THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions

Robin B. Stilwell, Circuit Court Judge

Appellant Case No.: 2012-208587

State of South Carolina, ... Respondent,

v.

Terry Dean Gregory, ... Appellant.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Terry Gregory ("Appellant") was charged with Murder (Indictment No. 2010 GS-23-6119) and Pointing and Presenting a Firearm (Indictment No 2010-GS-23-006118) for an incident that occurred on October 10, 2009. On February 24, 2011, the Appellant filed a Motion to Request an Immunity Hearing pursuant to S.C. Code § 16-11-450(A). On November 7-8, 2011, a hearing was held in front of Robin B. Stilwell, Circuit Court Judge for the Thirteenth Judicial Circuit. At the hearing, the Appellant presented his case for immunity pursuant to the Protection of Persons and Property Act, 16-11-410 *et seq.*

Specifically, the Appellant asserted that he was entitled to immunity through four separate and alternative scenarios. Appellant asserted that S.C. Code § 16-11-450(A) provided him immunity for the common law defenses of self-defense and defense of another. In addition, Appellant asserted that S.C. Code § 16-11-450(A) provided him immunity pursuant to S.C. Code §§ 16-11-440(B) (Defense of Vehicle) and 440(C) (Stand Your Ground). At the close of the hearing, the Trial Court requested proposed orders from both the Appellant and the State in lieu of argument (R. p. 585 ln. 1-14).

On January 30, 2012, the Trial Court issued an Order which denied the Appellant's request for immunity. The Trial Court held that S.C. Code § 16-11-450(A) did not apply for the common lawn assertions of self-defense and defense of another. In addition, the Trial Court held that neither § 440(B) nor § 440(C) were applicable.

On February 8, 2012, Appellant filed a Motion for Reconsideration. In his Motion for Reconsideration, the Appellant made it clear that the Trial Court had erred in failing to interpret S.C. Code § 16-11-450(A) to include the common law defenses of self-defense and defense of another, by failing to address defense of another from the standpoint of the person defended, by failing to consider the Deceased in finding the Appellant "at fault for bringing on the difficulty",

and failing to focus on the Deceased and expanding the statutory time frame in finding that the Appellant had been "engaged in unlawful conduct" at the moment when the fatal shot was fired.

On February 17, 2012, the Trial Court summarily dismissed the Motion for Reconsideration.

SUMMARY OF FACTS

Terry Dean Gregory, hereinafter ("Appellant") is currently charged with Murder, Pointing and Presenting a Firearm and Possession of a Weapon During Commission of a Violent Crime (R. p. 48 ln. 8-10). These charges all stem from an incident that occurred on Saturday, October 10, 2009, at 10:50 p.m. (R. p. 50 ln. 13-14).

On October 10, 2009, the Appellant and his wife, Louanne Gregory[1], were in downtown Greenville for "Fall for Greenville." (R. p. 61 ln. 13). Mid-afternoon of that day, they saw the Appellant's son, Steven Gregory, on Main Street handing out fliers for his aunt's restaurant, "Shane's". (R. p. 63 ln. 10). The Appellant had not seen or spoken to his son in several months. (R. p. 56). The Appellant believed that there was a serious misunderstanding between them that had arisen from a number of different family issues that had occurred that summer. (R. pp. 56-60). Primarily, Steven had not graduated from high school in June like most of his class-mates. (R. pp. 55, 56). In addition, Steven had spoken to Louanne Gregory using profanity and telling her to leave him alone. (R. pp. 57, 439).

The Appellant and Steven spoke briefly. (R. pp. 441-442). The conversation prompted Steven to call his brother Kellet Gregory[2]. The Appellant also called Kellet and left a provocative message for his son. (R. p. 443). Kellet Gregory called the Appellant shortly thereafter. (R. p. 445). It is undisputed that the Appellant and Kellet had gotten along fairly well prior to Kellet going to basic training for the Army. (R. pp. 432-437). In fact, the Appellant threw a party for his son in May 2010 before Kellet left. (R. pp. 432-433). It is also undisputed that Kellet stopped communicating with his father, the Appellant, at some point shortly after he went into basic training. (R. p. 437).

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[1] Louanne Gregory is sometimes referred to as "Mary" by other individuals.
[2] Kellet Gregory is transcribed as "Kelly" in most places.

