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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Lexington County
The Honorable Thomas A. Russo, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RAPHAEL LAMARR PONTOO,

APPELLANT

APPELLATE CASE NO. 2015-000323

FINAL REPLY BRIEF OF APPELLANT

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I. The State Misconstrues the Operation of the Language in The Statute in Question

a. The legislative history and clear language of the statute provides inference that the "absence of mitigating circumstances" is an element of the statute, not a proviso or exception.

The State claims that the language in S.C. Code Ann. § 56-5-750(a),"[in] the absence of mitigating circumstances," is not an element of the crime but a proviso or an exception. They further claim that to construe this as an element would make it impossible for the State to prove a case because it would have to prove a negative. Both these arguments fail.

The statute in question was first codified in 1962 as South Carolina Code § 46-359, and further modified in 1968. After the 1968 amendments the text of the statute was as follows:

> It shall be unlawful for any motor vehicle driver, while driving on any road, street or highway of the State, to fail to stop when signaled by any law-enforcement vehicle by means of a siren or flashing light. Any attempt to increase the speed of a vehicle or in other manner avoid the pursuing law-enforcement vehicle when signaled by a siren or flashing light shall constitute prima facie evidence of a violation of this section. Failure to see the flashing light or hear the siren shall not excuse a failure to stop when the distance between the vehicles and other road conditions are such that it would be reasonable for a driver to hear or see the signals from the law-enforcement vehicle.

State v. Hoffman, 257 S.C. 461, 470, 186 S.E.2d 421, 425 (1972).

The statute was renumbered in the 1976 Code to 56-5-750, but apparently did not undergo any more substantive changes until 1988. At that time, a Committee of Free Conference on bill S. 704 added the language in question, along with providing a provision of license suspension for violators. *See S.C. Gen. Assembly, Journal of the House of Representatives, 107th Session, 1987-1988, Wednesday, April 27, 1988.* On that date the bill was enrolled for ratification and enacted as 1988 Act No. 532, § 14.

The question raised by this modification is what effect the Legislature intended with this enactment. The words must mean something - "[a] statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous...." *Matter of Decker*, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995)(citation omitted). If, as the State contends, the additional language sets out a proviso or exception, what effect does this have? Certainly before this enactment, affirmative defenses for this crime such as duress or coercion were cognizable. If that is the case, then it can be logically inferred that the Legislature meant to include this "absence of mitigating circumstances" as an element of the crime.

Such an interpretation would not make it impossible to prosecute, as the State contends. Instead, this would be analogous to self defense, in which the defendant is required to advance the defense (in this case, mitigating circumstances) and then the burden rests with the State to disprove the defense beyond a reasonable doubt. *State v. Burkhart*, 350 S.C. 252, 565 S.E.2d 298 (S.C. 2002). This construction would also be consistent with the mandate that, "[i]n interpreting statutes, we look to the plain meaning of the statute and the intent of the Legislature. Because the statute is penal in nature, the Court must construe it strictly in favor of the defendant and against the State." *Cooper v. S. Carolina Dept. of Probation, Parole and Pardon Services*, 337 S.C. 489, 496, 661 S.E.2d 106, 110 (2008)(internal citations omitted). Likewise, this statute should be construed to require the State to prove the absence of mitigating circumstances if mitigating circumstances are alleged by the Defendant.

II. If the Errors Were Not Properly Preserved, the Court Should Exercise the Discretion to Review the Rulings for Plain Error

The State contends that none of the errors addressed in Pontoo's brief were properly preserved, and thus none are eligible for review. For the purposes of the following brief discussion, let us presume without conceding that is true. Unfortunately, South Carolina is one of only eight states in the nation that eschews the consideration of unpreserved errors, even if such errors deprive a litigant of Constitutional rights, result in manifest injustice, and affect the fundamental fairness of the proceedings.[1] The remaining forty-two states and all Federal courts of appeal have provided for appellate review of unpreserved error either through case law or rule. *See e.g.* Fed. R. Crim. P. 52(b).

