NO._____

IN THE SUPREME COURT OF THE UNITED STATES

CHRISTOPHER MIDDLETON, *Petitioner*

vs.

STATE OF GEORGIA, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether a finding of guilt can be predicated on the jury's disbelief of a defendant's statements where the defendant does not testify and the State fails to controvert the defendant's account of the incident and produce independent evidence of the essential elements of the crimes.

Whether the Georgia Supreme Court applied the wrong standard of review when it held that the trial court's refusal to charge self-defense was harmless error.

Whether an argument that the indictment fails to allege an essential element of the crime within a single count is a challenge to the sufficiency of the indictment.

PARTIES TO THE PROCEEDING

The parties to the proceedings below were Petitioner Christopher Middleton and Respondent State of Georgia. There are no non-governmental corporate parties requiring a disclosure statement under Supreme Court Rule 29.6.

All proceedings directly related to the case, per Rule 14.1 (b) (iii), are as follows:

1. Superior Court of Gwinnett County, Case No. 17B-01162-7, State v. Christopher Middleton, Jury trial held August 20-24, 2018; Motion for new trial hearing held on March 11, 2019; Order denying motion for new trial entered on April 29, 2019.
2. Georgia Supreme Court, Case No. S20A0718, Christopher Middleton v. The State, Opinion entered on October 19, 2020; Order denying motion for rehearing entered on November 16, 2020.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Christopher Middleton respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Georgia.

OPINION AND ORDERS BELOW

The Opinion of the Supreme Court of Georgia affirming Petitioner's judgment of conviction is published and reproduced here. Pet. App. 1a-17a. The order of the Superior Court denying Petitioner's motion for new trial is unpublished and reproduced here. Pet. App. 18a-23a. The order of the Georgia Supreme Court denying Petitioner's motion for rehearing is unpublished and reproduced here. Pet. App. 24a.

JURISDICTION

The Supreme Court of Georgia affirmed Petitioner's judgment of conviction on October 19, 2020. Pet. App. 1a-17a. The Supreme Court of Georgia denied Petitioner's motion for rehearing on November 16, 2020. Pet. App. 24a. On March 19, 2020, this Court issued an Order automatically extending the time to file a petition for writ of certiorari to 150 days from the date of the order denying motion for rehearing. This Court has jurisdiction under 28 U.S.C. § 1257 (a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment provides:

> No State shall . . . deprive any person of life, liberty or property, without due process of law[.]

INTRODUCTION

Petitioner was charged with, *inter alia*, malice murder, felony murder predicated on armed robbery, armed robbery, felony murder predicated on aggravated assault, and aggravated assault. Pet. App. 1a. While Petitioner defended on the basis of accident and justification by self-defense, the trial court charged the jury on accident only. Pet. App. 1a, 10a. The jury acquitted Petitioner of malice murder, apparently crediting Petitioner's accident defense, and convicted Petitioner of the remaining counts. Pet. App. 1a.

The incident forming the basis of the charges arose out of a drug deal between Petitioner and Bryant in Bryant's car. The State presented the only evidence of the encounter between the two men, Petitioner's recorded statement to police. Pet. App. 6a-7a. Petitioner stated in relevant part, that when he got into Bryant's car, Bryant handed him the marijuana before any money was exchanged; he asked if Bryant was trying to rip him off and Bryant said that he did not have a scale to weigh the marijuana. Bryant, the initial aggressor, pulled a 9 mm gun from his side and pointed it at Petitioner. Pet. App. 4a, 8a-9a. At that point, Petitioner grabbed Bryant's hand

and the gun, and the gun "went off" several times during the struggle over the gun. The gun fired accidentally, striking Bryant. Pet. App. 9a. Petitioner stated that his hand "might have" pushed Bryant's finger while it was on the trigger. Pet. App. 9a-10a. He admitted taking the 9mm gun and Bryant's marijuana when he got out of the car. Pet. App. 10a. He never admitted, however, that he took marijuana and a gun from Bryant by the use of a 9 mm gun or that he intentionally shot Bryant with a 9 mm gun. Pet. App. 8a-10a.

When we examine the State's evidence and ask whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt," the answer is no. Jackson v. Virginia, 443 U.S. 307, 319 (1979). "There was nothing in the proof submitted by the State to materially contradict the defendant's account of what occurred." Wall v. State, 5 Ga. App. 305, 308 (1908). Pet. App. 8a-10a.

As a general rule, the jury decides the credibility of witnesses. *See*, Hines v. State, 254 Ga. 386, 387 (1985). "When testimony of a witness is not believed, the trier of fact may simply disregard it. Normally, the discredited testimony is not considered a sufficient basis for drawing a contrary conclusion." Bose Corp. v. Consumers Union, 466 U.S. 485, 512 III (1984). Here, however, Petitioner did not testify. Pet. App. 6a-7a, 10a.