Both Kellet Gregory and the Appellant agree that the conversation started off in a fairly hostile manner. (R. pp. 386, 445). They both agree, however, that the conversation de-escalated into a discussion about where they could meet to talk. (R. p. 445). Initially, the Appellant suggested downtown Greenville. (R. pp. 387, 446). Next, the Appellant suggested Shane's restaurant nearby. (R. pp. 388, 446). Ultimately, Kellet Gregory suggested the time and meeting place. (R. pp. 389-390; 447). The meeting was scheduled to take place later in the evening of October 10, 2009, after Steven Gregory had gotten off work. (R. p. 364). The Appellant was told to meet his two sons on Shirley Road near a Spinx station at the intersection of Highway 154 and McKelvey Road. (R. pp. 389-390; 446). All parties testified that the intent of the meeting was for the Appellant and his sons to talk. (R. pp. 349; 392-395; 447).

The Appellant believed he was meeting to discuss the issues that had led his sons to cut off communication with him. (R. pp. 445-446). Steven and Kellet testified that they were going to tell their father that they simply did not want him in their life anymore. (R. pp. 392-395).

At the appointed time, Kellet Gregory and Steven Gregory headed toward McKelvey Road in separate trucks. (R. pp. 410-411). They took at least seven other people with them. Kellet Gregory took his friend Brent Hanvey[3]. (R. p. 395). Steven Gregory took the remaining six. (R. p. 393) The six other people included Lisa Brashier, the two sons' mother and Appellant's ex-wife. In addition, Lisa Brashier's live-in boyfriend Roger White, Sr., his son, Roger White, Jr., and Roger White, Jr.'s best friend Justin Davis accompanied Steven to the scene. The remaining two individuals included Ralph "Tripp" Pittman[4], Lisa Brashier's son by another marriage, and Dustin Lackey, Tripp Pittman's friend. (R. p. 393). The nine individuals listed above went to the scene in three separate trucks.

[3] This persons actual last name is spelled Hamby, however, it is consistently "Hanvey" throughout the transcript.
[4] Appellant requested that the Transcript reflect the correct name, however it appears as "Ralph Didon" in the Index, "Ralph Didlon" (R. p. 244), and Tripp Pittman as a heading to the testimony.

Kellet and Steven Gregory, and the seven other people arrived at the intersection of South Shirley Road and McKelvey Road first. (R. pp. 348-350). Kellet Gregory and Roger White, Sr. turned their trucks around so that they were facing McKelvey Road and blocking the right hand side of South Shirley Road. (Def.'s Ex. 4; State's Ex. 7)[5]. The third truck, Steven Gregory's, was positioned just off the pavement perpendicular to the entrance to McKelvey Road. (Def.'s Ex. 4). This is the direction from which they expected the Appellant to drive onto South Shirley Road. (R. p. 392). At least eight people exited the trucks and stood towards the front of the two trucks parked in South Shirley Road. (R. p. 366).

Meanwhile, the Appellant left his hotel room in Greenville with his wife Louanne Gregory. (R. pp. 74-76). They had planned on staying the weekend downtown. (R. pp. 62-62). The Appellant and his wife knew that they were meeting his two sons, but had never been informed that there would be a number of other people present. (R. p. 76). The Appellant had suggested a number of places to meet including downtown Greenville, a restaurant in downtown Greenville, and the Spinx gas station on Highway 418. (R. p. 446). The specific location of the meeting that actually took place was suggested by Kellet Gregory, and was unknown to the Appellant. (R. pp. 78, 447).

Initially, the Appellant missed the turn. (R. pp. 50, 80, 448). At **10:49:05 p.m.**, Kellet Gregory used his cell phone to call Louanne Gregory to tell them they had missed the turn. (R. pp. 80, 448). At **10:51:11 p.m.**, some **126 seconds** later, 911 Emergency Services received two phone calls indicating that Roger White, Jr. (hereinafter "the Deceased) had been shot. (R. pp. 50-51; 265).

[5] All references to Exhibits refer to the physical exhibits which have been transported to the South Carolina Supreme Court Clerk of Court.

Between **10:49 p.m.** and **10:51 p.m.**, there is very little factual dispute of any legal relevance. The State's witnesses agree to the sequence of events, location of the relevant parties, and their conduct during the **126 seconds** of the encounter between the parties.

The undisputed narrative of the critical 126 seconds is as follows: the Appellant arrived at South Shirley Road and stopped his truck in front of the vehicles blocking the road. (R. pp. 451-452). His wife, Louanne Gregory, occupied the passenger side of the truck, but never left her seat. Next, the Appellant opened his driver's-side door and stood between the interior of the driver's-side door and the cab of the truck. His body was partially in and partially out of the truck in the crook of the door with the door opened only wide enough to allow him to stand. (R. p. 90).

