ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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THE STATE,

RESPONDENT,

V.

DENNIS ELVIN CERVANTES-PAVON,

APPELLANT

APPELLATE CASE NO 2015-002472

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RECEIVED
JUL 13 2017
SC Court of Appeals

Appeal from Charleston County

Kristi Lea Harrington, Circuit Court Judge

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Opinion No. 2017-UP-258

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PETITION FOR REHEARING

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On June 28, 2017, this Court affirmed Appellant's conviction and sentence in an unpublished opinion. State v. Cervantes-Pavon, 2017-UP-258 (S.C. Ct. App. filed June 28, 2017). Pursuant to Rule 221(a), SCACR, Appellant respectfully requests this Court rehear the matter based on the significant points overlooked and/or misapprehended by this Court in rendering its decision. These points are discussed in greater detail below. Perhaps of greatest concern, but not to the exclusion of other concerns, was this Court's failure to address the trial judge's application of the incorrect burden of proof when rendering her ruling.

In affirming the lower court's decision to deny Appellant immunity from prosecution, this Court cited and quoted the relevant statutory provisions and controlling case law. Although this Court provided no analysis to explain how it applied the relevant statutes and case law to the facts presented, Appellant must assume this Court's analysis overlooked and/or misapprehended significant points either in the governing law or in the facts presented at trial. Therefore, Appellant will review the necessary facts and case law again to demonstrate why the trial judge erred in her ruling that Appellant was not entitled to immunity from prosecution.

After being charged with murder, Appellant sought immunity from prosecution pursuant to the Protection of Persons and Property Act (hereinafter, the "Act"). R. 8, ll. 6-20; R. 375-376. At the conclusion of the pre-trial hearing to determine whether Appellant was entitled to immunity, Judge Harrington denied Appellant's request. According to the judge, in order for the Act to apply, "[t]here must be an absence of aggression." R. 72, ll. 12-14. The judge construed the testimony as showing "there had been a mutual confrontation." R. 72, ll. 16-17. She relied heavily upon the testimony of one witness, Jose Somosa, whose she interpreted showed that Appellant and Muniz "had discarded the tools" and at the time of the stabbing, Muniz was unarmed. R. 72, ll. 17-20. The judge also noted that the witness "believed" that Muniz and Appellant "were merely wrestling." R. 72, ll. 20-21.

Thus, the judge denied the motion for immunity and concluded the issue of self-defense was for the jury. R. 72, ll. 22-23. According to the judge, "[t]he intent of the Act is for defensive not offensive protections." R. 72, ll. 12-13. The judge explained she did "not believe the testimony [rose] to the level *beyond a preponderance of the evidence* to grant the immunity designed by the legislature to protect someone from criminal prosecution." R. 72, l. 23 – R. 73, l. 1 (emphasis added). It was this erroneous ruling that this Court affirmed in its recent decision.

First, the trial judge applied the wrong burden of proof. Second, the trial judge's ruling overlooked the undisputed evidence presented during the hearing. Finally, the trial judge erred in her application of the law.

In August of 2014, the Belk Department Store in Mount Pleasant, South Carolina, was undergoing remodeling of its women's store. R. 208, ll. 15-18. Frisch and Associates was the lead contractor on the job. R. 208, ll. 10-18. Short on labor, Frisch and Associates engaged subcontractors for some of the work. R. 209, ll. 9-13. C.D. Contractors out of Richmond, Virginia, was one of the sub-contracting companies. R. 209, ll. 2-12. Herbie Evans was the superintendent over the construction site at Belk for Frisch and Associates. R. 10, ll. 16-22; R. 13, ll. 16-19. Appellant and Raymond Muniz, who worked for C.D. Contractors and traveled to South Carolina for the work, reported to Evans. R. 10, l. 23 – R. 11, l. 1; R. 46, ll. 3-20; R. 208, l. 19 – R. 209, l. 3. Problems soon developed between Appellant and Muniz.[1]

About a week before the stabbing, Appellant and Muniz fought when Muniz snatched a broom from him. R. 35, l. 21 – R. 36, l. 9; R. 47, ll. 4-10; R. 294, ll. 1-6. On another day, Appellant tried to inform his boss of Muniz's threats, but the boss was not in his office. R. 47, ll. 17-20; R. 294, ll. 10-14. Seizing the opportunity, Muniz first checked to ensure no security cameras were monitoring, and then, he began to physically assault Appellant. R. 47, l. 25 – R. 48, l. 2; R. 294, ll. 14-18. Thereafter, Muniz continued his campaign against Appellant by calling him a "faggot" and threatening to kill him. R. 48, ll. 4-11.