"If a jury concluded that a witness who was lying on the basis of demeanor alone, and inferred the opposite of what the witness claimed, an appellate court would not be able to judge the sufficiency of that inference; on review, nothing in the record could support it." (Citation omitted). State v. Rhodes, 335 Conn. 226, 251 n. 21 (2020). "The defendant's demeanor, although evidence, cannot be evaluated on appeal." United States v. Jenkins, 928 F.2d 1175, 1179 (D.C. Cir. 1991).

Because the State did not present affirmative evidence of the essential elements of armed robbery, the jury could not infer that the truth was the opposite of Petitioner's statement to police based on his demeanor alone. *See*, A. Pollis, "The Death of Inference," 55 B.C. L. Rev. 435, 461-62 (2014) ("[C]ourts, including the [United States] Supreme Court, have generally been hostile to accepting the probative value of the antithesis inference, especially without other evidence in support of the party carrying the burden of proof.").

"Although the sufficiency of the evidence standard is highly deferential to the jury, an appellate court cannot let this deference blind it on review to the government's burden to prove guilt beyond a reasonable doubt." United States v. Bailey, 553 F.3d 940, 946 (6th Cir. 2009). An approach that "begin[s] with the hypothesis that the jury must have gotten things right, contradicts the reason why appellate courts review convictions for sufficiency of evidence – that juries

sometimes get things wrong." (Citation omitted). United States v. Zeigler, 994 F.2d 845, 849 II (B) (D. C. Cir. 1993); Daughtie v. State, 297 Ga. 261, 264 (2015).

Where disbelief of a defendant's testimony "necessarily would be based entirely on demeanor, there must be some corroborating evidence of the resulting missing piece of the criminal puzzle." People v. Johnson, 2016 COA 15 [*P47], citing Stallings v. Tansy, 28 F.3d 1018 (10th Cir. 1994) (J. Jones, special concurring opinion).

Without considering these principles, the Georgia Supreme Court blindly countenanced the jury's verdict. The jury could not discredit Petitioner's statements to police explaining theories of accident and self-defense and infer that the truth was the opposite of his statements "to make up for a shortfall in the sufficiency of the government's evidence." Bailey, 553 F.3d 946-947. Its reliance on Eberhart v. State, 307 Ga. 254 (2019) and Vega v. State, 285 Ga. 32 (2009) was misplaced. Pet. App. 11a. In both cases, the defendant testified at trial. That circumstance is not present here.

"[E]ven if the jury disbelieved the entire defense testimony, that disbelief cannot constitute evidence of the crime charged and somehow substitute for [the essential elements of the crimes of which defendant was convicted]." United States v. Mills, 29 F.3d 545, 550 (10th Cir. 1994) "A crime consists of something more than the mere commission of an act. There must be a union of the act with intention."

Harrell v. State, 108 Ga. App. 295 (1) (1963), citing Owens v. State, 120 Ga. 296, 298-299 (1906). The only thing the State proved was theft of marijuana and a gun.

Additionally, the Georgia Supreme Court's finding of harmless error was flawed. It applied the wrong standard of review when it concluded that the jury would have reached the same verdict even if the trial court had charged the jury on a full instruction on self-defense. Pet. App. 13a. "The inquiry, [however][,] . . . is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." Sullivan v. Louisiana, 508 U.S. 275, 279 (1993). The "necessity and appropriateness of an analysis of [the] defense[]" is a relevant consideration. Hanrahan v. Thieret, 933 F.2d 1328, 1340 n. 29 (7th Cir. 1991).

Since the jury makes credibility determinations, finds the facts and applies the law to the facts, the Georgia Supreme Court improperly usurped the jury's role. Pet. App. 13a. *See*, Sullivan, 508 U.S. at 277 ("The right [to jury trial] includes, . . . as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of 'guilty.'"); Strauss v. United States, 376 F.2d 416, 419 (5th Cir. 1967) ("The judge is the law-giver. . . The jury is the fact-finder.").

STATEMENT OF THE CASE

Petitioner was convicted of armed robbery and felony murder premised on armed robbery (Count 2) in that he "did then and there unlawfully while in the

commission of a felony, to wit: Armed Robbery in violation of O.C.G.A. section 16-8-41, cause the death of Wesley Bryant, a human being by shooting said person with a handgun . . . ." Pet. App. 20a. He was acquitted of malice murder. Pet. App. 1a.

Petitioner requested a written jury charge on accident and the affirmative defense of justification by self-defense. Pet. App. 10a. The trial court refused to charge the affirmative defense of self-defense and only charged accident, relying upon precedent in McClure v. State, 347 Ga. App. 68, 70-71 (2) (2018) (hereinafter "McClure I"), which held that because defendant did not admit to aiming the BB gun at the victims, an element of aggravated assault as charged, he was not entitled to an instruction on any affirmative defense. Id. The trial court found that Petitioner was not entitled to a charge on self-defense since he did not admit to shooting the victim. Pet. App. 10a.