The Appellant held a flashlight and asked his sons to come over and talk. (R. p. 450). His sons told him to put the flashlight down, but began to advance towards the Appellant's truck. (R. p. 451). As they advanced, Lisa Brashier and Roger White, Sr. became involved in the conversation. Talking quickly turned to yelling with hateful things being said by all parties. (R. p. 168). At this point, Roger White, Sr., the Deceased, Steven Gregory, Kellet Gregory and Lisa Brashier began moving toward the Appellant's position. (R. pp. 87-88). The Appellant never left the area that he occupied when he first opened the door.

While the Appellant was standing on the inside of his door, his wife, Louanne Gregory, picked up or took out the pistol that was kept in the Appellant's truck. (R. p. 453). The pistol had always been kept in the truck. (R. pp. 76, 441). The Appellant owned the pistol and it was registered to him, Terry Gregory. (R. p. 426). The Appellant possessed a Concealed Weapon Permit (hereinafter "CWP") as did his wife, Louanne Gregory. (R. pp. 425-426; Def.'s Ex. 10.) She began to display the weapon at a number of the individuals that were at or near her side of

the truck. (R. pp. 90-91; 453-454). Several of the individuals testified that they saw Louanne Gregory with the pistol in her hand inside the cab of the truck. (R. p. 91). None of the individuals who had been waiting on the Appellant moved away or backed up at the initial display of the pistol by Louanne Gregory. (R. p. 91).

Depending on which side was testifying, the Appellant either, obtained the gun from his wife and displayed it from his position inside the door of the truck, or the individuals present rushed his door and pinned the Appellant in-between the door of the truck and the cab when he displayed the weapon. (R. pp. 453-454). Under either scenario, there is no dispute that the Appellant maintained his position inside the door of his truck and that at least Kellet Gregory, Steven Gregory, Lisa Brashier, Roger White, Sr. and the Deceased advanced on the Appellant's position. (R. pp. 289-290; 455).

For some moments prior to the fatal shot the pistol was visible to everyone at or near or on the Appellant. (R. pp. 457-458). Lisa Brashier advanced to the Appellant's door and began kicking it. (R. pp. 355, 561). Steven and Kellet Gregory moved up behind her with Roger White, Sr. advancing directly behind Steven and Kellet Gregory. (R. p. 455).

While the Appellant was occupied with these four individuals, the Deceased went down the passenger side of the Appellant's truck. The Deceased then snuck around the back of the Appellant's truck and came up from behind the Appellant. (R. pp. 93-94). His approach brought him to the Appellant's exposed side at the opening of the driver's-side door. (R. pp. 93-94). The Deceased then began to aggressively reach to grab the Appellant's pistol. (R. pp. 356, 417-418, 458). In order to get close enough to actually grab the pistol, the Deceased got between the open driver's-side door and the Appellant. (R. pp. 95-96). His body was up against the Appellant and he was bending over in an effort to grab the gun as it was being held waist-high at the

Appellant's right side. (R. pp. 95-96; 519). The wound indicated that the barrel of the pistol was in contact with the left lower side of the Deceased's neck. (R. p. 471). The Appellant shot once. The bullet entered the Deceased's neck, severed his spinal cord, paralyzed his body and killed him almost instantly. (R. pp. 506-508).

Both Louanne Gregory and Lisa Brashier immediately called 911 completing the critical 126 seconds. (Def.'s Exs. 2 and 3).

While the police and ambulance were en route, Louanne Gregory and Lisa Brashier stayed on the phone with 911. (Def.'s Exs. 2 and 3). Harsh language and threats from those outside the Appellant's truck are fairly clear in the background of the 911 tape. (Def.'s Ex. 2). Throughout the 911 phone call, the Appellant continued to maintain his position with the gun displayed. (R. p. 101; Def.'s Ex. 2). Louanne Gregory stayed on the phone with 911 until a deputy arrived. (R. pp. 100-101; Def.'s Ex. 2). She described in some detail the events that had transpired leading up to the fatal shot. (R. p. 102; Def.'s Ex. 2). Notably, she informed the 911 operator that cars were leaving and people were running from the scene. (R. p. 152, 461-462; Def.'s Ex. 2).

When the first officer arrived on the scene, the Appellant put the gun on the ground and raised his arms in the air. (R. p. 460). The Appellant was handcuffed and placed in the rear of the deputy's patrol vehicle. (R. p. 463). Louanne Gregory was separated from everyone else, interviewed at the scene, escorted to the Greenville County Law Enforcement Center ("LEC"), and interviewed again. (R. pp. 105, 107). The other individuals were held in a group at the rear of the scene, rode with each other to the LEC, waited together in a room at the LEC, and were then interviewed separately. (R. p. 265).

Two individuals who lived close to the incident location also called 911 shortly after the shot was fired. (Def.'s Ex. 2); (R. pp. 173-174, 183). Both of these individuals reported hearing and seeing multiple cars leaving the scene. (R. pp. 170, 187). One of the individuals reported to the 911 operator that an individual had run through his yard and was picked up by a black SUV or van. (R. pp. 185-186).