In all cases, including criminal cases, South Carolina fails to provide an avenue for relief regardless of whether the failure to preserve the issue is intentional (waiver) or unintentional (forfeiture). *See generally, United States v. Carrasco-Salazar*, 494 F.3d 1270, 1272 (10th Cir. 2007). Apparently wary of "overzealous advocacy" by the members of the South Carolina Bar, the courts presume that the failure to identify an error is invariably the result of "sandbagging," or waiver of the issue by failure to object to perceived error. *See State v. Torrence*, 305 S.C. 45, 65, 406 S.E.2d 315, 326 (1991)(Toal, J. concurring). According to this theory, all failure to object is calculated waiver. The premise is that any attorney is more than willing to abandon his responsibilities to her client and to the court by failing to object to that which she knows is objectionable. Having relinquished the right to object, and having placed her client in jeopardy of criminal conviction, the theory is that by proceeding in this manner she has saved an issue that may lead to a new trial on appeal.

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[1] Tory A. Weigand, *Raise or Lose: Appellate Discretion and Principled Decision-Making*, 17 Suffolk J. Trial & App. Advoc. 179, 222 (2012).

Lacking objective numbers on how often this occurs, the undersigned's faith in the integrity and the professional responsibility of the members of this Bar compel the belief that these incidents are rare, and that the majority of unpreserved error is constituted by forfeiture through error, not trickery by waiver. If the matter is plain error and the failure to resolve it results in manifest injustice, the party that would have been protected by objection must remain aggrieved though the appellate court may clearly recognize it. And ironically, the aggrieved party may have to seek Post Conviction Relief, which can result in the same issue presented to the appellate court, often years after it could have been initially addressed.

Understanding that this Court is bound by precedent to reject this argument, nonetheless it is worthwhile to note that there is a viable framework to provide limited appellate review of unpreserved issues. As the United States Supreme Court explains it, a simple four-step process can be utilized to provide the court discretion for limited review of unpreserved error.

> First, there must be an error or defect—some sort of deviation from a legal rule—that has not been intentionally relinquished or abandoned, i.e., affirmatively waived, by the appellant. Second, the legal error must be clear or obvious, rather than subject to reasonable dispute. Third, the error must have affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it affected the outcome of the district court proceedings. Fourth and finally, if the above three prongs are satisfied, the court of appeals has the discretion to remedy the error—discretion which ought to be exercised only if the error seriously affects the fairness, integrity or public reputation of judicial proceedings. Meeting all four prongs is difficult, as it should be.

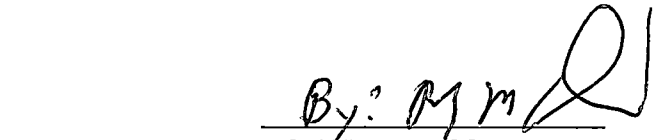
Puckett v. United States, 556 U.S. 129, 135 (2009)(internal citations and quotations omitted)

By failing to receive proper jury instructions, by having his post-Miranda silence used against him, and by an unfair identification process that presumes memories actually improve over time, Pontoo's substantial rights have been ignored, and those errors have seriously affected the fairness and integrity of the underlying proceeding. As such, these errors affected the outcome of the underlying proceeding. Pontoo respectfully requests that should the Court find the errors were not sufficiently preserved, that this Court conduct a review of the error because any failure to preserve the issues (which Pontoo denies) were solely the fault of forfeiture and not intentionally waived for strategic purposes.

CONCLUSION

Pontoo respectfully requests that this court vacate the convictions of Pontoo and remand the case to the Circuit Court for a new trial.

Respectfully submitted,



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This 13th day of September, 2016

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Final Reply Brief of Appellant complies to the best of my ability with Rule 211(b) SCACR, and with the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

September 13, 2016

By: [signature]

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