

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Dorchester County
Maite Murphy, Circuit Court Judge

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Aug 28 2020

S.C. SUPREME COURT

Opinion No. 2020-UP-178 (S.C. Ct. App. Filed June 10, 2020,
Withdrawn, Substitute, and Refiled July 29, 2020)
2015-GS-18-1882

THE STATE,

RESPONDENT,

V.

CHRISTIAN ANTHONY HIMES,

PETITIONER

APPELLATE CASE NO. 2017-000870

APPENDIX

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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Christian Anthony Himes, Appellant.

Appellate Case No. 2017-000870

Appeal From Dorchester County
Maite Murphy, Circuit Court Judge

Unpublished Opinion No. 2020-UP-178
Submitted May 1, 2020 – Filed June 10, 2020

AFFIRMED IN PART, VACATED IN PART

Appellate Defender Joanna Katherine Delany, of
Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Deputy
Attorney General Donald J. Zelenka, Senior Assistant
Deputy Attorney General Melody Jane Brown, and
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Columbia, and David Michael Pascoe, Jr., of
Orangeburg, all for Respondent.

PER CURIAM: Christian Anthony Himes appeals his convictions of murder and possession of a weapon during the commission of a violent crime and his sentences of life imprisonment without parole (LWOP) and five years' imprisonment. Himes argues the trial court erred in denying his motion for immunity under the Protection of Persons and Property Act (the Act) and in imposing a sentence of five years' imprisonment for possession of a weapon during the commission of a violent crime. We affirm in part and vacate in part.

1. Himes argues the trial court erred in finding he was not entitled to immunity from prosecution under the Act. We disagree.

We find the trial court did not abuse its discretion in determining Himes failed to prove he was entitled to immunity under the Act because a reasonably prudent man of ordinary firmness and courage would not have entertained the same belief that he was in imminent danger of serious bodily injury or death. *See State v. Curry*, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013) ("A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard, which [the appellate] court reviews under an abuse of discretion standard of review."); *State v. Douglas*, 411 S.C. 307, 316, 768 S.E.2d 232, 238 (Ct. App. 2014) ("[U]nder this standard, the appellate court 'does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial court's ruling is supported by any evidence.'" (quoting *State v. Mitchell*, 382 S.C. 1, 4, 675 S.E.2d 435, 437 (2009))).

The evidence indicates the victim's primary goal was to prevent Himes from entering the victim's ex-wife's apartment, not to attack Himes. Himes agreed the only threatening thing the victim said to him the night of the fatal shooting was "you're not going into that apartment where my two kids are." Himes stated he shot the victim because he was scared. The night of the incident, he told police officers he shot out of fear because "My father hurt me so much in the past mentally, physically and emotionally and I was going through it all over again." We find Himes failed to meet the elements of self-defense; thus, we find no abuse of discretion by the trial court in denying Himes's motion for immunity under the Act. *See* S.C. Code Ann. § 16-11-440(C) (2015) ("A person who is not engaged in an unlawful activity and who is attacked in another place where he has a right to be . . . 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*" (emphasis added)); *Curry*, 406 S.C. at 371, 752 S.E.2d at 266 ("Consistent with the Castle Doctrine and the text of the Act, a valid case of self-defense must exist, and the trial court must necessarily

consider the elements of self-defense in determining a defendant's entitlement to the Act's immunity. This includes all elements of self-defense, save the duty to retreat."); *id.* at 371 n.4, 752 S.E.2d at 266 n.4 (specifying the second and third elements of self-defense that must be demonstrated for immunity under the Act are as follows: "Second, the defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger. Third, 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. If the defendant actually was 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." (quoting *State v. Davis*, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984))); *id.* at 372, 752 S.E.2d at 267 (providing when a claim of self-defense presents a "quintessential jury question," immunity from prosecution is not warranted).

2. Himes also argues his sentence for possession of a firearm during the commission of a violent crime should be vacated. Himes admits this argument is not preserved for appeal; however, we address this issue in the interest of judicial economy.

South Carolina Code Section 16-23-490(A) (2015) expressly provides the mandatory five-year sentence for possession of a firearm during the commission of a violent crime shall not be imposed when the defendant is sentenced to death or to life without parole for the violent crime. "[A]n exception to the general rule of issue preservation exists authorizing the appellate court to consider an unpreserved issue in the interest of judicial economy under appropriate circumstances." *State v. Bonner*, 400 S.C. 561, 564, 735 S.E.2d 525, 526 (Ct. App. 2012); *see id.* at 567, 735 S.E.2d at 528 (vacating a sentence when the State conceded the trial court committed an error by imposing an improper sentence); *State v. Palmer*, 415 S.C. 502, 525, 783 S.E.2d 823, 835 (Ct. App. 2016) (vacating the defendant's five-year sentence for possession of a weapon during the commission of a violent crime after finding it inapplicable due to the trial court sentencing him to LWOP for the violent crime). We find the trial court erred by sentencing Himes to five years' imprisonment for the conviction of possession of a weapon during the commission of a violent crime in conjunction with his LWOP sentence for murder.

Based on the foregoing, we affirm Himes's murder conviction and LWOP sentence. We vacate the conviction of and five-year sentence for possession of a weapon during the commission of a violent crime.

AFFIRMED IN PART, VACATED IN PART.¹

HUFF, THOMAS, and MCDONALD, JJ., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

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Appellate Defender Joanna Katherine Delany, of
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Attorney General Alan McCrory Wilson, Deputy
Attorney General Donald J. Zelenka, and Senior
Assistant Deputy Attorney General Melody Jane Brown,
all of Columbia, David Michael Pascoe, Jr., of
Orangeburg, and Assistant Attorney General Alphonso
Simon, Jr., of Richmond, VA, all for Respondent.