During the investigation on-scene, deputies discovered marijuana and a smoking pipe in Steven Gregory's truck. (R. p. 292). Deputies discovered an unopened case of beer and an opened and partially empty bottle of vodka in Kellet Gregory's truck. (R. p. 292). Lisa Brashier, Roger White, Sr., Kellet Gregory, Steven Gregory, and Brent Hamby all admitted having consumed some alcohol prior to the meeting. (R. pp. 208, 402, 536). The Appellant and his wife had not consumed any alcohol. (R. p.103).

The post mortem toxicology of the Deceased, revealed a blood alcohol content of .08, marijuana at levels consistent with consumption having occurred within two hours of his death, and very small amounts of amphetamine and methamphetamine. (R. pp. 508-516).

Forensics documented blood drops from the deceased that were located on the interior of the Appellant's driver's-side door. (R. pp. 333, 517; State's Exs. 43-47). Gunshot residue tests were conducted on the Appellant's hands and the Deceased's hands with negative results from both. (R. pp. 497-498, 517-518).

ARGUMENT

1. THE TRIAL COURT ERRED IN ITS INTERPRETATION OF S.C. CODE § 16-11-450(A) WHEN IT DETERMINED THAT THE PHRASE "OR ANOTHER APPLICABLE PROVISION OF LAW" DOES NOT INCLUDE THE COMMON LAW PROVISIONS JUSTIFYING THE USE OF DEADLY FORCE.

The Trial Court held that the grant of immunity in S.C. Code § 16-11-450(A) does not include a grant of immunity for the common law provisions justifying the use of deadly force such as self-defense, defense of another, and defense of habitation. (R. p. 9) In so holding, the Trial Court erred in its interpretation of the statute.

A. STANDARD OF REVIEW

The Appellant asserts that the Trial Court has misinterpreted S.C. Code § 16-11-450(A). As such, Appellant alleges an error of law. *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006) (appellate court sits to review errors of law in criminal cases).

B. STATUTORY LANGUAGE

The statute at issue is South Carolina Code § 16-11-450(A). It states in pertinent part:

> **"A person who uses deadly force as permitted by the provisions of this article or another applicable provision of law is justified in using deadly force and is immune from criminal prosecution and civil action for the use of deadly force."**

(Emphasis added). The term "**or**" indicates that there are two different sources of immunity for a person who uses deadly force. As this Court stated in *Brewer v. Brewer,* 242 S.C. 9, 14, 129 S.E.2d 736, 738 (1963), the use of the word "or" in a statute "is a disjunctive particle that marks an alternative." Therefore, if the word "or" is to be given any meaning, then there must be two alternative sources for the grant of immunity contained in S.C. Code § 16-11-450(A). The first source of immunity is the provisions of the article. The alternative source of immunity is any other applicable provision of law.

The first of the two alternatives is easily addressed. The language "**as permitted by the provisions of this article**," refers specifically to the "Protection of Persons and Property Act." In particular, the factual scenarios permitting the use of deadly force and granting immunity for the same are described in S.C. Code § 16-11-440(A) and (C). The provisions permitting the use of deadly force in the "Protections of Persons and Property Act" were designed to expand the common-law right to self-defense, defense of habitation and defense of another. This fact is made clear in the statement of purpose contained in the Article itself: "no person . . . should be required to surrender his personal safety to a criminal, nor should a person . . . be required to needlessly retreat in the face of intrusion or attack." *S.C. Code* § 16-11-420(E) (Supp. 2006).

While sub-sections (A) and (C) overlap to some extent, they ultimately describe two different types of confrontations. Sub-section (A) can best be described as the "Defense of Vehicle" immunity, whereas sub-section (C) can best be described as the "Stand Your Ground" immunity. The fact that the language "**as permitted by the provisions of this article**," stands alone as source for the grant of immunity appears to be without question. *See State v. Duncan*, 392 S.C. 404, 709 S.E.2d 662 (2011).