During the evening, on August 12, 2015, Muniz accosted Petitioner at the hotel where the C.D. Contractors employees were staying. R. 18, l. 23 – R.1 9, l. 4; R. 19, ll. 3-12; R. 28, l. 25 – R. 29, l. 3; R. 36, ll. 10-13; R. 296, ll. 1-14. Muniz removed his shirt and tried to fight

[1] Raymond Muniz confided in his friend and co-worker, Travis Flowers, that there was bad blood between Appellant and Muniz. R. 118, ll. 16-20.

Appellant. R. 296, ll. 11-14. Appellant moved away to avoid the confrontation. R. 19, ll. 9-10; R. 20, ll. 12-13; R. 36, ll. 17-19; R. 296, ll. 11-14. In light of these incidents, Muniz's much larger size and greater strength, and Muniz's campaign of harassment, Appellant was terrified. R. 296, l. 18 – R. 297, l. 2.

Around 9 a.m. on August 13, 2014, Muniz's friend and co-worker approached Appellant, getting "on top of him like he wanted to hit" Appellant. R. 49, ll. 10-18; R. 296, ll. 1-8.[2] During the work day, Jose Somosa, another construction worker from Virginia, and Appellant were framing a wall. R. 20, ll. 17-24. Appellant was up on the ladder while Somosa was on the ground acting as Appellant's helper. R. 20, l. 25 – R. 21, l. 9. Muniz was in the same area working on the concrete floors. R. 21, ll. 10-11. Every time Muniz passed Appellant, who was standing ten feet off the ground on a ladder, Muniz would taunt him about fighting. R. 21, ll. 12-21; R. 36, l. 24 – R. 37, l. 7. Appellant responded that he did not want any trouble. R. 21, ll. 22-24.

At lunch, Flowers and Muniz threatened Appellant at the entrance to the worksite. R. 299, l. 25 – R. 300, l. 3. Shortly after 1 p.m., Appellant went to his boss, Herbie Evans, to report his problems with Muniz. R. 12, ll. 15-23; R. 12, l. 24 – R. 13, l. 3; R. 14, ll. 4-13; R. 50, ll. 17-22; R. 210, l. 5 – R. 211, l. 7; R. 299, ll. 4-17. Appellant was "terrified, afraid." R. 51, ll. 1-3. Appellant asked Evans to intervene. R. 12, ll. 21-23. Evans did so only by speaking with Muniz about his conduct. Specifically, Evans told Muniz that he "would not allow conflict or any problems on the project ... and if there was going to be conflict between any employees that

[2] According to Travis Flowers, he confronted Appellant around noon to ask if he were talking trash about him in Spanish because Muniz had informed him that Appellant was doing so. Appellant denied saying anything about Flowers and told him he had no problems with him. R. 120, l. 12 – R. 121, l. 8.

[Evans] would immediately send them home." R. 13, ll. 8-1; see also R. 210, l. 14 – R. 210, l. 4. Evans also told Appellant that he would not tolerate conflict at work. R. 14, l. 24 – R. 15, l. 12. Although Evans called attention to Muniz's harassment, Muniz was undeterred. R. 51, ll. 4-9. The threats continued into the afternoon. R. 51, ll. 15-17. While Appellant remained up on the ladder, Muniz threatened him with a pipe. R. 51, ll. 21-25.

At the end of the work day, Appellant got down from the ladder where he was framing a wall. Muniz, who was taller and bigger than Appellant, continued his taunts by suggesting they take it "outside," but Appellant refused. R. 22, ll. 15-18; R. 24, ll. 15-18. Muniz approached him with a pipe, and Appellant grabbed another pipe for protection. R. 22, ll. 3-14; R. 23, ll. 13-17; R. 37, l. 25 – R. 38, l. 4; R. 38, ll. 11-13; R. 52, ll. 3-6; R. 52, l. 6; R. 297, ll. 19-24; R. 298, ll. 1-4; R. 302, ll. 4-8.[3] As Appellant walked by Muniz, which was necessary in order for him to get his tools and to leave the building, Muniz swung the metal at him twice, striking him. R. 52, ll. 6-7; R. 298, ll. 5-6; R. 299, l. 23 – R. 300, l. 5; Defendant's Exhibit #1; Defendant's Exhibit #2. Muniz struck Appellant on his stomach and his jaw. R. 52, ll. 15-22; Defendant's Exhibit #1. Appellant was terrified. R. 299, ll. 19-22.