PER CURIAM: Christian Anthony Himes appeals his convictions of murder and possession of a weapon during the commission of a violent crime and his sentences of life imprisonment without parole (LWOP) and five years' imprisonment. Himes argues the trial court erred in denying his motion for immunity under the Protection of Persons and Property Act (the Act) and in imposing a sentence of five years' imprisonment for possession of a weapon during the commission of a violent crime. We affirm in part and vacate in part.

1. Himes argues the trial court erred in finding he was not entitled to immunity from prosecution under the Act. We disagree.

We find the trial court did not abuse its discretion in determining Himes failed to prove he was entitled to immunity under the Act because a reasonably prudent man of ordinary firmness and courage would not have entertained the same belief that he was in imminent danger of serious bodily injury or death. *See State v. Curry*, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013) ("A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard, which [the appellate] court reviews under an abuse of discretion standard of review."); *State v. Douglas*, 411 S.C. 307, 316, 768 S.E.2d 232, 238 (Ct. App. 2014) ("[U]nder this standard, the appellate court 'does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial court's ruling is supported by any evidence.'" (quoting *State v. Mitchell*, 382 S.C. 1, 4, 675 S.E.2d 435, 437 (2009))).

The evidence indicates the victim's primary goal was to prevent Himes from entering the victim's ex-wife's apartment, not to attack Himes. Himes agreed the only threatening thing the victim said to him the night of the fatal shooting was "you're not going into that apartment where my two kids are." Himes stated he shot the victim because he was scared. The night of the incident, he told police officers he shot out of fear because "My father hurt me so much in the past mentally, physically and emotionally and I was going through it all over again." We find Himes failed to meet the elements of self-defense; thus, we find no abuse of discretion by the trial court in denying Himes's motion for immunity under the Act. *See* S.C. Code Ann. § 16-11-440(C) (2015) ("A person who is not engaged in an unlawful activity and who is attacked in another place where he has a right to be . . . 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*" (emphasis added)); *Curry*, 406 S.C. at 371, 752 S.E.2d at 266 ("Consistent with the Castle Doctrine and the text of the Act, a valid case of self-defense must exist, and the trial court must necessarily

consider the elements of self-defense in determining a defendant's entitlement to the Act's immunity. This includes all elements of self-defense, save the duty to retreat."); *id.* at 371 n.4, 752 S.E.2d at 266 n.4 (specifying the second and third elements of self-defense that must be demonstrated for immunity under the Act are as follows: "Second, the defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger. Third, 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. If the defendant actually was 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." (quoting *State v. Davis*, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984))); *id.* at 372, 752 S.E.2d at 267 (providing when a claim of self-defense presents a "quintessential jury question," immunity from prosecution is not warranted).

2. Himes also argues his sentence for possession of a firearm during the commission of a violent crime should be vacated. Himes admits this argument is not preserved for appeal; however, we address this issue in the interest of judicial economy.

South Carolina Code Section 16-23-490(A) (2015) expressly provides the mandatory five-year sentence for possession of a firearm during the commission of a violent crime shall not be imposed when the defendant is sentenced to death or to life without parole for the violent crime. "[A]n exception to the general rule of issue preservation exists authorizing the appellate court to consider an unpreserved issue in the interest of judicial economy under appropriate circumstances." *State v. Bonner*, 400 S.C. 561, 564, 735 S.E.2d 525, 526 (Ct. App. 2012); *see id.* at 567, 735 S.E.2d at 528 (vacating a sentence when the State conceded the trial court committed an error by imposing an improper sentence); *State v. Palmer*, 415 S.C. 502, 525, 783 S.E.2d 823, 835 (Ct. App. 2016) (vacating the defendant's five-year sentence for possession of a weapon during the commission of a violent crime after finding it inapplicable due to the trial court sentencing him to LWOP for the violent crime). We find the trial court erred by sentencing Himes to five years' imprisonment for the conviction of possession of a weapon during the commission of a violent crime in conjunction with his LWOP sentence for murder.

Based on the foregoing, we affirm Himes's murder conviction and LWOP sentence. We vacate the five-year sentence for possession of a weapon during the commission of a violent crime.

AFFIRMED IN PART, VACATED IN PART.¹

HUFF, THOMAS, and MCDONALD, JJ., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Dorchester County

Honorable Maité Murphy, Circuit Court Judge

Opinion No. 2020-UP-031

THE STATE,

RESPONDENT,

V.

CHRISTIAN ANTHONY HIMES,

APPELLANT.

APPELLATE CASE NO. 2017-000870

PETITION FOR REHEARING

On June 10, 2020, this Court affirmed Appellant's conviction in an unpublished opinion. *State v. Himes*, 2020-UP-178 (S.C. Ct. App. filed June 10, 2020). Pursuant to Rule 221(a), SCACR, counsel for Appellant respectfully requests this Court rehear the matter based upon the significant points overlooked and/or misapprehended by this Court.

On appeal, Appellant argued in his first issue that the trial court erred in finding that he was not eligible for or entitled to immunity from prosecution under the Protection of Persons and Property Act, because Appellant was eligible for immunity under the Act and proved the elements required under subsection (C), and Appellant established a valid case of self-defense. In

his second issue, Appellant argued that, pursuant to S.C. Code Ann. § 16-23-490, this Court should vacate the five-year sentence imposed for possession of a firearm during the commission of a violent crime since Appellant was sentenced to life without parole for the murder case. This Court affirmed Appellant's murder conviction and sentence but vacated the conviction and five-year sentence for possession of a weapon during the commission of a violent crime. Appellant requests rehearing on the first issue.