The trial court imposed a sentence of life imprisonment with the possibility of parole on felony murder predicated on armed robbery, merged the aggravated assault and armed robbery counts into that count, and vacated the felony murder count predicated on aggravated assault by operation of law. Pet. App. 1a-2a.

After Petitioner appealed the denial of his motion for new trial, the Georgia Supreme Court affirmed the judgment of his conviction on October 19, 2020. Pet. App. 1a-17a. By that time, the Georgia Supreme Court had vacated McClure I in McClure v. State, 306 Ga. 856 (2019) (McClure II), which held that "a criminal

defendant is "not required to 'admit' anything, in the sense of acknowledging that any particular facts are true, in order to raise an affirmative defense[.]" Id. at 857.

Petitioner argued below that the evidence was insufficient to support the conviction, Count 2 was void *ab initio* for failing to allege the essential elements of armed robbery, the predicate felony, and the trial court erred by refusing to charge justification by self-defense. Pet. App. 1a.

REASONS FOR GRANTING THE PETITION

"An inference is not legally supportable . . . merely because the scenario that it contemplates is remotely possible under the facts. To permit such a standard would be to sanction fact-finding predicated on mere conjecture or guesswork. Proof by inference is sufficient, rather, only if the evidence produces in the mind of the trier [of fact] a *reasonable belief in the probability of the existence* of the material fact." (Emphasis in original; punctuation omitted). State v. Reynolds, 264 Conn. 1, 97 (2003), cert denied, 541 U.S. 908 (2004). A reviewing court must determine whether the evidence supporting a criminal conviction was sufficient to find defendant guilty beyond a reasonable doubt. *See, e.g.*, In re Winship, 397 U.S. 358, 364 (1970). "[C]aution must be taken that the conviction not be obtained by piling inference on inference." (Punctuation omitted). United States v. Jones, 44 F.3d 860, 865 (10th Cir. 1995).

This Court has held that a trier of fact may disregard the testimony of a witness it does not believe, but "the discredited testimony is not considered a sufficient basis for drawing a contrary conclusion." Bose Corp., 466 U.S. at 512 III. *Accord* United States v. Tyler, 758 F.2d 66, 70 n. 3 (2d Cir. 1985); United States v. Reece, 86 F.3d 994, 996 (10th Cir. 1996) ("Mere disbelief of a defendant's testimony is insufficient to carry the government's burden as to [any essential element of the crime charged]."); Grimm v. State, 135 A.3d 844, 859 (Md. 2016) ("[m]any jurisdictions, including Maryland, recognize the doctrine that disbelief of testimony may not alone support a finding in civil and criminal litigation"); People v. Boatman, 221 Cal. App. 4th 1253 (2013) (the prosecution's "burden is not met through mere disbelief of a defendant's denial that he committed the crimes."); Varbel v. Sandia Auto. Elec., 128 N.M. 7 [*11] (1999) ("A finding that the testimony of a witness is not credible does not amount to a finding that the opposite of that witness' testimony is true."); Novak v. Anderson, 178 Conn. 506, 508 (1979) ("While it is true that it is within the province of the jury to accept or reject a defendant's testimony, a jury in rejecting such testimony cannot conclude that the opposite is true . . . . A jury cannot, from a disbelief of a defendant's testimony, infer that a plaintiff's allegation is correct.").

Here, the State failed to controvert a defendant's account of the incident or establish the essential elements of the crimes of which he was convicted, including his criminal intent. The State "offered no supporting evidence that would have

justified an inference that [Petitioner committed the armed robbery and aggravated assault as alleged in the indictment]." State v. Alfonso, 195 Conn. 625, 634-635 (1985).

Since Petitioner did not testify at his trial, "no question is raised about what inferences a jury may rationally draw from its observation of testimony." United States v. Nieves-Castano, 480 F.3d 597, 601 II (A) (1st Cir. 2007), citing United States v. Sanders, 240 F.3d 1279, 1284 (10th Cir. 2001).

This is not a new rule; it equally applies in civil cases. *See*, Moore v. Chesapaeke & Ohio R. Co., 340 U.S. 573, 576 (1951) ("True, it is the jury's function to credit or discredit all or part of the testimony. But disbelief of the engineer's testimony would not supply a want of proof[]"), citing Bunt v. Sierra Butte Gold Mng. Co., 138 U.S. 483, 485 (1891); Kendall v. Daily News Publ. Co., 716 F.3d 82, 97 IV C (3d Cir. 2012) ("The jury's disbelief of the statement's author is not sufficient because a plaintiff must show more than mere disbelief to establish actual malice.").