The second of the two alternatives is also readily discernible. The language "**or another applicable provision of law**" refers to the common-law provisions for self-defense, defense of another, and defense of habitation. The plain meaning of the word "law" includes statutory law, constitutional law, regulatory law, case law, and the common law. *Black's Law Dictionary* 6th ed. p. 612 (1991). Even if the plain meaning of "law" did not include the common law, South Carolina has adopted the common law of England by statute. "The common law of England . . . continue[s] in full force and effect" in South Carolina. *S.C. Code* § 14-1-50. Self-defense, defense of another, and defense of habitation have long been considered part of the common law

of England and are applicable to this day. *State v. Hill*, 129 S.C. 166, 123 S.E. 817 (1924) (self-defense); *State v. Cook*, 78 S.C. 253, 59 S.E. 862 (1907) (defense of another); and *State v. Bradley*, 126 S.C. 528, 120 S.E. 240 (1923) (defense of habitation). The common law provisions for self-defense, defense of another, and defense of habitation, all permit the use of deadly force. *Id.* Because self-defense, defense of another and defense of habitation are all "applicable provisions of law", and, because each provision permits the use of deadly force, they form the second alternative for the grant of immunity contained in S.C. Code §16-11-450(A).

Therefore, the Trial Judge erred when it determined that "another applicable provision of law" does not include common law provisions permitting the use of deadly force. The words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction **to limit** or expand the statute's operation. *Hitachi Data Sys. Corp. v. Leatherman*, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992). The Trial Court's interpretation limited the immunity statute and violated the rules of statutory construction by making the terms "or another applicable provision of law" meaningless.

2. THE TRIAL COURT ERRED IN FAILING TO ANALYZE THE COMMON LAW "DEFENSE OF ANOTHER" FROM THE STANDPOINT OF THE PERSON BEING DEFENDED.

Under the common law provision of defense of another, the right to protect another arises under the same circumstances as self-defense except that the law views the circumstances from the point of view of the person being protected. *State v. Cook*, 78 S.C. 253, 59 S.E. 862 (1907) (applying alter ego rule); *see also, State v. Hays*, 121 S.C. 163, 168, 113, S.E. 362, 364 (1922) (elements).

In its Order, the Trial Court held that:

> Self-Defense is further extended for the defense of others: "one is not guilty of taking the life of an assailant who assaults a friend, relative, or bystander if that friend, relative, or bystander would likewise have the right to take the life of the assailant in self-defense." *State v. Starnes*, 340 S.C. 312, 323, 531 S.E.2d 907, 913 (2000).
>
> **The Appellant fails to satisfy every prong of the standard of Self-Defense.**

(R. pp. 9-10) (emphasis added). The Trial Court's statement, highlighted in bold above, appeared to conclude that the Appellant's failure to prove self-defense also precluded a finding that the Appellant could prove defense of another. *Id.* In Appellant's Motion for Reconsideration, the Appellant made it clear that the Trial Court's finding failed to analyze the defense of another from the standpoint of the Appellant's wife. (R. p. 22). The Trial Court summarily dismissed the Appellant's Motion for Reconsideration without addressing the error. (R. p. 11).

Therefore, the Trial Court committed an error of law when it failed to apply the alter ego rule to its analysis of defense of another.

A. STANDARD OF REVIEW

The Appellant asserts an error of law in the Trial Court's legal analysis of defense of another. Because the Trial Court did not analyze defense of another from the position of the Appellant's wife, its findings were "controlled by an error of law." *State v. Thrift*, 312 S.C. 282, 440 S.E.2d 341 (1994). As such, this Court is not bound by the Trial Court's findings or, in this case, the lack thereof. *Id.*

B. PROPER ANALYSIS OF APPELLANT'S DEFENSE OF ANOTHER

From the outset of legal proceedings, the Appellant has always maintained that he had the right to defend his wife with deadly force and was entitled to immunity for doing so. (R. p. 49 ln. 21-24); *See* (R. pp. 22-47); *see also, State v. Francis*, 152 S.C. 17, 149 S.E. 348 (1929)

(spouse); *State v. Sales*, 285 S.C. 113, 328 S.E.2d 619 (1985) (relative); *State v. Ross*, 272 S.C. 56, 249 S.E.2d 159 (1978) (siblings); *State v. Hewitt*, 205 S.C. 207, 31 S.E.2d 257 (1944); *State v. Woodham*, 162 S.C. 492, 160 S.E. 885 (1931) (offspring and parents). As the Appellant stated: "I was in fear for my life, in fear for my wife's life, Louanne, and there was no other choice." (R. p. 423 ln. 13-15).

1. Elements of Defense of Another

The four elements of self-defense viewed from the standpoint of the Appellant's wife, are as follows:

> First, the Appellant's wife must be without fault in bringing on the difficulty.
>
> Second, the Appellant's wife must have actually believed she was in imminent danger of losing her life or sustaining serious bodily injury, or she actually was in such imminent danger.
>
> Third, if her defense is based upon her belief of imminent danger, a reasonably prudent person of ordinary firmness and courage would have entertained the same belief. If the Appellant's wife actually was in imminent danger, the circumstances were such as would warrant a person of ordinary prudence, firmness and courage to strike the fatal blow in order to save herself from serious bodily harm or losing her own life.
>
> Fourth, the Appellant's wife had no other probable means of avoiding the danger of losing her own life or sustaining serious bodily injury other than to act as she did in this particular instance.