Counsel respectfully asserts that this Court overlooked or misapprehended several critical facts in issuing its decision affirming his murder conviction and sentence. Appellant did not bring about the difficulty, and he was in a place where he had a right to be. Appellant was also in reasonable fear of imminent serious bodily injury or death given his knowledge of the decedent's history of violence and the decedent's threatening text message two days prior. Appellant was also in reasonable fear because the decedent began reaching in his pocket, ignored multiple pleas from Appellant to back up, and lunged at Appellant. Finally, Appellant had no duty to retreat, although he tried to do so.

On April 3, 2017, an immunity hearing was held pursuant to the Protection of Persons and Property Act (the Act), and the following facts were established.

Heather Ham (Heather) had been separated from her abusive husband David Ham (Decedent) for approximately eighteen months before Heather became romantically involved with Appellant, Christian Himes. R. 41, l. 20 – 42, l. 24. Heather and Decedent separated after an argument became physical when Decedent dragged her from the house in front of their young children. R. 121, l. 2-15; R. 44, ll. 16-24. At that point, Heather already had a scarred face from earlier in the relationship when Decedent punched her in the face. R. 120, l. 14 – 121, l. 1; R. 45,

ll. 15-16. However, they remained cordial after separating and they shared custody of their children pursuant to an informal agreement.

Heather had been Appellant's counselor when he was a juvenile living in a group home, and after he was released from prison, she assisted him in the process of getting back on his feet and the two fell in love. R. 115, ll. 9-20; R. 116, l. 23 – 117, l. 10. It was undisputed that Appellant began staying at Heather's apartment three weeks before the fatal altercation that would kill Decedent. R. 11, ll. 14-24; R. 117, l. 24 – 119, l. 9. Appellant's clothes and toothbrush were at Heather's apartment. R. 119, ll. 10-13. Appellant had the use of Heather's apartment key and she occasionally allowed him to drive her car. R. 119, ll. 14-22. It is notable that the apartment was not Decedent's—he never lived there. Instead, Heather had moved there about three months prior to the shooting. R. 58, ll. 3-5.

Decedent was not aware of the budding romance between Heather and Appellant. Heather feared an altercation would occur if the two men met. R. 122, ll. 1-8. On occasions when Decedent came by to pick up the children, Appellant remained hidden in the back of the Heather's apartment. R. 129, l. 23 – 130, l. 6. Usually, such exchanges took only five or ten minutes. R. 129, l. 20 – 130, l. 25. However, a few days before the shooting, Decedent learned that Heather was in a romantic relationship with Appellant. On October 30, 2015, Decedent sent Heather a text message that read, "tell your bf don't let me catch him slippin." R. 589; R. 125, ll. 7-21.

Appellant saw the text message and he found it threatening. "I thought that meant—to me it meant if he sees me, he's gonna come at me and he's gonna attack me." R. 125, ll. 22-24.

On November 1, 2015, Decedent came by to drop off the children but his stay was “a lot longer” than the usual five or ten minutes. R. 54, ll. 4-8. Decedent had been drinking heavily—it would later be determined that he had a 0.19 blood alcohol content. R. 25, ll. 5-8.

Appellant had borrowed Heather’s car and arrived home late with the car, which necessitated that Decedent bring the children to Heather’s apartment, rather than Heather bringing the children to Decedent’s apartment. R. 127, l. 18 – 128, l. 1; R. 77, l. 7 – 79, l. 23. When Appellant arrived home, Heather met him at the door and told him to leave because Decedent was still there. R. 128, ll. 10-14.

Appellant was aware of Heather’s physical abuse by Decedent in the past. R. 120, l. 4 – 121, l. 1. However, Appellant left and went to a gas station, and he remained there for thirty or forty-five minutes. R. 129, ll. 11-16. When he thought more than enough time had elapsed for Decedent to be gone, Appellant drove back to Heather’s apartment and again walked towards the door. R. 129, l. 17-24. However, Decedent was coming out of the apartment at that moment and waylaid Appellant, asking him, “You Chris?” R. 586. Appellant tried to walk past Decedent into the apartment but Decedent blocked his entry. R. 132, ll. 21-22. Appellant noticed that Decedent was taller than him. R. 132, l. 18.

A verbal altercation ensued.

When he came out, he asked me if I was crazy. And I told him, yeah. I told him that I didn’t want to do this here and now because his kids was in the house. And he was upset. He was throwing his arms. And he told me that I needed to leave. And he said he didn’t want me to be a father to his kids. He wasn’t going to allow his kids to call me daddy . . .

Initially, I told him I was going inside. And he blocked me off. And he started walking towards me. And at that time he was stating that he wasn’t going to allow me to be a father to his kids. And he kept coming towards me.

R. 132, ll. 3-24.

Appellant believed he backed up about fifty feet, and police officers would estimate the fatal encounter took place about thirty-three to thirty-nine feet from the breezeway that led to the apartment. R. 98, l. 19 – 99, l. 4; R. 133, ll. 13-19. At that point, Appellant pulled out a gun. R. 133, ll. 1-19. Appellant had bought the gun because Heather was raped by an acquaintance on October 26, 2015. R. 126, l. 5 – 127, l. 14.

Appellant tried to continue backing away towards Heather's car, but Decedent, "was yelling at me. He said I'm not scared of your punk ass gun." R. 134, ll. 6-12. Appellant told Decedent to leave, and said he was going into Heather's apartment but Decedent told Appellant he was not going in the apartment. R. 134, ll. 14-17. Decedent began reaching in his pocket. R. 156, ll. 4-5; R. 586; R. 135, ll. 6-8.

"When he told me that he wasn't going to let me in the apartment, he started walking towards me aggressively. And I told him to backup." R. 134, ll. 20-22. "I told him to back up a few times and he charged at me." R. 134, l. 24. Heather, who was listening at the door, confirmed that she heard Appellant tell Decedent to back up three times. R. 90, ll. 12-16. However, instead of backing up, Decedent lunged at Appellant. "He went to lung[e] at me, and I stumbled back. And I shot him." R. 135, ll. 1-2.