Under the factual circumstances of this case, the jury could not infer Petitioner's guilt based on a disbelief of a defendant's explanation of the incident, including his defenses of accident and self-defense, without more, to prove his guilt. *See*, United States v. Aulicino, 44 F.3d 1102, 1114-1115 II (C) (2d Cir. 1995) ("A verdict of guilt cannot properly be based solely on the defendant's denial of the

charges and the jury's disbelief of his testimony."). *Compare*, St. Mary's Honor Center v. Hicks, 509 U.S. 502, 510 (1993) ("The factfinder's disbelief of the reasons put forth by the defendant . . . may, together with the elements of the prima facie case, suffice to show intentional discrimination.").

Because there was "no competent evidence to support each fact necessary to make out the State's case[,]" the Georgia Supreme Court was wrong when it held that the "evidence presented at trial was sufficient as a matter of constitutional due process to authorize a rational jury to find Appellant guilty beyond a reasonable doubt of felony murder based on armed robbery." Miller v. State, 273 Ga. 831, 832 (2001). Pet. App. 11a. A rational trier of fact could not have found Petitioner guilty of armed robbery or felony murder premised on armed robbery as alleged in Count 2 beyond a reasonable doubt. Jackson, 443 U.S. at 319 III (B). Armed robbery is not defined as "shooting [Wesley Bryant] with a handgun." Pet. App. 20a. *See*, O.C.G.A. § 16-8-41 (a) ("A person commits the offense of armed robbery when, with intent to commit theft, he . . . takes property of another from the person or the immediate presence of another by use of an offensive weapon[.]"). *Compare*, O.C.G.A. § 16-5-21 (an aggravated assault is an act which "places a victim in reasonable apprehension of immediately receiving a violent injury."). The Court's holding is wrong for many reasons.

Second, "[a]s a general proposition, a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." Mathews v. United States, 485 U.S. 58, 63 (1988). *Accord* Shah v. State, 300 Ga. 14, 22 (2) (b) (2016) (a defendant "may offer dissonant defense theories[]" if the evidence supports the theory); Strauss, 376 F.2d at 419 ("[I]t is elementary law that the defendant in a criminal case is entitled to have presented instructions relating to a theory of defense for which there is any foundation in the evidence.") "The foundation of [a defense] theory may rest upon evidence elicited from government witnesses either on direct or cross-examination." (Citation omitted). United States v. Prieskorn, 658 F.2d 631, 636 II (8th Cir. 1981). "The judge is the law-giver. He decides whether the facts constituting the defense framed by the proposed charge, if believed by the jury, are legally sufficient to render the accused innocent." Strauss, 376 F.2d at 419.

The Georgia Supreme Court's decision fails to recognize settled precedent holding that a defendant has the right to present inconsistent defenses. *See*, Mathews, 485 U.S. at 63-64; Gregoroff v. State, 248 Ga. 667, 670 (1982).

Finally, the Georgia Supreme Court's finding of harmless error was based on hypothesis and rank speculation about what it believed the jury would have found had the trial court instructed the jury on a complete charge on justification by self-defense. Pet. App. 14a. But, "[h]armless error review looks . . . to the basis on which

'the jury *actually rested* its verdict.'" Sullivan, 508 U.S. at 279, citing Yates v. Evatt, 500 U.S. 391, 404 (1991) (emphasis added). The Court "usurp[ed] the sacred obligation of the jury to be the exclusive trier of fact[]" when it concluded that because Appellant was purchasing marijuana, or at least attempting to purchase marijuana when Bryant was shot, "it is highly probable that any error in denying Appellant's request to instruct the jury on justification based on self-defense did not affect the verdicts and was therefore harmless." Pet. App. 15a-16a. Broaddrick v. State, 706 P.2d 534, 538 [*P3] (Okla. Crim. App. 1985) (Parks, P.J., special concurrence).

The jury makes "the ultimate decision whether to accept or reject the offered defense." (Citations omitted). Nance v. State, 838 P.2d 513, 515 [*P9] (Okla. Crim. App.1992). Petitioner's jury was not given the opportunity to decide whether "the acts immediately preceding the allegedly unintentional homicide were intentional, forcible and self-defensive." Koritta v. State, 263 Ga. 703, 705 (1994). "[M]atters of intent are for the jury to consider." McCormick v. United States, 500 U.S. 257, 270 (1992).

Petitioner respectfully requests that this Court grant the writ of certiorari, reverse his felony murder conviction predicated on armed robbery and remand the case to the trial court for findings consistent with this Opinion.

I. The jury was not authorized to reject Petitioner's accident defense where he did not testify and the State failed to produce evidence as to the essential elements of the crimes.

"An essential of the due process guaranteed by the Fourteenth Amendment [is] that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof – defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." Stallings, 28 F.3d at 1023.

"However satisfied a court may be from the witness's demeanor or his demonstrated untruthfulness in other respects that certain testimony is false, it cannot use such disbelief alone to support a finding that the opposite was the fact." Janigan v. Taylor, 344 F.2d 781, 784 (1st Cir. 1965). *Accord* Magidson v. Duggan, 212 F.2d 748, 759 (8th Cir. 1954) ("[T]he giving of such false testimony is substantive proof of nothing."). Likewise, a jury's verdict cannot be sustained when the jury could not judge Petitioner's demeanor on the witness stand.

