STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

WAYNE GARY POLITE

APPELLANT

APPELLATE CASE NO 2015-001843

Appeal from Charleston County

Deadra L. Jefferson, Circuit Court Judge

Opinion No. 2017-UP-021

PETITION FOR REHEARING

On January 11, 2017, this Court affirmed Appellant's conviction for obtaining property valued at ten thousand dollars or more by false pretenses in a *per curiam* unpublished opinion. State v. Polite, Op. No. 2017-UP-021 (S.C. Ct. App. filed Jan. 11, 2017). Pursuant to Rule 221(a), SCACR, Appellant respectfully requests this Court rehear both issues presented on appeal based on significant facts overlooked by this Court in arriving at its conclusions and an apparent misapprehension of how the controlling case law applies to the facts presented.

This Court's rationale to affirm Appellant's conviction is difficult to discern from the opinion due to its brevity. Appellant will endeavor to determine how this Court applied the law

cited in the opinion to the facts presented at Appellant's trial, and in doing so, illustrate how this Court overlooked and/or misapprehended certain facts and the application of the law to those facts.

Right to self-representation

In affirming the trial judge's refusal to permit Appellant to exercise his state and federal constitutional right to self-representation, this Court cited several authorities with parentheticals of the applicable principles of law derived from those cases. Based upon the parentheticals, it appears this Court determined the trial judge's refusal to allow Appellant to proceed *pro se* was sound for a variety of reasons. Appellant will address each of those in turn.

The law governing one's right to self-representation regard is quite clear: a criminal defendant "has the constitutional right to represent himself under both the federal and state constitutions." State v. Barnes, 407 S.C. 27, 35, 753 S.E.2d 545, 550 (2014) (citing State v. Starnes, 388 S.C. 590, 698 S.E.2d 604 (2010)); see also State v. Winkler, 388 S.C. 574, 586, 698 S.E.2d 596, 602 (2010)(explaining "[a]n accused may waive the right to counsel and proceed pro se" and "[t]he request to proceed pro se must be clearly asserted by the defendant prior to trial").[1] "The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense." Faretta v. California, 422 U.S. 806, 819 (1975). "That right must be preserved even if the court believes that the defendant will benefit from the advice of counsel." State v. Fuller, 337 S.C. 236, 241, 523 S.E.2d 168, 170 (1999)(citing United States v. Singleton, 107 F.3d 1091 (4th Cir. 1997)). In fact, even if the decision to proceed *pro se* is to the defendant's detriment, the decision "must be honored out of that respect for the individual

[1] The South Carolina Constitution explicitly provides for the right of self-representation: "Any person charged with an offense shall enjoy the right ... to be fully heard in his defense by himself or by his counsel or by both." S.C. Const. Art. I, § 14.

which is the lifeblood of the law." Faretta, 422 U.S. at 834; see also State v. Brewer, 328 S.C. 117, 119, 492 S.E.2d 97, 98 (1997). "So long as the defendant makes his request prior to trial, the *only* proper inquiry is that mandated by Faretta." Barnes, 407 S.C. at 35, 753 S.E.2d at 550 (emphasis added).

"When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel." Faretta, 422 U.S. at 835. Thus, the decision to proceed *pro se* must be made knowingly, intelligently, and voluntarily. Id. "The ultimate test of whether a defendant has made a knowing and intelligent waiver of the right to counsel is not the trial judge's advice, but the defendant's understanding." Brewer, 328 S.C. at 119, 492 S.E.2d at 98 (citing Graves v. State, 309 S.C. 307, 422 S.E.2d 125 (1992)). "A determination by the trial judge that the accused lacks the expertise or technical legal knowledge to proceed *pro se* does not justify a denial of the right to self-representation; the only relevant inquiry is whether the accused made a knowing and intelligent waiver of the right to counsel." Id. "A decision can be made intelligently, with an understanding of the consequences, without the decision itself being a wise one." Id. at 120, 492 S.E.2d at 99.