"I was trying to back up to my car and he started charging at me." R. 158, ll. 1-2. Appellant's testimony was uncontradicted in this regard. No eyewitness saw and heard the entirety of the confrontation, although various witnesses corroborated portion's of Appellant's account of events.

Appellant explained in his testimony at the immunity hearing that, from the time he saw Decedent at the door to the time he shot Decedent, after backing up a significant distance, “I was thinking he was going to hurt me.” R. 136, ll. 6-12.

Appellant gave a written statement to Detective Weaver, which was admitted at the immunity hearing. Appellant’s statement, which was written by Detective Weaver, stated that, “**I was just thinking how much he hurt Heather.** And I went back to thinking of how my dad treated my family.” R. 586 (emphasis added). Appellant’s statement also reflected that Appellant said, “I was scared, my father hurt me so much in the past mentally, physically, and emotionally. And I was going through it all over again.” R. 587.

Appellant explained that when Detective Weaver wrote that Appellant said he did not think Decedent had a gun, that was only after being at the police station and reflecting back on what happened. “In this statement, I had time to reflect back on everything that happened. And reflecting back, there was more than enough opportunity to pull a gun before I pulled mine if he had one.” R. 135, l. 15 – 136, l. 5. “I didn’t say I knew for a fact that he wasn’t [armed]. I said that I don’t think he was after the fact when I was reflecting back on what actually happened.” R. 155, ll. 10-12.

Appellant would go on to testify at trial that, although he continued to back away towards his car, he was afraid to turn his back on the Decedent. R. 500, ll. 21-22.

The immunity hearing proceeded under subsection (C) of the Act. R. 176, ll. 15-16. S.C. Code Ann. § 16-11-440(C) provides that

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.

However, the circuit court denied immunity, and ruled: “Under the Castle Doctrine, one which is attack[ed] without qualm upon his part on his own premises has a right in establishing self-defense, to claim immunity from the law of the retreat which ordinarily is an essential element of that defense.” R. 184, l. 22 – 185, l. 5. The judge found Appellant ineligible for immunity because, even if Appellant had a right to be in the apartment, the altercation itself occurred outside. Further, to the extent Appellant was eligible for immunity, she found he did not prove the elements of self-defense by a preponderance of the evidence. R. 185, ll. 5-13.

The circuit court found that Appellant was at fault in bringing on the difficulty for two reasons. First, he “was sleeping with the victim’s spouse and was around his minor children” and “[a]lthough they were separated, they were still legally married and he knew that.” Under those circumstances, she reasoned that Appellant knew, and been warned, that there would be a potential conflict if he and Decedent ever met. R. 185, ll. 14-21; R. 186, ll. 7-11. Second, she found that Appellant showed a “complete disregard of the victim’s car and her timing and her requirement that she pick up her children on time,” which resulted in the victim bringing the children home. R. 185, l. 22 – 186, l. 9.

The circuit court found that Appellant failed to prove he actually believed he was in imminent danger of sustaining serious bodily injury, noting that Decedent never said to Appellant: “I’m going to shoot you. I’m going to stab you. I’m going to kill you.” R. 186, ll. 11-17. The circuit judge further noted that Appellant “did not think that the victim was armed with a weapon, that he never saw a weapon, and had he had a weapon, he would’ve had enough time to pull it out.” R. 186, ll. 18-22. In finding that the circumstances were not such that a reasonably prudent man of ordinary firmness and courage would have been warranted in striking the fatal

blow, the circuit judge noted the similarity in size between the men, that Decedent was not armed, and that it was Appellant who pointed a gun at Decedent. With respect to the text message, the court found that it could be viewed and interpreted “in many different ways,” including the view taken by Heather, which was that it was not a threat. R. 186, l. 23 – 187, l. 17.

Inexplicably, the circuit judge then discussed the duty to retreat, finding that Appellant did not prove that he had no other probable means of avoiding the danger. R. 187, l. 17 – 188, l. 2. *See State v. Curry*, 406 S.C. 364, 752 S.E.2d 263 (2013) (“Consistent with the Castle Doctrine and the text of the Act, a valid case of self-defense must exist, and the trial court must necessarily consider the elements of self-defense in determining a defendant’s entitlement to the Act’s immunity. This includes all elements of self-defense, *save the duty to retreat.*” (emphasis added); S.C. Code Ann. § 16-11-440(C) (“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 . . .”)

However, the judge found that “as soon [as Appellant] saw the victim, he could have just turned around and walked away.” Alternatively, he could have said “sure, I’m not going there” instead of “insisting that he go into the residence.” R. 187, l. 21 – 188, l. 2. Accordingly, the circuit court denied the motion for immunity. R. 188, l. 2-3. The court maintained its ruling upon renewal of the motion. R. 416, l. 18 – 417, l. 6; R. 507, ll. 14-21.

In *State v. Himes*, 2020-UP-178 (S.C. Ct. App. filed June 10, 2020), this Court found “the trial court did not abuse its discretion in determining Himes failed to prove he was entitled to immunity under the Act because a reasonably prudent man of ordinary firmness and courage would not have entertained the same belief that he was in imminent danger of serious bodily injury or death.”

This Court reasoned,

The evidence indicates the victim's primary goal was to prevent Himes from entering the victim's ex-wife's apartment, not to attack Himes. Himes agreed the only threatening thing the victim said to him the night of the fatal shooting was "you're not going into that apartment where my two kids are." Himes stated he shot the victim because he was scared. The night of the incident, he told police officers he shot out of fear because "My father hurt me so much in the past mentally, physically and emotionally and I was going through it all over again." We find Himes failed to meet the elements of self-defense; thus, we find no abuse of discretion by the trial court in denying Himes's motion for immunity under the Act.