The Georgia Supreme Court erred in concluding that the jury was authorized to reject Petitioner's accident defense. *See*, United States v. Burgos, 94 F.3d 849, 891 (4th Cir. 1996) (dissenting opinion) (the government "cannot prove its case by negative inferences based on demeanor evidence.") (citation omitted). Petitioner was the only eyewitness to the encounter with Bryant. The State did not present any

evidence to controvert Petitioner's account that the shots were fired accidentally. Nor did it prove that Petitioner intended to rob the victim of marijuana and a gun with a deadly weapon or that he assaulted the victim with a deadly weapon.

"Ordinarily the jury in considering an admission which is partly inculpatory and partly exculpatory, may believe in part and disbelieve in part; and this rule, by the very terms of the statute, is especially applicable to the statement the defendant is allowed to make in his own behalf at the trial." Wall, 5 Ga. App. at 308. "This is not a case in which [Petitioner] testified, so no question is raised about what inferences a jury may rationally draw from its observation of [his] testimony." Nieves-Castano, 480 F.3d at 601 II (A), citing Sanders, 240 F.3d at 1284.

"It is a violation of due process to convict and punish a man without evidence of his guilt." Thompson v. Louisville, 362 U.S. 199, 206 (1960).

A. The Question Presented is Important Because the Federal Circuits are Split as to Whether a Finding of Guilt Can Be Predicated on the Jury's Disbelief of a Defendant's Testimony Alone.

"There is no principled way of deciding when the government's proof, less than enough to sustain the conviction, is nevertheless enough to allow adding negative inferences from the defendant's testimony to fill the gaps." Zeigler, 994 F.2d at 850. This issue has plagued the federal circuits, as they have reached contrary conclusions as to whether an antithesis inference can be drawn from a defendant's

testimony, what weight, if any, may a jury place upon its disbelief of a defendant's testimony in determining a defendant's guilt of the charged crimes, and the amount of evidence needed to corroborate an inference of guilt based on disbelief of a defendant's testimony.

The First, Second, Third, Fourth, Seventh and Tenth Circuits agree that a jury may not infer a defendant's guilt solely from its disbelief of a defendant's testimony or rely on that inference to make up for shortfall in the State's proof. *See*, United States v. Fernandez-Hernandez, 652 F.3d 56, 70 n. 12 (1st Cir. 2011); Aulicino, 44 F.3d at 1114-1115 II (C) ("A verdict of guilt cannot properly be based solely on the defendant's denial of the charges and the jury's disbelief of his testimony."); United States v. Urban, 404 F.3d 754, 782 (3d Cir. 2005) ("discredited testimony is not a sufficient basis for drawing a contrary conclusion."); United States v. Fountain, 993 F.2d 1136 (4th Cir. 1993) ("while [defendant's] evidence may be disbelieved, it contained nothing which, through disbelief, could be converted to positive proof of [the crime of which he was convicted]."); Bankers Life & Casualty Co. v. Guaranty Reserve Life Ins. Co., 365 F.2d 28, 34 (7th Cir. 1966) (disbelief of a witness' testimony "cannot support an affirmative finding that the reverse of his testimony is true, that is, it cannot supply a want of proof.") (citations omitted); Reece, 86 F.3d at 996 ("even if the jury disbelieved the entire testimony presented by the defense, that disbelief cannot constitute evidence of the crime charged[.]").

The Fifth and Eleventh Circuits consider the quality of a defendant's testimony in considering whether the jury can draw an inference of guilt from disbelief of that testimony, together with other corroborating evidence. *See*, United States v. Restrepo-Granda, 575 F.2d 524, 528 (5th Cir.), cert denied, 439 U.S. 935 (1978) (noting that defendant's "inherently improbable story does not provide accused with a plausible explanation for his possession of the cocaine consistent with his innocence"); United States v. McCarrick, 294 F.3d 1286 (11th Cir. 2002) ("in combination with other evidence, the jury's disbelief of a defendant's testimony may be used to establish his guilt.").

On the other hand, the Second and Ninth Circuits do not consider the quality of the defendant's testimony. These circuits hold that "disbelief of a defendant's own testimony may provide at least a partial basis for a jury's conclusion that the opposite of the testimony is the truth. But such belief can provide only partial support; there must also be other objective evidence on the record which buttresses the fact finder's drawing of the opposite inference." United States v. Martinez, 514 F.2d 334, 341 (9th Cir. 1975); United States v. Elsen, 974 F.2d 246, 259 (2d Cir. 1992).

The Eighth Circuit agrees. *See*, United States v. Reed, 297 F.3d 787, 789 (8th Cir. 2002) (noting that the jury may draw inference of guilt from its disbelief of a defendant's denial when other corroborative evidence of guilt exists).