"Under Faretta, the trial judge has the responsibility to make sure that the defendant is informed of the dangers and disadvantages of self-representation, and that he makes a knowing and intelligent waiver of his right to counsel." Barnes, 407 S.C. at 36, 753 S.E.2d at 550; see also State v. Dixon, 269 S.C. 107, 236 S.E.2d 419 (1977) (explaining "it is the responsibility of the trial judge to determine whether there is or is not an intelligent and competent waiver"). "Faretta requires that a defendant 'be made aware of the dangers and disadvantages of self-representation so that the record will establish he knows what he is doing and his choice is made with eyes open.'" Wroten v. State, 301 S.C. 293, 294, 391 S.E.2d 575, 576 (1990)(quoting Faretta, 422 U.S. at 835). "To

establish a valid waiver of counsel, Faretta requires the accused be: (1) advised of his right to counsel; and (2) adequately warned of the dangers of self-representation." Prince v. State, 301 S.C. 422, 423-424, 392 S.E.2d 462, 463 (1990).

According to the South Carolina Supreme Court, "a specific inquiry by the trial judge expressly addressing the disadvantages of a *pro se* defense is preferred." Id. The trial judge must "make a meaningful inquiry into [a defendant's] background to determine whether [the defendant] had sufficient experience or knowledge to waive counsel." Watts v. State, 347 S.C. 399, 403, 556 S.E.2d 368, 371 (2001). However, "[t]he ultimate test of whether a defendant has made a knowing and intelligent waiver of the right to counsel is the defendant's understanding." State v. Reed, 332 S.C. 35, 41, 503 S.E.2d 747, 750 (1998). The United States Supreme Court held that when a defendant requests to proceed *pro se*, "a judge must investigate as long and as thoroughly as the circumstances of the case before him demand." Von Moltke v. Gillies, 332 U.S. 708, 723-724 (1948). "To be valid such a waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter." Id. at 724. Thus, a judge must make "a penetrating and comprehensive examination of all the circumstances." Id.

"The judicial inquiry and educative effort concerning the importance of legal representation that must necessarily precede any knowing and intelligent waiver of counsel cannot be cursory or by-the-way in nature." United States v. Belanger, 936 F.2d 916, 918 (7th Cir. 1991). At a minimum, a court must inform a defendant "of the crimes with which he was charged, the nature of those charges, and the possible sentences they carry." Id. Also, "a defendant should be made aware

of the 'difficulties he would encounter in acting as his own counsel.'" Id. at 919 (quoting United States v. Moya-Gomez, 860 F.2d 706, 733 (7th Cir. 1988)).

Clear & unequivocal invocation

To the extent, this Court determined Appellant's assertion of his right was not clear and unequivocal, Appellant respectfully requests this Court's decision is based upon a misapprehension of the facts in the record. Prior to the trial, Appellant moved to relieve trial counsel. R. 6, ll. 5-8. To support his request, Appellant explained that he had requested trial counsel subpoena certain witnesses, and trial counsel had failed to do so. R. 6, ll. 10-12; R. 7, ll. 7-12. The judge responded that trial counsel would make "the decision about who gets called as a witness," not Appellant. R. 7, ll. 13-23. When Appellant said he did not want trial counsel as his advocate, the judge wanted to know why. R. 10, ll. 1-3. Appellant explained he did not "have confidence in him" and as a result, there were "certain things" Appellant could not share with him. R. 10, ll. 4-5; see also, R. 27, l. 25 – R. 28, l. 6. Thereafter, the judge asked why Appellant had not hired someone, and Appellant explained he had been in jail, which made hiring someone difficult, but that he had been working on it. R. 10, ll. 9-16.

During this colloquy, Appellant invoked his constitutional right to self-representation, and the judge agreed he had a right to self-representation. R. 11, ll. 3-6. Appellant **clearly and unequivocally invoked** his right to self-representation when the judge told him his only options were to either be represented by trial counsel or to represent himself. R. 11, l. 9 – R. 12, l. 2. Rather than engaging in the proper inquiry as required by law, the judge voiced her opinion that such a choice was not "such a good idea." R. 11, l. 9 – R. 12, l. 2. While Appellant agreed it was not a good idea due to his limited ability to conduct legal research in the jail, he did not waver from his

desire to represent himself. R. 11, l. 9 – R. 12, l. 2; R. 21, l. 22 – R. 22, l. 4; R. 34, l. 24- R. 35, l. 1; R. 35, ll. 1-6.

Knowing, intelligent, and voluntary invocation

To the extent, this Court determined Appellant's assertion of his right was not knowing, intelligent, and voluntary, Appellant respectfully requests this Court's decision is based upon a misapprehension of the facts in the record. While the Court failed to engage in an adequate colloquy with Appellant in regard to his desire to proceed pro se, as discussed *infra*, evidence in the record revealed Appellant's request for self-representation was made knowingly, intelligently, and voluntarily.