During the attack, Muniz, who was stronger and taller than Appellant, took the pipe from Appellant. R. 55, ll. 14-23; R. 56, ll. 6-12; R. 302, ll. 9-15. Muniz grabbed Petitioner around the neck, strangling him. R. 24, l. 20 – R. 25, l. 3; R. 56, ll. 1-2; R. 56, ll. 13-20; R. 62, ll. 12-14. Due to the way Muniz was holding him, Appellant could barely breathe – he was being choked. R. 298, ll. 13-14; R. 312, ll. 2-4. Appellant had a saw used to cut sheetrock in his tool belt. R. 23, ll. 20-24. Appellant pulled out his saw and stabbed Muniz once. R. 25. ll. 5-24; R. 56, ll. 3-

[3] Appellant picking up the pipe for protection was confirmed by the testimony of Jeremiah Oxendine who described Appellant as dragging the pipe behind him as he walked near Muniz. R. 164, ll. 1-16.

5; R. 56, ll. 21-24; R. 57, ll. 2-13; R. 298, ll. 14-16; R. 303, ll. 3-9; R. 312, ll. 14-15. Muniz released Appellant and ran outside. R. 26, l. 9-23; R. 57, ll. 14-20; R. 88, l. 20 – R. 89, l. 1; R. 167, l. 1-12. Still fearful, Appellant left. R. 57, ll. 19-25; R. 312, ll. 21-25. Muniz died at the scene. R. 89, l. 24 – R. 90, l. 2.

The sole independent eyewitness to the encounter testifying during the pre-trial hearing, Jose Somosa, was emphatic – Muniz started the fatal fight. R. 27, ll. 2-3.

After the presentation of the evidence during the pre-trial hearing, trial counsel argued that Appellant was in a place where he had a right to be – his place of business, and therefore, the duty to retreat was not applicable pursuant to the Act. R. 66, ll. 1-14. According to trial counsel, Appellant was not causing any problems with Muniz, but that there was "continual harassment, bullying" by Muniz directed toward Appellant. R. 66, ll. 15-23. In fact, there had been a physical altercation between the two in the weeks immediately preceding this shooting incident. R. 66, ll. 23-24. Additionally, a co-worker was joining Muniz's harassment of Appellant at Muniz's instigation. R. 66, l. 24 – R. 67, l. 4. During Muniz's threats, Appellant was on top of a ladder – "a very vulnerable position." R. 67, ll. 5-9. Appellant stood approximately "five foot three" and was "very small in stature." R. 67, ll. 9-10. However, Muniz was "about six feet." R. 67, ll. 10-11.

Muniz was armed with a large piece of metal, which he swung at Appellant. R. 67, ll. 11-13. Appellant also had a piece of metal and there was "a clash of metal" as Appellant tried to defend himself. R. 67, ll. 14-18. Appellant was struck by Muniz's metal pole and received several injuries, which were documented by the police. R. 67, ll. 14-21. Muniz wrapped his arm around Appellant and began to strangle him. R. 67, l. 25 – R. 68, l. 2. Trial counsel explained that despite the fact that the men were unarmed when the fatal blow was struck, the evidence

presented showed that Muniz was holding Appellant around the neck, which placed Appellant at risk of serious bodily harm. R. 71, ll. 1-12. Then, Appellant was forced to pull his saw from his tool belt and stab Muniz. R. 68, ll. 2-5. Only then did Muniz let him go. R. 68, l. 5. According to trial counsel, Appellant testified he was actually afraid and that fear was reasonable because of the difference in sizes and the fact that Muniz's friend had been threatening earlier in the day. R. 68, ll. 7-23. In conclusion, trial counsel explained Appellant satisfied each element of self-defense except the duty to retreat, which he was not required to satisfy because he was in his place of business. R. 68, l. 23 – R. 69, l. 4.