State v. Himes, 2020-UP-178 (S.C. Ct. App. filed June 10, 2020),

As to whether a reasonably prudent man would have believed he was in imminent danger of serious bodily injury or death, this Court's decision focused primarily on an unexplained remark in Appellant's written statement to Detective Weaver that the violent encounter with Decedent brought back memories of abuse by his father. However, counsel respectfully submits this Court overlooked other facts that went to the heart of the reasonableness of Appellant's fear. In the same statement, Appellant also said that, at the time, he was "thinking how much he [Decedent] hurt Heather." R. 586.

Also, counsel submits this Court's reasoning that "Himes agreed the only threatening thing the victim said to him the night of the fatal shooting was 'you're not going into that apartment where my two kids are,'" overlooked other threatening remarks testified to by Appellant. In particular, Decedent repeatedly told Appellant that, "He wasn't going to allow his kids to call me daddy," and "he wasn't going to allow me to be a father to his kids." R. 132, ll. 3-24. These words, combined with Decedent's actions of continuously coming towards Appellant, while Appellant retreated, were also threats as they conveyed Decedent's intent to act to ensure Appellant never became a father to the children.

Appellant believed he had backed up about fifty feet by then, and police officers would estimate the fatal encounter took place about thirty-three to thirty-nine feet from the breezeway that led to the apartment. R. 98, l. 19 – 99, l. 4; R. 133, ll. 13-19. At that point, Appellant pulled out a gun. R. 133, ll. 1-19. (Appellant had bought the gun because Heather was raped by an acquaintance on October 26, 2015.) R. 126, l. 5 – 127, l. 14.

Appellant continued backing away towards Heather's car, but Decedent, "was yelling at me. He said I'm not scared of your punk ass gun." R. 134, ll. 6-12. That too, was a threatening remark by the Decedent that night.

Counsel respectfully submits that the Court overlooked other significant evidence offered at the immunity hearing on the reasonableness of Appellant's fear. *See* BOA at 6 – 10; BOA at 20 – 22; BOA at 25 – 28. In particular, Appellant's knowledge of Decedent's prior violent physical conduct towards Heather was relevant to the reasonableness of Appellant's fear. Appellant knew Decedent had physically abused Heather at least twice. Once, Decedent's violent physical abuse of Heather was so severe it left her with permanent facial scarring.

Counsel also submits this Court misapprehended the threatening nature of the text message sent by the Decedent, particularly in the context that it was sent just two days before the confrontation. Given Decedent's use of the words, "don't let me catch him slipping," Appellant quite reasonably feared being assaulted by an angry and violent Decedent, when he was caught by Decedent heading to Heather's apartment. *See People v. Arellano*, 23 Cal. Rptr. 3d 172, 174 (Cal. Ct. App. 2004); *Boddie v. State*, 494 S.E.2d 651, 652 (Ga. 1998). This message must also be considered in the context that Appellant went out of his way to hide from and avoid Decedent on previous occasions and on the night in question.

Appellant was also in reasonable fear because the decedent began reaching in his pocket, ignored multiple pleas from Appellant to back up, and lunged at Appellant. “A defendant, in a self-defense case, has the right to act on appearances.” *State v. Fuller*, 297 S.C. 440, 443, 377 S.E.2d 328, 331 (1989). That is true even if the defendant’s belief about those appearances is ultimately mistaken. *State v. Dickey*, 394 S.C. 491, 501, 716 S.E.2d 97, 102 (2011). Similarly, the accused does not have to wait until his assailant gets the drop on him—he has the right to act under the law of self-preservation and prevent his assailant “from getting the drop on him.” *State v. Rash*, 182 S.C. 42, 50, 188 S.E. 435, 438 (1936). Appellant told Decedent to “back up” at least three times, pleas that were overheard and confirmed by Heather. Appellant himself had also backed up more than thirty feet before the fatal shot was fired, yet the Decedent kept coming at him.

In *State v. Dickey*, 394 S.C. 491, 716 S.E.2d 97 (2011), our Supreme Court held that the defendant, a security guard, was entitled to a directed verdict on self-defense when he fatally shot a man he was lawfully ejecting from an apartment building. The Court determined that the defendant reasonably believed he was in actual danger of death or serious bodily injury because the victim was highly intoxicated, acted aggressively over the course of the conflict, began advancing toward the defendant quickly with the purpose of assaulting him and continued advancing toward the defendant after defendant pulled the gun. *Id.* at 501, 716 S.E.2d at 102. Similarly, here, Decedent was highly intoxicated, was undeterred by the threat of the gun, and he kept advancing on Appellant despite being exhorted to back up. It was only when Decedent finally lunged at Appellant that Appellant fired a single shot.

Counsel also respectfully submits the Court overlooked the fact that Appellant did not bring about the difficulty. *See* BOA at 17 – 18; BOA at 22 - 24. To the extent that the solicitor

contended Appellant was acting unlawfully because he was not in lawful possession of the gun, “a person can be acting lawfully, even if he is in unlawful possession of a weapon, if he was entitled to arm himself in self-defense at the time of the shooting.” *State v. Burriss*, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999). And, the circuit court’s overly moralistic conclusion that Appellant brought about the difficulty because he was in a relationship with Heather did not take into consideration the fact that Decedent and Heather had been separated for eighteen months and lived in different residences, and Appellant was living with Heather.

Nor was Appellant’s tardy arrival responsible for bringing about the difficulty. Under that erroneous line of reasoning espoused by the circuit court, Decedent should be at fault for bringing on the difficulty because he only encountered Appellant pursuant to his decision to drive his children while grossly intoxicated, instead of waiting until the next day. However, it was, in fact, the Decedent’s conduct in continuing to force Appellant backward and ignoring his pleas to stop, culminating in Decedent’s decision to charge at and lunge at Appellant that brought about the difficulty here.