"In the absence of a specific inquiry by the trial judge addressing the disadvantages of a *pro se* defense as required by the second Faretta prong, [the reviewing court] will look to the record to determine whether [the defendant] had sufficient background or was apprised of his rights by some other source." Prince, 301 S.C. at 424, 392 S.E.2d at 463. In other words, "[i]f the record demonstrates the defendant's decision to represent himself was made with an understanding of the risks of self-representation, the requirements of a voluntary waiver will be satisfied." Wroten, 301 S.C. at 294, 391 S.E.2d at 576.

According to this Court, a variety of factors may be considered by a reviewing court when determining if an accused has sufficient background to comprehend the dangers of self-representation, including:

> (1) the accused's age, educational background, and physical and mental health; (2) whether the accused was previously involved in criminal trials; (3) whether the accused knew the nature of the charge(s) and of the possible penalties; (4) whether the accused was represented by counsel before trial and whether that attorney explained to him the dangers of self-representation; (5) whether the accused was attempting to delay or manipulate the proceedings; (6) whether the court appointed stand-by counsel; (7) whether the accused knew he would be required to comply with the rules of procedure at trial; (8) whether the accused knew the legal

> challenges he could raise in defense to the charge(s) against him; (9) whether the exchange between the accused and the court consisted merely of *pro forma* answers to *pro forma* questions; and (10) whether the accused's waiver resulted from either coercion or mistreatment.

In re Christopher H., 359 S.C. 161, 167-168, 596 S.E.2d 500, 504 (Ct. App. 2004).

Appellant had significant contacts with the criminal justice system as indicated by his criminal record. R. 211, l. 3 – R. 213, l. 15; R. 42, ll. 13 – R. 48, l.2. In fact, Appellant entered a guilty plea just two years prior to this trial. R. 44, l. 24 – R. 45, l. 1. Appellant was forty-three years old at the time of the trial. R. 267. The record revealed Appellant had prior work experience, including fixing computers and printers, loading trucks, and running trucking routes. R. 154, ll. 4-7; R. 165, ll. 2-24. Thus, the evidence in the record, albeit limited due to the judge's failure to engage in the proper inquiry, pointed to Appellant's invocation as knowing, intelligent, and voluntary.

Timely invocation

To the extent, this Court determined Appellant's assertion of his right was not timely, Appellant respectfully requests this Court's decision is based upon a misapprehension of the facts in the record. Appellant respectfully requests this Court review the facts in the record that support Appellant's contention that his request for self-representation was not for purposes of delay, disruption, distortion, or manipulation.

Appellant's request was timely. See Fuller, 337 S.C. 236, 241, 523 S.E.2d 168, 170 (1999)(declining "to hold that a motion to proceed *pro se* made on the day of trial, but before the commencement of trial proceedings, is either timely or untimely as a matter of law" and recognizing the "variety of reasons which might excuse a last minute request by a defendant to proceed *pro se*"). Just as in Fuller, Appellant's request to proceed *pro se* "was made in an atmosphere of his escalating dissatisfaction with his attorney" and Appellant "complained to the trial court that his counsel had been ineffective in preparing for trial." See id. at 242, 523 S.E.2d at 171. Appellant's

"purpose in making the request was not to delay or stall the proceedings, but rather to address his growing concerns about his attorney." See id.

Adequate hearing

To the extent, this Court determined the trial court conducted an adequate hearing to fully assess the purpose of Appellant's request and assess the effect of granting the request, Appellant respectfully requests this Court's decision is based upon a misapprehension of the facts in the record and of the law regarding the scope of the inquiry when an individual invokes his right to self-representation.

The inquiry that followed Appellant's request had little do to with the *only* inquiry that mattered – whether Appellant was making a knowing and voluntary decision to waive his right to counsel. Instead, the judge focused on whether trial counsel had provided ineffective assistance during the investigative phase of the case. Although the judge agreed with Appellant that he had a constitutional right to self-representation and advised Appellant that waiving counsel was not "such a good idea," the judge did little else to ensure Appellant could make an intelligent and voluntary waiver. Rather, the judge turned her attention to Appellant's complaints against trial counsel and his efforts and ability to retain private counsel. The trial judge's error is clear in her ruling that she had "not heard any bases to relieve" trial counsel and had "not heard anything that amounts to ineffective assistance of counsel." R. 31, ll. 18-23; see also R. 35, ll. 7-11 (where the trial judge held Appellant had not provided "any independent information" to "justify" "relieving an attorney who is prepared and ready to go forward"). Appellant was under no obligation to present a basis to relieve counsel or to present evidence of ineffective assistance in order to exercise his constitutional right to self-representation. The trial judge erred and violated Appellant's constitutional rights pursuant to the federal and state constitutions to represent himself in criminal proceedings.