The state argued the Act did not apply because Appellant "is an illegal alien and has no right to be in the country at all much less over there." R. 9, ll. 1-5.[4] The prosecutor also argued that the case presented a "clear question of fact" based on the testimony of Somosa and Appellant. R. 70, ll. 1-4. According to the prosecutor, Somosa testified to a physical altercation involving a broom and an offer to fight the night before, but "that at no time other than mouthing off at each other at no time was Mr. Muniz armed until he came after him with a pipe in which point he picked up the piece of pipe." R. 70, ll. 4-10. The prosecutor claimed that both men were unarmed when Appellant stabbed him in the chest and killed him. R. 70, ll. 11-14.

In 2006, the South Carolina General Assembly adopted the Protection of Persons and Property Act. S.C. Code Ann. § 16-11-410, et seq. The General Assembly explained its 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). The General Assembly recognized "that persons

[4] Judge Harrington refused to address the state's argument that Appellant was not entitled to immunity under the Act because he was not in the United States legally. According to Judge Harrington, "the statute was indicated to protect all persons," and therefore, Appellant would be entitled to immunity if he satisfied the other statutory requirements.

residing in or visiting this State have a right to expect to remain unmolested and safe within their homes, businesses, and vehicles." S.C. Code Ann. § 16-11-420(D). Finally, the General Assembly explained "that no person or victim of crime should be required to surrender his personal safety to a criminal, nor 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).

To effectuate this intent, the General Assembly created a statute providing for immunity from prosecution to "[a] person who uses deadly force as permitted by the provisions of this article or another applicable provision of law." S.C. Code Ann. § 16-11-450(A). One of the provisions of the Act provides:

> 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 or another person or to prevent the commission of a violent crime as defined in Section 16-1-60.

S.C. Code Ann. § 16-11-440(C).

"A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard." State v. Curry, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013). During the pretrial hearing, a defendant must set out "a valid case of self-defense must exist," excluding the duty to retreat prong, "and the trial court must necessarily consider the elements of self-defense in determining a defendant's entitlement to the Act's immunity." Id. at 371, 752 S.E.2d at 266.

To establish self-defense, four elements must be present: (1) the defendant must be without fault in bringing on the difficulty; (2) the defendant must have been in actual imminent danger of losing his life or sustaining serious bodily injury, or he must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) if his defense is based

upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief, or if the defendant was actually in imminent danger, 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; and (4) the defendant 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, 657-658, 244 S.E.2d 503, 505-506 (1978); see also State v. Davis, 282 SC. 45, 46, 317 S.E.2d 452, 453 (1984).

The South Carolina Supreme Court recently affirmed a grant of immunity in State v. Jones, 416 S.C. 283, 786 S.E.2d 132 (2016). Jones and her boyfriend, Eric Lee, shared a residence. Id. at 287, 786 S.E.2d at 134. On the evening of November 1, 2012, Jones and Lee were involved in a physical altercation. Id. Jones left the residence and returned when she had "cooled down." Id. at 288, 786 S.E.2d at 134. While Jones gathered her things, Lee yelled at her and followed her around. Id. at 288, 786 S.E.2d at 135. Jones grabbed a knife for protection. Id. Lee grabbed Jones, shook her, and told her it was over. Id. Believing Lee was going to hit her again, Jones grabbed the knife out of her shirt and stabbed him once in the chest. Id. Although Jones initially left Lee, she and a friend shortly returned to the residence and took Lee for help. Id. However, Lee later died at the hospital. Id.

The Court found there was "nothing in the record to suggest that Jones was at fault in bringing on the difficulty" because she attempted to leave the apartment before the first altercation, returned to the apartment to gather her belongings, and called her friends to pick her up. Id. at 301-302, 786 S.E.2d at 142. Jones told police that she believed Lee "was going to hit her again and that had she not acted as she did, then she would have been killed." Id. at 302, 786 S.E.2d at 142. Next,

the Court held Jones' belief that she was in imminent danger of losing her life or sustaining great bodily injury was reasonable in light of Lee having punched her earlier in the night and in Lee grabbing Jones and shaking her immediately prior to the stabbing. Id. Finally, the Court held that Jones had no duty to retreat pursuant to the Act because she was attacked in her home. Id.