Moreover, counsel submits that this Court overlooked the fact that Appellant was in a place where he had a right to be. *See* BOA at 18 – 20. In *State v. Jones*, 416 S.C. 283, 296-97, 786 S.E.2d 132, 139 (2016), our Supreme Court clarified the scope of subsection (C) of the Act, finding that it is “broadly worded” and that the Legislature intended its protection “to apply to incidents, provided the other requirements are met, without a geographical restriction.” Appellant had been staying at Heather’s apartment for several weeks. His clothing and toothbrush were there. He was an invited guest, expected by Heather to come back.

This Court also overlooked the fact that Appellant had no duty to retreat. *See* BOA at 28 - 29. The circuit court’s findings in this regard, that Appellant should have walked away, are

inexplicable. *See* S.C. Code Ann. § 16-11-440(C) (“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** . . .”) (emphasis added). Our Courts have determined that, in order to be granted immunity from prosecution under the Act, a defendant must also prove all the elements of self-defense, **except the duty to retreat**, by a preponderance of the evidence. *State v. Curry*, 406 S.C. 364, 371-72, 752 S.E.2d 263, 266-67 (2013). “[T]he duty to retreat, need not be shown when seeking immunity under the Act.” *State v. Douglas*, 411 S.C. 307, 318, 768 S.E.2d 232, 239 (Ct. App. 2014). Moreover, any further retreat by Appellant could have put him in danger, since Decedent was unsatisfied with Appellant’s attempts to retreat. Decedent continued to follow Appellant and charged at him, even though Appellant was retreating and Appellant had repeatedly entreated Decedent to back up.

The trial court erred by finding Appellant was not eligible for or entitled to immunity from prosecution under the Protection of Persons and Property Act. Based on the above arguments, counsel for Appellant respectfully seeks rehearing pursuant to Rule 221(a), SCACR, due to the significant points overlooked and/or misapprehended by the Court in affirming Appellant’s murder conviction.

Respectfully Submitted,

s/ Joanna K. Delany
JOANNA K. DELANY
Appellate Defender

This 25th day of June, 2020.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Dorchester County

Honorable Maité Murphy, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CHRISTIAN ANTHONY HIMES,

APPELLANT

CERTIFICATE OF SERVICE

Pursuant to the Supreme Court’s Order “RE: Operation of the Appellate Courts During the Coronavirus Emergency,” dated March 20, 2020, the undersigned hereby certifies a true copy of the Petition for Rehearing in the above referenced case has been served upon Melody Brown, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and a copy of the Petition for Rehearing has been served upon Christian Anthony Himes, #344458, at Kirkland Reception and Evaluation Center, 4344 Broad River Road, Columbia, SC 29210, this 25th day of June, 2020.

s/ Joanna K. Delany

Joanna K. Delany
Appellate Defender
ATTORNEY FOR APPELLANT

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Dorchester County
The Honorable Maite Murphy, Circuit Court Judge

Unpublished Opinion No. 2020-UP-178

The State,

Respondent,

v.

Christian Anthony Himes,

Appellant.

Appellate Case No. 2017-000870

PETITION FOR REHEARING

In its opinion issued June 10, 2020, the Court vacated Himes's conviction and sentence for possession of a weapon during the commission of a violent crime. The Court erred for these reasons:

- Himes did not argue to this Court that there was any error in the conviction; Himes argued only that his sentence was incorrect;
- No basis exists to set aside the jury's verdict based upon a sentencing issue; and,
- The Court erred in reaching the sentencing issue, because the sentencing issue was not preserved for appellate review.

Respondent seeks rehearing pursuant Rule 221(a), SCACR, because this Court erred as a matter of law in vacating the conviction, and in reaching the unpreserved sentencing issue. Respondent submits the Court should grant rehearing, and consider this case in light of the following points, arguments, and case law that may have been misapprehended or overlooked:

Discussion

In the second issue presented in his appeal, Himes challenged his *sentence* of five years for possession of a weapon during the commission of a violent crime when he was sentenced to life without parole on his murder conviction. (FBOA, pp. 30-31). Himes argued:

The trial judge erred as a matter of law *in sentencing* Himes, and *the five year sentence* for possession of weapon during the commission of a violent crime pursuant to S.C. Code Ann. § 16-23-490 *should be vacated*. Though defense counsel did not raise an objection to the improper imposition of this sentence during Himes' sentencing hearing, this Court can address this issue in the interest of judicial economy. *See, e.g., State v. Vick*, 384 S.C. 189, 201-03, 682 S.E.2d 275, 281-82 (Ct. App. 2009).

(FBOA, pp. 30-31) (emphasis added). (*See also* FBOA, p. 1, Statement of Issues on Appeal, Issue II. (“Whether, in the interest of judicial economy, this Court should vacate the five year sentence imposed for possession of a firearm during the commission of a violent crime....”)).

Two things are evident. One, that Himes only asked for his sentence of five years to be vacated. And two, that Himes admitted the sentencing issue was not preserved. The Court erred in reaching the issue and in vacating the conviction. Neither is warranted nor allowed.

Procedurally, appellate courts simply do not address issues not raised to them:

As Chief Judge Alex Sanders so aptly stated, “[A]ppellate courts, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked.”

Kennedy v. S.C. Ret. Sys., 349 S.C. 531, 533, 564 S.E.2d 322, 323 (2001) (quoting *State v. Austin*, 306 S.C. 9, 19, 409 S.E.2d 811, 817 (Ct.App.1991)). Himes did not present any argument on the conviction. Thus, whether the conviction should be vacated was not a matter to be considered. *Id. See also* Rule 208 (b)(1)(B), SCACR (“Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal.”). Further, the Court has identified no basis to vacate the conviction. Any reliance on S.C. Code Ann. § 16-23-490 is misplaced.