When the judge ordered Appellant to provide trial counsel with the names of potential character witnesses, Appellant again informed the judge that he did not want trial counsel as his representative. R. 21, l. 22 – R. 22, l. 4. The judge responded:

> I've already made the decision, sir, that your motion is denied. You've not provided the Court with any information that would amount to him being ineffective or his inability to be prepared to go forward in trial, and you have not made any efforts, at least that you have been able to provide the Court with independent corroboration, that you have made any attempts to obtain new counsel, and at this point your actions appear to the Court to be dilatory in nature.

R. 22, ll. 5-15.

Appellant responded that he wanted to do his best to fight for his rights. R. 34, l. 24- R. 35, l. 1. All he wanted was "a fair chance and a fair opportunity." R. 35, ll. 1-2. While trial counsel "might be a great lawyer for someone else," he was not the right lawyer for Appellant. R. 35, ll. 3-6. To Appellant's continued request, the judge responded that Appellant had not provided "any independent information ... that would justify ... relieving an attorney who is prepared and ready to go forward." R. 35, ll. 7-11. When Appellant tried to argue his point further, the judge instructed him, "There is no further argument once the Court has ruled." R. 36, ll. 2-9. Despite Appellant's continued refusal to accept the judge's ruling, the judge instructed Appellant that trial counsel was "going to be representing him." R. 37, ll. 5-6.

The trial judge failed to follow the law in response to Appellant's clear and unequivocal invocation of his right to self-representation. Instead of advising Appellant of the dangers and disadvantages of self-representation, the judge placed the burden on Appellant to provide reasons to relieve counsel, and even went so far as to require those reason to amount to ineffective assistance of counsel. The right to self-representation does not hinge upon one's ability to show counsel's representation is inadequate. Rather, the right to self-representation must be honored with no regard

to the ability of counsel to represent the individual. The judge failed to engage in the proper colloquy regarding Appellant's invocation.

Appellant respectfully requests this Court rehear the issue presented regarding his right to self-representation based on the significant facts overlooked and this Court's misapprehension of the case law, particularly governing the adequacy of a trial judge's hearing when a defendant invokes his right to proceed *pro se*.

Jury instruction – lesser-included offense

In affirming the trial judge's decision not to charge the jury regarding the lesser-included offense, this Court cited Sellers v. State, 362 S.C. 182, 189, 607 S.E.2d 82, 85 (2005), for the proposition that "[a] [trial court] is only required to charge a jury on a lesser-included offense if evidence exists that suggests that the lesser, rather than the greater, crime was committed." While this is a correct statement of the law, this Court's construction and application of the statement to Appellant's case is too narrowly drawn. This Court failed to consider the statement within the context of the well-known principle that a defendant is entitled to a jury charge on the lesser-included offense when there is *any* evidence in the record to support the lesser-charge. Appellant respectfully requests rehearing on this matter in light of this Court's misapprehension of the applicable law and the facts overlooked in the record.[2]

---

[2] In his brief, Appellant argued the lesser statutory valuations constituted lesser-included offenses. This Court's opinion appeared to agree; however, if Appellant is wrong, Appellant respectfully seeks rehearing on this matter based on the legal analysis in the brief, and discussed succinctly here. Application of the "same elements" test and consideration of legislative intent reveals the greater offense of obtaining property valued at $10,000 or more includes all of the elements of the lesser offenses. See State v. Primus, 349 S.C. 576, 579-580, 564 S.E.2d 103, 105 (2002); Charleston County Sch. Dist. v. State Budget and Control Bd., 313 S.C. 1, 5, 437 S.E.2d 6, 8 (1993).

The statute under which Appellant was charged provided for three valuation levels of the property obtained by false pretenses. The first level, and the one provided for in the indictment, concerned property valued at ten thousand dollars or more. S.C. Code Ann. § 16-13-240(1). The second level provided for property valued at "more than two thousand dollars but less than ten thousand dollars." S.C. Code Ann. § 16-13-240(2). Finally, the third level dealt with property valued at two thousand dollars or less. S.C. Code Ann. § 16-13-240(3).