This Court affirmed a grant of immunity in State v. Douglas, 411 S.C. 307, 768 S.E.2d 232 (Ct. App. 2014).[5] Douglas and his friend, Charles Smith, had spent the day on the golf course drinking. Id. at 312, 768 S.E.2d at 236. After leaving the golf course, the two went to Douglas' home and continued drinking. Id. at 313, 768 S.E.2d at 236. Smith found a bottle of Douglas' anti-anxiety medicine and began teasing Douglas about it. Id. When Douglas grew angry, Smith "snapped" and "went crazy." Id. Smith grabbed Douglas by his arms and threw him against the refrigerator. Id. When Douglas fell to the floor, Smith got on top of him and struck him in the eye. Id. at 314, 768 S.E.2d at 236. Although Douglas told Smith to leave, Smith refused, but did go into another room. Id. Douglas crawled to his bed and got a pistol from the nightstand. Id. Douglas, returning to the kitchen, again told Smith to leave. Id. Instead, Smith advanced toward Douglas. Id. Douglas lifted the pistol to scare Smith. Id. When Smith was two feet away, Douglas fired the pistol. Id. A bullet hit Smith, and he died within minutes. Id.

This Court held Douglas proved by a preponderance of the evidence that he reasonably believed shooting Smith was necessary to prevent great bodily injury to himself, and that he acted in self-defense. Id. at 319, 768 S.E.2d at 239. The physical evidence was consistent with Douglas' testimony, showing that Smith was in close proximity when the pistol was fired. Id. at 319-320, 768 S.E.2d at 239. This Court noted that Douglas was injured in the altercation prior to the fatal shot,

[5] The South Carolina Supreme Court granted certiorari on November 5, 2015. However, on July 13, 2016, the Court dismissed the petition as improvidently granted. State v. Douglas, 416 S.C. 427, 788 S.E.2d 686 (2016).

and that in light of Smith's lack of serious injury, Douglas' belief that Smith was about to inflict serious bodily injury upon him if he did not act to protect himself was reasonable. Id. at 320, 768 S.E.2d at 240. This Court also considered evidence that several years prior to the shooting, Smith assaulted Douglas by slamming him against a wall and choking him. Id. According to this Court, Douglas was not at fault in brining on the difficulty where "Smith's violent behavior was an unreasonable reaction to a reasonable demand for Smith to return [Douglas]'s medicine." Id. at 321, 768 S.E.2d at 240. Further, this Court found that after Smith attacked Douglas and Douglas retreated to his bedroom, his "reappearance at the kitchen's threshold with a loaded pistol by his side was lawful, as he had a right to defend his home and demand that Smith leave." Id.

In light of the immunity statute's incorporation of the elements of self-defense save the retreat prong, an examination of South Carolina's self-defense jurisprudence is necessary and helpful. An individual who provokes or initiates an assault may not assert self-defense. State v. Bryant, 336 S.C. 340, 345, 520 S.E.2d 319, 322 (1999). "Any act of the accused in violation of law and reasonably calculated to produce the occasion amounts to bringing on the difficulty and bars his right to assert self-defense as a justification or excuse for a homicide." Id. "[T]he mere unlawful possession of a firearm, with nothing more, does not automatically bar a self-defense charge." State v. Slater, 373 S.C. 66, 70, 644 S.E.2d 50, 52 (2007). In Slater, the Court determined the defendant was not entitled to a charge on self-defense because he was not without fault in bringing on the difficulty where the defendant was "in unlawful possession of a weapon; he carried the cocked weapon, in open view, into an already violent attack in which he had no prior involvement." Id. at 71, 644 S.E.2d at 53.

In State v. Light, 378 S.C. 641, 650, 664 S.E.2d 465, 469 (2008), the South Carolina Supreme Court held a defendant's statement that it was either "her or me" after the defendant took

the gun from the victim established that the defendant believed he was in imminent danger. The Court determined this belief was reasonable in light of the defendant's testimony that in the preceding weeks the victim had been acting jealous, had followed him, and told him that if she caught him with another woman it was "going to be messy." Id.