S.C. Code Ann. § 16-23-490(A) provides:

If a person is in possession of a firearm or visibly displays what appears to be a firearm or visibly displays a knife during the commission of a violent crime and is convicted of committing or attempting to commit a violent crime as defined in Section 16-1-60, he must be imprisoned five years, in addition to the punishment provided for the principal crime. This *five-year sentence does not apply in cases where the death penalty or a life sentence without parole is imposed for the violent crime.*

(emphasis added).

The Supreme Court of South Carolina has resolved that this section of the statute prohibits imposition of a sentence in the listed circumstances, but not that it provides a basis for vacating the conviction. In fact, if the sentence of the accompanying crime is modified to be less than death or life without parole, the five year sentence must be imposed once again:

Section 16–23–490(A) expressly provides the mandatory five year sentence for possession of a firearm during the commission of a violent crime shall not be imposed when the defendant is sentenced to death or to life without parole for the violent crime. Appellant was sentenced to death. Accordingly, we *vacate the five year sentence* for possession of a firearm during the commission of a violent crime. *If, on resentencing, appellant receives a sentence other than death or life without the possibility of parole, he shall also be sentenced to five years imprisonment for possession of a firearm during the commission of a violent crime. ...*

State v. Owens, 346 S.C. 637, 666–67, 552 S.E.2d 745, 760 (2001), *overruled on other grounds by State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005). *Cf. State v. Perry*, 278 S.C. 490, 495–96, 299 S.E.2d 324, 327 (1983) (applying similar provision in kidnapping statute: “The statute does not mandate a vacation of the kidnapping conviction. It merely provides that either the life imprisonment sentence or the death penalty sentence required in a murder conviction shall be sufficient punishment. The kidnapping conviction is, accordingly, affirmed.”).

Consequently, the grant of relief vacating the conviction is procedurally and substantively wrong. Further still, the Court erred in addressing a procedurally barred sentencing issue.

In his brief, Himes admitted his sentencing issue was not preserved for review. (FBOA, p. 30). The Court noted this fact and set out in the opinion that “Himes admits this argument is not preserved for appeal....” (Opinion, [unnumbered] p. 3, para. 2). The Court continued to subsequently address the issue on the merits. Absent an objection, though, the issue was not preserved for review and should not have been reached.

“In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge.” *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003). The Supreme Court “has routinely held the plain error rule does not apply in South Carolina state courts.” *State v. Sheppard*, 391 S.C. 415, 421, 706 S.E.2d 16, 19 (2011) (citing *Jackson v. Speed*, 326 S.C. 289, 306, 486 S.E.2d 750, 759 (1997)). *See also Kennedy v. S.C. Ret. Sys.*, 349 S.C. at 532–33, 564 S.E.2d at 323 (“Preserving issues for appellate review is a fundamental component of appellate practice. South Carolina appellate courts do not recognize the plain error rule.”) (citing Jean H. Toal, Shahin Vafai & Robert Muckenfuss, *Appellate Practice in South Carolina* 65 (1999)). This Court has similarly noted there is no plain error rule in this jurisdiction. *See State v. Burroughs*, 328 S.C. 489, 496, 492 S.E.2d 408, 411 (Ct. App. 1997) (“South Carolina has no ‘plain error’ rule.”). Therefore, the issue should not have been reached.

The Court appears to acknowledge the limitation as, rather than addressing the procedural obstacle, it announced that it would resolve the sentencing issue “in the interest of judicial economy.” (Opinion, [unnumbered] p. 3, para. 2). Yet, the Court identifies no basis for the extraordinary step of avoiding the clearly established preservation rules. The Court cites to *State v. Bonner*, 400 S.C. 561, 564, 735 S.E.2d 525 (Ct.App. 2012), but the basic fact this Court relied upon in *Bonner* to find an “exceptional circumstance” is not present here. As this Court notes in the parenthetical following the *Bonner* cite, *Bonner*’s sentence was vacated because the State

conceded error. (Opinion, [unnumbered] p. 3, para. 2, sec. 2). *See also Bonner*, 400 S.C. at 567, 735 S.E.2d at 528 (“... this case presents an exceptional circumstance because the State concedes in its brief that the trial court committed error by imposing an improper sentence.”) In the other case cited in the opinion, *State v. Palmer*, 415 S.C. 502, 783 S.E.2d 823 (Ct. App. 2016), the reasoning for relief likewise referenced a concession: “The State concedes this was in error, and we agree. Therefore, Palmer’s sentence for possession of a weapon during the commission of a violent crime should be vacated.” 415 S.C. at 525, 783 S.E.2d at 835. However, in this case, the State did not concede error, but relied solely on the fact the issue was not preserved. (See FBOR, pp. 24-25). In sum, a principle reason cited in both *Bonner* and *Palmer* for avoiding the procedural bar and resorting to judicial economy is not present here. Further, there is no cause to expedite consideration of this issue rather than allow the issue to be addressed in the ordinary course of collateral review.

The Supreme Court has set out that “a challenge to sentencing must be raised at trial, or the issue will not be preserved for appellate review.” *State v. Johnston*, 333 S.C. 459, 462, 510 S.E.2d 423, 425 (1999). The Court in *Johnston* recognized an extremely limited exception to the general preservation rule – an exception to allow the Court to swiftly address a sentencing error where “there [was] the real threat” *Johnston* “w[ould] remain incarcerated beyond the legal sentence due to the additional time it will take to pursue” post-conviction relief. *Id.*, 333 S.C. at 464, 510 S.E.2d at 425. The *Johnston* exception does not apply in a case such as the instant one where there is no danger of serving time beyond the maximum imposed. This Court had previously followed that logic. In *State v. Passmore*, 363 S.C. 568, 611 S.E.2d 273 (Ct. App. 2005), this Court considered whether the *Johnston* exception applied in regard to an unpreserved challenged to an already expired contempt sentence and found:

... the exceptional circumstance carefully carved out by the *Johnston* court is not present here. Appellant has already served the duration of her sentence; therefore, she does not face the threat of continuing incarceration beyond the legal sentence. *Johnston* does not control.

