. Reviewing the progression of the inference jury charge, this Court determined, in keeping with other jurisdictions, that "our modern day usage of this jury charge has strayed from this Court's original jurisprudence." *Id.* at 602, 685 S.E.2d at 804. "We are firmly convinced that instructing a jury that 'malice may be inferred by the use of a deadly weapon' is confusing and prejudicial where evidence is presented that would reduce, mitigate, excuse or justify the homicide." *Id.* at 611, 685 S.E.2d at 810. "Because our decision represents a clear break from our modern precedent, today's ruling is effective in this case and for all cases which are pending on direct review or not yet final where the issue is preserved." *Id.* at 612, 685 S.E.2d at 810. This case had been decided by the Court of Appeals but the Petition for Certiorari had not yet been granted when *Belcher* was decided. *Dickey* was pending direct review. The impermissible inference charge coupled with the illustration on four square with the facts of the case that "will be" manslaughter rises to a charge on the facts.

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

[6] This now impermissible inference charge was given here as well. However, since trial and appellate counsel had no reason to believe that law would be changed, it was not raised below.

the undisputed nature of the facts and the judge's directive that the exact facts of the case "will be" manslaughter, the trial judge improperly charged on the facts. [R.807] Thus, the charge was clearly prejudicial to appellant where the jury was deciding between voluntary manslaughter and self-defense. Because the facts were undisputed, an illustration using the exact facts of the instant case became a critical error necessitating reversal.

VII. The Court of Appeals erred in holding that the Stand Your Ground Act should not be applied retroactively because it creates substantive rights rather than recognizing that it merely codifies the existing common law Castle Doctrine and procedurally changes what the State has to disprove for self defense.

The Court of Appeals held that the Act should not be applied retroactively, relying solely on its stated effective date. The Court is not limited to the legislature's statement within the Act of its effective date. Rather, in determining whether a law is applied prospectively or retroactively, courts look to whether the effect is substantive or procedural. The Court erred in holding that the Act creates substantive rights. Rather, the Act codified common law and is procedural because it changes what the State has to disprove for self defense. As such, the new law should be applied retroactively and the Court erred in holding it should not.

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.

> "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 (1896) (quoting Cooley, *Const. Lim.* 272).

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 doormat under the overhang just in front of the Cornell Arms door, where he both lived and was employed. [R.557]

> [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). This 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 length the distinctions and similarities among the three, and their relation to the law of self defense.

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. 2007). "[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. 2007). "Dwelling" means a building . . . including an attached porch." S.C. Code Ann. § 16-11-430 (1) (Supp. 2007).

> 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. 2007).

> 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. 2007).

The Stand Your Ground Act 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 Act is procedural because it changes what the State has to disprove beyond a reasonable doubt under the elements of self defense. 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 was employed as a security guard, lived in the apartment building, and never left the front doormat under the overhang. [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. Thus, the judge erred in submitting the duty to retreat under self-defense to the jury rather than holding under the Stand Your Ground Act and preexisting common law Castle Doctrine that Dickey had no duty to retreat from the curtilage of his place of business and home.

CONCLUSION

The Court of Appeals' errors in isolation are significant, but when viewed collectively, they require reversal by this Court. The Court of Appeals opinion is erroneous in seven important respects: (1) failing to reconcile fear as heat of passion under *Wiggins* with self defense under *Hendrix*; (2) finding Dickey brought on the difficulty and had a duty to retreat under *Hendrix*; (3) failing to hold a glass bottle is a deadly weapon; (4) holding a public sidewalk cannot be curtilage; (5) holding the right to act on appearances was adequately charged; (6) holding an illustration using the exact facts does not require reversal; and (7) holding the Stand Your Ground Act should not be applied retroactively. Dickey accordingly respectfully requests that

this Court reverse the Court of Appeals' decision, reverse his manslaughter conviction, and 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,

November 11, 2010
Columbia, South Carolina

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THE STATE OF SOUTH CAROLINA
In the Supreme Court

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 Norman Mark Rapoport of the Attorney General's Office has been served by hand delivery to his office of record in the Dennis Building, 5th floor, on the Statehouse grounds, 1000 Assembly Street, Room 519, Columbia, South Carolina, 29201 on November 11, 2010.

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