An individual has the right to act on appearances. State v. Starnes, 340 S.C. 312, 531 S.E.2d 907 (2000); see also State v. Jackson, 277 S.C. 271, 87 S.E.2d 681 (1955). The South Carolina Supreme Court held the trial judge erred in failing to instruct the jury that the defendant had the right to act on appearances concerning one of the shootings. Starnes, 340 S.C. at 320, 531 S.E.2d at 912. In Starnes, one of the potential drug buyers, Wellborn, pointed a gun at the defendant, cursed him, and questioned where he was going. Id. The Court held the defendant was not entitled to a charge on the right to act on appearances concerning Wellborn because his claim to self-defense arose from an *actual* threat. Id. However, concerning the shooting of the other potential buyer, Champlin, the Court held the defendant was entitled to an appearances charge. Id. at 321, 531 S.E.2d at 912. The pertinent fact noted by the Court was that "[i]mmediately prior to the shooting, [the defendant] observed Champlin hold a gun to [another]'s head and threaten to shoot him, apparently because the intended drug deal, which [the defendant] had arranged, had gone awry." Id. The Court held the defendant was entitled to an appearances charge even though the defendant did not testify that he thought he saw a weapon in Champlin's hand at the time of the shooting. Id.

Additionally, "words accompanied by hostile acts, may, depending on the circumstances, establish a plea of self-defense" from State v. Harvey, 220 S.C. 506, 68 S.E.2d 409 (1951). Furthermore, "when 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. In Douglas v. State, 332 S.C. 67, 72-73, 504 S.E.2d 307, 309-10 (1998), the

Supreme Court noted the judge had charged that if the defendant was justified in firing the first shot he was justified in continuing to shoot until any danger to his life and body had ceased.

As an initial matter, the trial judge used the wrong legal standard when examining Appellant's request for immunity. Although the judge at first correctly stated that Appellant must prove his case by a preponderance of the evidence, when she was ruling on the motion, she stated she did "not believe the testimony [rose] to the level beyond a preponderance of the evidence to grant the immunity designed by the legislature to protect someone from criminal prosecution." R. 72, l. 23 – R. 73, l. 1. By requiring Appellant prove his entitlement to immunity *beyond* a preponderance of the evidence, the judge committed a legal error and a reversal is necessary.

Examining the evidence in the proper light reveals Appellant established his right to statutory immunity from prosecution by a preponderance of the evidence. The undisputed evidence demonstrated prior difficulties between Appellant and Muniz and Muniz as the initial aggressor during those prior difficulties. The undisputed evidence demonstrated that Appellant was not at fault at bringing on the difficulty. Muniz had been taunting Appellant for weeks and continued his campaign of threats and harassment on the day of the stabbing. Although Appellant sought help, his pleas were unanswered and Muniz was undeterred. Appellant was not the initial aggressor. He armed himself with a pipe in self-defense because he knew he had to walk by Muniz in order to leave the jobsite, and, according to Appellant, Muniz was armed prior to Appellant grabbing a pipe. Who was in possession of a pipe first – whether Appellant or Muniz – is of no mind. This was no instance of mutual combat as argued by the state. Appellant was acting in self-defense.

Appellant testified that he was in fear of losing his life or imminent bodily harm. Appellant's fear was reasonable in light of the difference in size, Muniz choking Appellant, and

Muniz's prior threats and physical assaults. Appellant had to act in an effort to save his life. He used the only thing he could find – his saw – to stab Muniz once in the chest. Contrary to the state's assertions on appeal, Appellant did not arm himself with the saw in order to harm Muniz. The saw was in his tool belt as he was a construction worker on the job framing a wall. The saw was not in Appellant's possession as a weapon – it was a tool of his trade. Only when Muniz was choking the life out of him did Appellant reach for the saw to defend himself.

Finally, Appellant had no duty to retreat because he was at his place of business.

Appellant respectfully requests this Court rehear this matter to address the trial judge applying an improper burden of proof, one that required Appellant to meet a higher standard of proof than established by the law. Additionally, Appellant respectfully requests this Court rehear this matter to consider how the judge's ruling was not supported by the evidence presented and was contrary to controlling case law.

Respectfully Submitted,

Susan B. Hackett

SUSAN B. HACKETT
Appellate Defender

This 13th day of July, 2017.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Charleston County

Kristi Lea Harrington, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

DENNIS ELVIN CERVANTES-PAVON,

APPELLANT

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CERTIFICATE OF SERVICE

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The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon Susannah R. Cole, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Dennis Elvin Cervantes-Pavon, #366042, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 13th day of July, 2017.

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

SUBSCRIBED AND SWORN TO BEFORE
ME this 13th day of July, 2017.

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