363 S.C. at 585–86, 611 S.E.2d at 282–83.

The panel concluded in the absence of a properly preserved issue or recognized exception: “Appellant will be forced to seek redress through the avenue of post-conviction relief.” *Id.* at 586, 611 S.E.2d at 283. However, later, in *State v. Vick*, this Court expanded the Supreme Court *Johnston* exception finding the sentence for kidnapping, though unpreserved, would be vacated in light of a concession by the State that the sentence was improper; judicial economy; and, that the same issue would likely be addressed in a later post-conviction relief action. *State v. Vick*, 384 S.C. 189, 682 S.E.2d 275 (Ct. App. 2009). This Court concluded:

...because the State concedes the kidnapping sentence was erroneously imposed, and in light of the fact our courts recognize there may be exceptional circumstances allowing the appellate court to consider an improper sentence even though no challenge was made to the sentence at trial and have further summarily vacated in matters such as the one at hand, in the interest of judicial economy we vacate the clearly erroneous kidnapping sentence.

Vick, 384 S.C. at 203, 682 S.E.2d at 282.

Again, such a concession as referenced is not present here. Further, there are limitations to incorporating the logic of the cases cited in *Vick* in support of judicial economy.

Vick cites to *S. Bell Tel. & Tel. Co. v. Hamm*, 306 S.C. 70, 75, 409 S.E.2d 775, 778 (1991) and *Jeter v. S.C. Dep't of Transp.*, 369 S.C. 433, 441 n. 6, 633 S.E.2d 143, 147 n. 6 (2006). *Id.* Both of those cases are civil cases, and do not contemplate an option for post-conviction relief. Further, the *Bell Telephone* opinion reflects the court actually found “the trial court properly considered the issue,” but would at any rate address and resolve a novel constitutional issue regarding a right of privacy to a publically offered, widely available, service,

306 S.C. at 75, 409 S.E.2d at 778; and, the *Jeter* case resolved a venue issue in a matter that had two other trials and was likely to be tried a third time, 369 S.C. at 441, 633 S.E.2d at 147 n. 6. Even so, the logic reflected in those two civil cases simply does not apply in the criminal context where post-conviction relief is available. And further still, there is danger to the Court's avoidance of its established procedural rules.

Should appellate courts routinely cite judicial economy to address unpreserved errors, the exception becomes the rule. In the criminal appeal context, such action would work to undermine the scope and purpose of the Post-Conviction Relief Act, see S.C. Code §§ 17-27-10 et.seq. Moreover, such action may tend to inhibit rather than promote judicial economy. For example, if in PCR, or other challenge, the sentence for murder is modified to less than life without parole, then, under *Owens, supra*, the existing five year sentence is proper. There would be no error to correct if both are addressed together in later litigation. Here, though, this Court has vacated both the conviction and sentence. That not only frustrates potential sentencing after modification, but also immediately frustrates, without cause or justification, the jury's reasoned decision on the crimes committed. There is little judicial economy, or justice, to be found on these facts.

In sum, Himes should not be excused from adherence to the general preservation rules. At a minimum, though, the Court should grant rehearing and modify the relief to restrict the relief to vacating the sentence, and not the conviction. *See Owens, supra*.

Conclusion

For the foregoing reasons, the Respondent respectfully requests this Court reconsider its opinion based on the foregoing and reverse the grant of relief *in toto*. Alternatively, Respondent requests the Court amend its relief to reflect only what was requested and only what could be

allowed under the statute provision cited – modification of the sentence without disturbing the weapon conviction.

Respectfully submitted,

ALAN WILSON
Attorney General

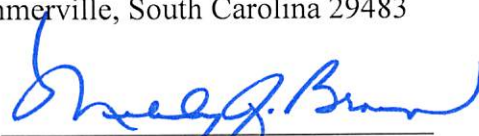
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By:



MELODY J. BROWN
S.C. Bar No. 14244

ATTORNEYS FOR RESPONDENT

June 25, 2020
Columbia, South Carolina.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Dorchester County
The Honorable Maite Murphy, Circuit Court Judge

Unpublished Opinion No. 2020-UP-178

The State,

Respondent,

v.

Christian Anthony Himes,

Appellant.

Appellate Case No. 2017-000870

CERTIFICATE OF SERVICE

I, Melody J. Brown, counsel for the Respondent, certify that I have served the Petition for Rehearing in the captioned case by e-mail service upon Appellant's attorney of record, Joanna K. Delaney, Esquire, and also by mailing a paper copy of same addressed to counsel at the following address: South Carolina Commission on Indigent Defense, Division of Appellate Defense, Post Office Box 11589, Columbia, South Carolina 29211-1589.

This 25th day of June, 2020.

MELODY J. BROWN

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ATTORNEY FOR RESPONDENT

The South Carolina Court of Appeals

The State, Respondent,

v.

Christian Anthony Himes, Appellant.

Appellate Case No. 2017-000870

ORDER

The petitions for rehearing are denied. The attached opinion is substituted for the previous opinion, which is withdrawn.

Thomas C. Hill

J.

Paul W. Thomas

J.

Stephen P. McBride

J.

Columbia, South Carolina

cc:

Alan McCrory Wilson, Esquire

Donald J. Zelenka, Esquire

Alphonso Simon, Jr., Esquire

Melody Jane Brown, Esquire

David Michael Pascoe, Jr., Esquire

Joanna Katherine Delany, Esquire

The Honorable Maite Murphy

FILED

July 29, 2020