The D.C. Circuit distinguishes between inferences to be drawn from a defendant's demeanor and those to be drawn from a defendant's facially inconsistent or implausible testimony. *See*, Zeigler, 994 F.2d at 849.

Given the circuit split and the lack of any bright-line rule regarding the amount of corroborating evidence to support an antithesis inference, it would be inequitable to allow the jury to infer that the truth is the opposite of a defendant's statements, without more, where defendant did not testify.

II. The Georgia Supreme Court applied the wrong standard of review when it concluded that the trial court's refusal to charge self-defense was harmless error.

This Court has held that "selecting from among conflicting inferences" is "[t]he very essence of [the jury's] function" and has admonished courts not to substitute their own inferences for those drawn by the jury. Tennant v. Peoria P. U. R. Co., 31 U.S. 29, 35 (1944). *See also,* Nesson, Charles R., *Reasonable Doubt & Permissive Inferences: The Value of Complexity*, 92 HARV. L. REV. 1187, 1193 n. 15 (1979) (courts "have been unable to clearly delineate the boundary between "rational inference" and "speculation.").

It was wrong for the Georgia Supreme Court to speculate that the jury's verdict would have been the same had the trial court given the jury a full instruction on self-defense. "[T]o hypothesize a guilty verdict that was never in fact rendered –

no matter how inescapable the findings to support that verdict might be – would violate the jury-trial guarantee." (Citations omitted). Sullivan, 508 U.S. at 279. "The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual finding of guilty." Id. at 280, citing Bollenbach v. United States, 326 U.S. 607, 614 (1946).

The Georgia Supreme Court further erred when it compared Petitioner's accident defense to his justification defense of self-defense, deemed the accident defense to be stronger, and rested its holding on that basis. Pet. App. 13a. The law does not permit the grading of defenses. Only slight evidence is required to support a charge, and a defendant has the right to present inconsistent defenses. *See*, Mathews, 485 U.S. at 63; Gregoroff, 248 Ga. at 670; United States v. Cruse, 805 F.3d 795, 815 II (E) (7th Cir. 2015) (inconsistent defenses are permissible); Arcoren v. United States, 929 F.2d 1235, 1245 (8th Cir. 1991) (same); United States v. Spentz, 653 F.3d 815, 818 II (9th Cir. 2011) (same); United States v. Trujillo, 390 F.3d 1267, 1274 II (10th Cir. 2004) ("a criminal defendant is entitled to instructions on any defense, including inconsistent ones, that find support in the evidence and the law and failure to so instruct is reversible error"); United States v. Smith, 757 F.2d 1161, 1167 IV (11th Cir. 1985) (same); Womack v. United States, 336 F.2d 959 (D.C. Cir. 1964) ("a defendant is entitled to an instruction on any issue fairly

raised by the evidence, whether or not consistent with the defendant's testimony or the defense trial theory.").

> If the trial judge evaluates or screens the evidence supporting a proposed defense, and upon such evaluation declines to charge on that defense, he dilutes the defendant's jury trial by removing the issue from the jury's consideration. In effect, the trial judge directs a verdict on that issue against the defendant. This is impermissible.

Strauss, 376 F.2d at 419.

Moreover, the underlying premise for the Georgia Court's holding was flawed. The charge on self-defense *was not* "inconsistent with the defendant's own account of the events." There was ample evidence to support the charge. Pet. App. 13a. Petitioner's police statement that the victim pulled out a gun and pointed it at him, to which he tried to defend himself by grabbing the victim's hand holding the gun, supported a charge on self-defense. Pet. App. 4a, 8a-10a. Koritta, 263 Ga. at 705 ("Where evidence is presented that a homicide resulted from a reasonable fear in the mind of the defendant that the victim was intending to kill or inflict great bodily harm upon the defendant[,] the issue of justifiable homicide is present."); Printup v. State, 217 Ga. App. 495, 496 (3) (1995) (defendant's testimony that the victim of his aggression "initiated the altercation by jumping on and hitting him and

that he merely tried to push her away" provided some evidence supporting the charge on self defense).

Here, "it was essential to the defense that the jury should be clearly and distinctly advised as to the baring of [Bryant's act of pulling a gun from his side and pointing it at defendant] and the appearance of danger at the moment from defendant's standpoint[.]" Allison v. United States, 160 U.S. 203, 216 (1895). A rational trier of fact could reasonably infer that Bryant's act of brandishing a gun was a threat or menace "sufficient to arouse in Middleton, as a reasonable man, fears for his life or great bodily injury and that he acted from such fears[]" when he grabbed Bryant's gun to prevent injury or death to himself in an obvious attempt to wrest control over same. Facison v. State, 152 Ga. App. 645, 650 (1) (1979). *See also*, O.C.G.A. § 16-5-21 (an aggravated assault is an act which "places a victim in reasonable apprehension of immediately receiving a violent injury").