State v. Davis, 284 S.C. 45, 317 S.E.2d 452 (1984).

Viewing the circumstances from the standpoint of the Appellant's wife, Louanne Gregory, the analysis is without any real factual disputes. It is worth noting that the Trial Court found that the Appellant satisfied each of the elements of self-defense in his own right with the exception of "not being at fault in bringing on the difficulty." (R. p. 10). As presented below, Louanne Gregory was without fault in bringing on the difficulty and satisfies the remaining three elements of self-defense in the same way as the Appellant.

a. Appellant's wife was without fault in bringing on the difficulty.

In determining the fault of the Appellant, the Trial Court focused on the events precipitating the meeting between the Appellant and his sons. (R. p. 8). In addition, the Trial Court determined that the Appellant had "agreed to meet his sons for the purposes of an altercation." *Id.* Assuming arguendo that the Trial Court's focus is appropriate for an "at-fault" analysis, the Appellant's wife, Louanne Gregory, is simply not a part of the Trial Court's equation.

The Trial Court relied heavily on a provocative voicemail that the Appellant left for his son Kellet in determining that the Appellant was "at fault". *See* (R. p. 3). Louanne Gregory was not a party to the provocative voice-mail that the Appellant left his son Kellet. Louanne Gregory did not make this phone call, nor did she hear any part of it. (R. p. 68 ln. 2-5). In fact, the Appellant asked her for her phone and stepped away when he made that phone call. "I got Louanne' s phone, her cell phone, and I walked off to the side, and I called him and I left a message." (R. p. 443 ln. 21-23). When Kellet called back, Louanne Gregory was "ecstatic, that we were going to get to talk to him and get things worked out." (R. p. 69 ln. 13-14). The conversations with Kellet Gregory on October 10, 2009, although on Louanne Gregory's phone, were between the Appellant and his son. (R. pp. 70-74). Louanne Gregory believed that they were all going to meet to "sit down and talk." (R. p. 77 ln. 22). Specifically, if she had had any idea that the meeting was for the purpose of an altercation, she "would not have gone." (R. p. 77 ln. 18).

While this testimony may seem self-serving at first blush, Louanne Gregory is medically infirm and, therefore, physically fragile and vulnerable. She was 56 years old when the incident

took place. (R. p. 77 ln. 10-11). Louanne Gregory testified to her medical condition: "I have allegen perosis, I have Lupus, I have herniated discs in my back, I have skeloderma." (R. p 76 ln. 25 - p. 77 ln. 1). "I've been disabled for over thirteen years." (R. p. 77 ln. 1-2). Physically she was "very weak." (R. p. 77 ln. 5).

In addition, the meeting time and place happened in the middle of a holiday vacation that Louanne Gregory and Appellant were taking in downtown Greenville. Months earlier, Louanne Gregory and Appellant had arranged for a number of Louanne's family members to meet for the downtown festival "Fall for Greenville." (R. pp. 61-62). The plan included spending the night at the Hyatt in downtown Greenville and enjoying the festivities from Friday October 9th until Sunday October 11th. (R. p. 62). Louanne Gregory and Appellant fully expected to be in downtown Greenville on the 10th and 11th to continue their holiday weekend with family. (R. p. 62 ln. 11). From Louanne's perspective, she didn't have a clue that there would be a physical altercation. (R. p. 77 ln. 16-18).

Therefore, to the extent that the Trial Court found the Appellant "at fault in bringing on the difficulty" by leaving a provocative voice-mail and agreeing to meet his sons "for the purpose of an altercation", Louanne Gregory played no part and clearly believed the meeting was for the purpose of talking.

Although the Trial Court focused on the hours leading up to the meeting and the communications between Appellant and his sons, the law says that the focus should be on the moments immediately before the encounter and that the encounter at issue should be the one charged in the indictment. "In order to successfully plead self-defense, one must prove by the preponderance of the testimony that he himself was without fault in bringing on the alleged immediate encounter charged in the indictment." *State v. Burnett*, 210 S.C. 348, 42 S.E.2d 710

(S.C. 1947). The Appellant is charged with the murder of the Deceased. The Deceased is not one of the Appellant's two sons. Therefore, the appropriate encounter to judge whether Louanne Gregory was "at-fault" is the one involving the Deceased, not Appellant's two sons. The appropriate moments to judge whether Louanne Gregory was "at-fault" would be the moments just before the immediate encounter, i.e. when the Deceased attacked the Appellant.