Corresponding with the varying valuations, the statute provided for varying punishments. For example, a person convicted of obtaining property valued at ten thousand dollars or more by false pretenses could be sentenced up to ten years. S.C. Code Ann. § 16-13-240(1). A person convicted of obtaining property valued between two thousand dollars and $9,999 could be imprisoned not more than five years. S.C. Code Ann. § 16-13-240(2). And, finally, a person convicted of obtaining property valued less than two thousand dollars was subject to a fine or up to thirty days' imprisonment. S.C. Code Ann. § 16-13-240(3).

The "any evidence" standard

A jury charge to a lesser-included offense is required when the evidence warrants such an instruction. State v. Geiger, 370 S.C. 600, 606, 635 S.E.2d 669, 673 (Ct. App. 2006). South Carolina law **mandates** a jury instruction on a lesser-included offense when there is **any** evidence from which it could be inferred that the lesser, rather than the greater, offense was committed. State v. Watson, 349 S.C. 372, 375, 563 S.E.2d 336, 337 (2002); see also State v. Gourdine, 322 S.C. 396, 398, 472 S.E.2d 241, 241 (1996). In other words, the evidence must allow "a rational inference" that the defendant committed the lesser offense. Geiger, 370 S.C. at 607, 635 S.E.2d at 673. In determining whether such a rational inference exists the court must examine the totality of evidence. Id. As this Court explained in State v. Patterson, 337 S.C. 215,

233, 522 S.E.2d 845, 854 (Ct. App. 1999), "[i]n order to justify a charge of a lesser included offense, the evidence must be capable of sustaining either the greater or the lesser offense, depending on the jury's view of the facts."

Affirming the trial judge's decision, this Court cited Sellers, supra, for the proposition that a trial court is "only required to charge a jury on a lesser-included offense if evidence exists that suggest that the lesser, rather than the greater, crime was committed." This Court's interpretation of this statement seems to indicate that only if the evidence shows the defendant committed the lesser offense, **and not the greater offense**, would the defendant be entitled to the charge on the lesser offense. This simply cannot be, and is not, the case. The rule is not that the judge must instruct the jury on the lesser-included offense when the evidence indicates *only* the lesser offense was committed because if the evidence indicated only the lesser-included offense were committed, then the judge would be obligated to direct a verdict on the greater offense and send only the lesser offense to the jury.

While Sellers, certainly states exactly what this Court said, the statement must be read to be consistent with the long-standing rule in South Carolina that a person is entitled to a jury charge on the lesser-included offense when there is **any** evidence in the record to support the lesser offense. Sellers cited to State v. Gourdine, 322 S.C. 396, 398, 472 S.E.2d 241, 242 (1996), to support this statement. According to Gourdine, "[t]he trial judge is to charge the jury on a lesser included offense if there is **any** evidence from which it could be inferred the lesser, rather than the greater, offense was committed." Gourdine, 322 S.C. at 398, 472 S.E.2d at 242 (emphasis added). Placing Sellers in the proper context reveals the proposition cited by this Court must not be so narrowly construed. Rather, this Court must read Sellers to permit a jury

instruction on a lesser-included offense where **any** evidence in the record permits the jury to infer the lesser offense was committed.

During the charge conference, Appellant requested "something regarding the dollar amount controversy." R. 218, ll. 20-21. The judge responded, "That's a penalty provision. It's not for the jury to decide." R. 218, ll. 23-24. The judge continued that "[t]he only instructions that are regarding money in the statute deals with penalty and you would never instruct penalty to the jury. That's not within their province." R. 219, ll. 4-7. Appellant clarified that he was requesting the jury be instructed as to the lesser-included offense, which would be based upon the lesser value. R. 219, ll. 8-9. The judge responded,

> The only way they can find him guilty is that the state establishes - - the only way they will be able to meet the elements of the offense, if he's found guilty by virtue of that, they would have proven that it was $10,000, or more. And that's the only evidence in the record as to the value of the car. There is no other testimony in the record regarding the value of the chattel.