"[W]here the defendant's proposed charge presents, when properly framed, a valid defense, and where there has been some evidence relevant to that defense adduced at trial, then the trial judge may not refuse to charge on that defense." Strauss, 376 F.2d at 419. Because there was evidence "to support a finding that [a] shooting was either accidental or justified [or both], it [is] for the jury, under proper instruction, to determine the truth from among the conflicting available inferences." Koritta, 263 Ga. at 705. *See also*, Hudson v. State, 284 Ga. 595, 597 (4) (2008)

(defendant's testimony that her husband was threatening her and that she used the knife to force him to get back and she did not mean to stab him and she did not know how the knife became lodged in his chest was evidence that supported an instruction on both self-defense and accident).

Given the jury's acquittal on the malice murder count, the jury must have believed that Bryant's death was the result of an accident, credited Petitioner's statement, and discredited the testimony of the State's witnesses. *See*, Hines, 254 Ga. at 387; *Compare*, McDade v. State, 270 Ga. 654, 657 (5) (1999) ("as the jury believed defendant guilty of malice murder, it could not have believed [the victim's] death to be the result of an accident."). Because there was more than slight evidence to create a doubt as to whether Petitioner's acts were justified by self-defense, and the premise for the trial court's refusal was overruled in McClure II, the Georgia Supreme Court "cannot say that it is highly probable that the trial court's instructional error did not contribute to the verdicts against [Petitioner]." Henry v. State, 307 Ga. 140, 146 (2) (c) (2019). The State's evidence supported the self-defense claim, which Petitioner relied upon when he "laid out his theory of the case – including justification – during opening statement but then was refused jury instructions on these points." Id. Pet. App. 6a-7a.

It was the jury's prerogative to consider whether Petitioner's actions were justified, whether he reasonably believed that Bryant's pointing a gun at him would

result in death or serious bodily injury, whether Petitioner's defensive action was reasonable to prevent death, serious bodily injury or the commission of a forcible felony. O.C.G.A. § 16-3-21 (a). Only the jury could determine whether Petitioner was attempting to commit or committing a felony at the time Bryant pulled out a gun and pointed it at him, not the reviewing court. O.C.G.A. § 16-3-21 (b) (2). *See*, Prieskorn, 658 F.2d at 636 II (jury's task to "evaluate the credibility of the witnesses, the weight to be given their testimony and, following appropriate instructions, the adequacy of appellant's theory of defense."); Bailey, 553 F.3d at 946-947 (credibility determinations and resolving conflicts in the evidence falls within the jury's province, not the reviewing court).

The Georgia Supreme Court erred when it made credibility determinations reserved for the jury in finding harmless error. *See*, Allison, 160 U.S. 203 at (1895). ("it is for the jury, and not for the judge, [to] pass[] upon the weight and effect of the evidence, to determine how [a slight movement may justify instant action because of reasonable apprehension of danger][]"); Banks v. Dretke, 540 U.S. 668, 702 (2004) (Court has "counseled submission of the credibility issue to the jury."); Hanrahan, 933 F.2d at 1340, n. 29; Bailey, 553 F.3d at 946-947.

It further erred when it decided an issue that was not raised and ruled upon below. The trial court did not find that Petitioner was not entitled to a charge on self-defense because he was attempting to commit or committing a felony of the purchase

of marijuana. Rather, the court's refusal to charge was based solely on its reliance upon McClure I and Petitioner's lack of admission to shooting the victim. Pet. App. 10a. "To conform to due process of law, petitioner[] [was] entitled to have the validity of [his] conviction[] appraised on consideration of the case as it was tried and as the issues were determined in the trial court." Cole v. Arkansas, 333 U.S. 196, 202 (1948).

A. The question presented is important because a defendant has a constitutional right to present a complete defense, even if it is inconsistent with other defenses.

"The Fourteenth Amendment prohibits any State from depriving a person of life, liberty or property without due process of law." Meachum v. Fano, 427 U.S. 215, 223 II (1976). "Liberty interests protected by the Fourteenth Amendment may arise from two sources – the Due Process Clause itself and the laws of the States." (Citation omitted). Hewitt v. Helms, 459 U.S. 460, 466 (1983). "[A] person's liberty is equally protected, even when the liberty itself is a statutory creation of the State. The touchstone of due process is protection of the individual against arbitrary action of government[.]" Meachum, 427 U.S. at 226.