The Appellant and the Deceased had no interaction in the hours leading up to the meeting. When asked if he was aware of any "beef" between the Appellant and the Deceased, the Deceased's father, Roger White, Sr. stated: "They didn't know each other." (R. p. 328 ln. 1). "[T]hey never met." (R. p. 328 ln. 9). The Deceased made the decision to accompany everyone else to the scene. (R. p. 253 ln. 19-22). In fact, neither the Appellant nor Louanne Gregory was aware that the Deceased would even be present at the scene. (R. p. 87 ln. 24 – p. 88 ln. 5; p. 422 ln. 10-15).

Once he got to the incident location, the Deceased made the decision to advance toward the Appellant after Louanne Gregory had displayed the pistol, told everyone to get back, and told everyone to let them leave. (R. p. 91 ln. 3-4). Despite this clear indication that Appellant and Louanne Gregory felt threatened, the Deceased moved around behind the Appellant's truck to attack the Appellant through the opening of the driver's side truck door. (R. pp. 227 – 228). This fact is confirmed by Lisa Brashier's son Trip Pittman. *Id.* The Deceased advanced toward the Appellant after the Appellant also presented his pistol and warned the crowd surrounding him to get back. "At that point, I came forward and I shoved [the Deceased] back this way and I come up with the gun straight up in the air and presented it so everybody could see it, and I told him to get back." (R. p. 457 ln. 15-18). There is no dispute that the Deceased struck the initial blow when he grabbed for the gun. (R. p. 401 ln. 15-17). The Deceased said: " I ain't afraid of

no f-ing gun; I'm going to kill you and your bitch." (R. p. 457 ln. 20-25). The Deceased "lunged forward – he came forward to get the gun and the rest of them were back behind him at this time still pushing on the door." (R. p. 458 ln. 13).

Throughout the incident, Louanne Gregory occupied the passenger side of the Appellant's truck. Her window was up and her door was locked.

To the extent there was any interaction between the Deceased and Louanne Gregory, she describes it as follows: "He was yelling, I'm going to kill you and your bitch; you and your bitch are gonna die; we're going to kill you and your bitch." (R. p. 90 ln. 22-24). At this point, Louanne Gregory picked up the Appellant's pistol. She testified: "I held it straight up in the air and started screaming, get back and let us out of here." (R. p. 91 ln. 3-4). At Appellant's request, she put the gun down on the console. When the Deceased and several others came at the Appellant through the opening of the driver's side door, the Appellant "fell back into the side of the truck nearly onto [Louanne Gregory's] lap and grabbed the gun off the arm rest." (R. p. 95 ln. 3-5). At this point, Louanne Gregory became a spectator to the struggle for the pistol. The Deceased "got the door open enough to come in on Terry, completely on him." (R. p. 95 ln. 21-22). When the Deceased grabbed the gun, Louanne Gregory was within a couple of feet from the attack with nothing between her and the Deceased except her husband. The fatal shot came moments later.

Consequently, under the appropriate "at-fault" analysis, Louanne Gregory did not commit "[a]ny act . . . in violation of law and reasonably calculated to produce the occasion." *State v. Bryant*, 336 S.C. 340, 345, 520 S.E.2d 319, 322 (1999). In fact, her warnings to get back evidence the opposite intent. The only conclusion is that Appellant's wife was not at-fault in bringing on the difficulty with the Deceased.

b. Appellant's wife believed she was in imminent danger, and she actually was in imminent danger.

There are two alternative sources for the second element of common law self-defense. The two alternatives are a person's belief in imminent danger or actual imminent danger. In this case, both exist.

(i.) Appellant's wife was afraid of the crowd surrounding her and her husband's truck.

Louanne Gregory testified to the fact that she believed she was in imminent danger. "I was past afraid. I wouldn't want my worst enemy to ever have to feel what I felt that night." (R. p. 92 ln. 15-16). "I was going to be killed, my husband was going to be killed, in the worst case. I would have loved to have thought in my heart they were gonna mangle us or something because we knew too much on them, but it was way beyond that because they were so wild. You could smell alcohol, you could see their eyes red and glassy, and we knew something bad was going to happen." (R. p. 92 ln. 18-25).

Louanne Gregory told the 911 operator within moments of the fatal shot: "They turned the headlights on us and jumped out and come at us." (Def.'s Ex. 2) *and* (Def.'s Ex. 3 at p. 8). "I done pulled the gun out of his zipper telling them to go back and they wouldn't move off and he grabbed it." *Id.* When the first law enforcement officer arrived, Louanne Gregory was still in fear. She said to the 911 operator: "Don't leave me, please don't leave me, we need more. These people jumped him. You don't understand." (Def.'s Ex. 3 at p. 13). "They're going to get me. I need somebody to get me out of here. They told me that." *Id.* at 14.