R. 219, ll. 14-22. Appellant noted the testimony that the car was an "older model." R. 220, ll. 23-24. The judge responded there had been "no testimony as to Blue Book value." R. 220, ll. 9-10. The judge ruled that "[t]he only evidence in the record that's uncontroverted is that the value of the car was $10,000." Thus, she refused to charge the jury as to the lesser-included offense. R. 220, ll 12-19.

As an initial matter, the judge's ruling that the valuation portions of the statute were not matters for the jury's consideration was an error of law. It is clearly established that any question of fact that increases the penalty for a crime must be determined by a jury. Apprendi v. New Jersey, 530 U.S. 466, 490 (2000). Thus, to the extent the judge relied upon her misapprehension that the property values contained within the statutory provisions were "not

within [the jury's] province" in making her decision not to charge the jury concerning the lesser-included offenses, her ruling was an error of law.

There were at least two pieces of evidence before the jury to support an instruction on the lesser-included offense based on the car's value. First, the recorded telephone conversations between Appellant and Love supported valuation of $800 for the car. Although Love testified the car that was the topic of the conversation was not the car at issue in the case, the state argued to the jury that Love lied in her testimony and that the car that was discussed by Love and Appellant was the car sold to him by East Coast Sports and Imports. Thus, a reasonable inference from the evidence was that the car discussed by Love and Appellant during the recorded conversation was the 2004 BMW X3 purchased from East Coast Sports and Imports.

Second, the document showing conditional approval of the financing agreement, which was an exhibit admitted by the state, indicated the financing company valued the car at $8,875.00 as a "clean trade-in." R. 264. The term "clean trade-in" is a common term used in the sale of used cars meaning the value of the car if in good condition. Thus, the value of the car according to the financing company was below the $10,000 threshold of the greater offense. The state should not be permitted to present evidence of a lesser value – in the form of the exhibit from the financing company and the recorded telephone conversations – and then run from such evidence when it does not support the state's theory.

Furthermore, Tursi testified that he had purchased the car for $10,000, which was the very lowest valuation of the greater offense. Thus, it would not be unreasonable for a jury to believe that Tursi had paid too much for the car – even just one dollar too much. This would be especially unsurprising to a juror who recognized that Tursi had sold the car to Appellant even before Tursi owned the car. In other words, Tursi knew how much he would make from the car,

and it would not be unreasonable for him to be willing to pay a few dollars more for the car in light of his promised profit margin. This reasoning coupled with trial counsel's argument to the jury that the value of the car was probably less than $10,000 based upon one of the most important factors for valuation of cars known to all jurors – the age. The BMW at issue was ten years old at the time of the sale and its value was likely much less than the $10,000 claimed by the state.

Relying upon her misapprehension of the law concerning the jury's "province," the trial judge ignored evidence in the record supporting charging the jury on the lesser-included values of the property. Not only could the jury use its common sense to determine the car was valued at less than $10,000, which was the price paid by the car dealer on the date after he sold it to Appellant, the jury could have relied upon the evidence that the financing company valued the car at less than $10,000 and the conversation between Appellant and Love that the car was worth only $800. This evidence required charging the jury on the lesser-included offenses.

Pursuant to Rule 221(a), SCACR, Appellant respectfully requests rehearing on this matter due to this Court's misapprehension of the facts and the law that support reversal. Appellant was entitled to a jury instruction on the lesser-included offense because the evidence presented supported a finding by the jury that the car was valued at less than $10,000. The trial judge erred as a matter of law in determining the valuation was not within the province of the jury. This Court erred in construing Sellers too narrowly – the law is not that a defendant is entitled to a jury instruction on a lesser-included when the evidence shows only the lesser-included offense could have been committed to the exclusion of the greater offense. Rather, the law provides that a defendant is entitled to such an instruction when the evidence shows the lesser-included offense could have been committed.

For the above-stated reasons, Appellant respectfully requests rehearing on both issues presented on appeal due to this Court's misapprehension of the governing case law and the significant record facts overlooked by this Court in arriving at its conclusions.

Respectfully Submitted,

Susan B. Hackett

SUSAN B. HACKETT
Appellate Defender

This 26th day of January, 2017.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Deadra L. Jefferson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

WAYNE GARY POLITE

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon William M. Blitch, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Wayne Gary Polite, at 4420 Oakwood Avenue, Lot 9, North Charleston, SC 29405, this 26th day of January, 2017.

Susan B. Hackett
Susan B. Hackett
Appellate Defender
ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 26th day of January, 2017.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.