"[T]he Constitution guarantees criminal defendants 'a meaningful opportunity' to present a complete defense." (Citation omitted). Holmes v. South Carolina, 547 U.S. 319, 324 (2006); California v. Trombetta, 467 U.S. 479, 485

(1984). Petitioner had a liberty interest to present his self-defense theory to the jury under the Fourteenth Amendment. "A defendant cannot be shortchanged nor his jury trial truncated by a failure to charge." Strauss, 376 F.2d at 419. The trial court's failure to charge a defendant's defense theory necessarily implicates his due process right to present a complete defense. *See*, U.S. Const. amend. XIV; Ga. Const. art. 1, § 1, ¶ 1; Sloan v. Gramley, 2000 U.S. App. LEXIS 8815 II B (1) [*8] ("Where there is evidentiary support for a defendant's theory of self-defense, failure to instruct on self-defense violates a defendant's Fifth and Sixth Amendment rights.") (citation omitted).

III. An argument that the indictment fails to allege the essential elements of a crime within a single count is a challenge to the sufficiency of the indictment.

If there is any ambiguity in an indictment, it should be narrowly construed against the State. *See*, United States v. Gross, 2017 U.S. Dist. LEXIS 172567 ("as between the government and the defendant, the government, being the party that drafts indictments should bear any burden resulting from imprecise language.").

The nomenclature of Count 2 alleged a felony murder based on the predicate felony of armed robbery; however, it did not allege the essential element of armed robbery in that count. Pet. App. 20a. Petitioner argued below that Count 2 was void *ab initio* for failing to state the essential element of armed robbery. Pet. App. 1a.

The Supreme Court rejected the argument and concluded that the argument was a challenge to the form of the indictment, and since Petitioner did not file a special demurrer, the argument was waived on appeal. Pet. App. 12a. This was error.

An indictment's "primary office" is "to inform the defendant of the nature of the accusation against him." Russell v. United States, 369 U.S. 749, 767 (1962). When "[a]n indictment [is] not framed to apprise the defendant with reasonable certainty, of the nature of the accusation against him[,] . . . [it] is defective, although it may follow the language of the statute." Id. at 765.

Count 2 was not framed with reasonable certainty to inform the jury or the defendant about the nature of the charge against him and did not set forth the offense in the words of the armed robbery statute. *See*, O.C.G.A. § 17-7-54 (an indictment that "states the offense in the terms and language of [the applicable Code section] or so plainly that the nature of the offense charged may easily be understood by the jury shall be deemed sufficiently technical and correct."); O.C.G.A. § 16-8-41 (a). It did not "contain[] the essential elements of the offense intended to be charged, [felony murder predicated on armed robbery]," failed to "sufficiently apprise[] the [petitioner] of what he must be prepared to meet, and . . . [did not] allow[] the [petitioner] to show with accuracy to what extent he may plead a former acquittal of conviction in the event of a subsequent prosecution." (Citations omitted). United States v. Saybolt, 577 F.3d 194, 204-205 (3d Cir. 2009). *See also*, United States v.

Hoover, 467 F.3d 496 (5th Cir. 2006) (an indictment "must allege the essential elements of the charged offense"). *Compare*, United States v. Agostino, 132 F.3d 1183, 1189 (II) A (7th Cir. 1997) ("an indictment is sufficient when it sets forth the offense in the words of the statute itself, as long as those words expressly set forth all the elements necessary to constitute the offense intended to be punished."). This is an argument challenging the sufficiency of the indictment based on the defect in Count 2.

Because Count 2 of the indictment does not specifically reference Count 3 or allege the same language in Count 3, the "[a]llegations set forth in [Count 3] . . . cannot be imputed to a separate count, [Count 2][,] absent specific reference to the allegation sought to be imputed." Smith v. Hardwick, 266 Ga. 54, 56 (3) (1995). Pet. App. 20a-21a. "Each count in an indictment is regarded as if it was a separate indictment." Dunn v. United States, 284 U.S. 390, 393 (1932). "Each count of the indictment should be complete within itself." Durden v. State, 152 Ga. 441, 443 (1) (1921). *Accord* State v. Lea, 41 Tenn. 175, 177-178 (1860). This is not a "fussy technicality." Everhart v. State, 337 Ga. App. 348, 354 (3) (a) (2016). "There can be no conviction for the commission of a crime an essential element of which is not charged in the indictment." Id. at 355 (3) (a). *See also*, State v. Wilson, 318 Ga. App. 88, 91 n. 10 (2012) ("[A] person cannot be lawfully convicted on an invalid indictment.").

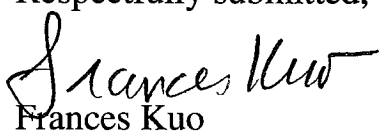
"Conviction upon a charge not made would be sheer denial of due process." DeJonge v. Oregon, 299 U.S. 353, 362 (1937). Petitioner's felony murder conviction predicated on armed robbery was a nullity and must be vacated. O.C.G.A. § 17-9-4 ("The judgment of a court . . . . [that is] void for any other cause, is a mere nullity and may be so held in any court when it becomes material to the interest of the parties to consider it."). The Georgia Supreme Court erred in finding otherwise.

CONCLUSION

The petition for a writ of certiorari should be granted.

This 15th day of April, 2021.

Respectfully submitted,



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