Louanne Gregory's statements never changed. She made the same statements to the on-scene officer. (Def.'s Ex. 5). She also made the same statements to the investigating officer that

took her written statement. (State's Ex. 1).

(ii.) Appellant's wife was in imminent danger of being shot when the Deceased engaged in a struggle to remove the pistol from the Appellant.

Louanne Gregory actually was in imminent danger. She was in imminent danger of being shot when the Deceased attacked the Appellant and tried to take the pistol. Even the Deceased's father, Roger White, Sr., corroborates the fact that the Deceased went for the pistol being held by the Appellant. "I seen him reaching, to try to grab for the pistol." (R. p. 309 ln. 17-18). "No question whatsoever" that the Deceased was trying to grab the pistol when the Appellant shot. (R. p. 309 ln. 19-21).

All of the forensic evidence confirms the eyewitness testimony that the Deceased was in a struggle for the Appellant's pistol at or near the steering wheel of the Appellant's truck. The forensic evidence also confirms that the Deceased was on the interior of the driver's side door next to the steering wheel.

Blood drops from the Deceased are present on the interior of the driver's side door of the Appellant's truck. (State's Exs. 43-46). Of significance, there is only one open wound from which blood exited the Deceased, i.e. the bullet entrance wound at the lower left side of the Deceased's neck. (R. p. 517 ln. 14-16). Further, testimony from the pathologist indicates that a contact bullet wound of this nature would not cause splatter from the initial shot. (R. pp. 518-519, 522, 526). In other words, the blood drops are the result of exsanguination and gravity. There are blood drops on the interior of the driver's-side door near the apex of the door and just below the window. (State's Exs. 43-46). These drops necessarily place the Deceased almost completely within the area between the steering wheel and the forward most portion of the driver's side door. In addition, a clear drop of blood appears in the bottom of the driver's-side

door map-holder/compartment. (State's Ex. 46). This drop of blood is significant as it evidences the proposition that the Deceased was being prohibited from falling, at least for a moment, by the pressure being exerted against the truck door from the individuals on the outside of the door. Had the truck door not been pushed in by the individuals on the outside of the truck, the Deceased would have fallen immediately to the ground. Testimony from the pathologist included the opinion that the Deceased was prevented from falling, at least for the moments necessary to create the blood drop, by pressure exerted from the outside of the driver's side door. (R. p. 526 ln. 9-16).

Additional testimony from the pathologist indicated that the Deceased was instantaneously incapacitated at the moment the shot was fired. (R. p. 507 ln. 8-10). The bullet partially transected the spinal cord at C7 and exited at T1. (R. p. 507 ln. 5-7). There is no testimony or report that the Deceased was moved after he fell to the ground. Crime scene photos show that the Deceased's feet were located at a point just between the driver's-side door and the driver's seat of the Appellant's truck. (State's Ex. 17). These findings match the descriptions that the Deceased came into physical contact with the Appellant when grabbing for the pistol and that this contact occurred within the opening created by the driver's side door.

Finally, the blood found on the inside of the Appellant's driver's-side door and the trajectory of the bullet are, in the pathologist's opinion, entirely consistent with the fact that the Deceased was bent over at the waist, reaching onto and across the Appellant's torso, towards the Appellant's lower right hip where the Appellant had the pistol in his right hand against his hip. (R. p. 519 ln. 10-25). These conclusions are supported by the hypothetical questions put forward to the pathologist, the crime scene photos, DNA tests on the blood drops, and virtually all of the witness's testimony.

Having concluded that the struggle between Appellant and the Deceased took place just to the left of the steering wheel, Louanne Gregory's position in the passenger's seat puts her within a few feet of the pistol. Deceased's attempts to grab the pistol and pull it away created the imminent danger of an accidental discharge. Because Louanne Gregory was in such close proximity to the struggle, there was the very realistic possibility that she could be shot. The Deceased's actions created real danger for Louanne Gregory.

c. Appellant's wife reasonably believed she was in imminent danger and the fatal blow was warranted to save her from serious bodily injury or death.

There are two alternative sources for the third element of common law self-defense as applied to Louanne Gregory. These two alternatives include the reasonableness of a person's belief in imminent danger or that the fatal blow was warranted to avoid serious bodily injury or death. Once again, both alternatives exist.

(i.) Appellant's wife's belief in imminent danger was reasonable under the circumstances presented.

The Court must take into consideration a number of factors that were present at the incident location in determining the reasonableness of Louanne Gregory's belief. First, the number of persons lying in wait supports Louanne Gregory's belief that she was in danger. *See State v. Fuller*, 297 S.C. 440, 377 S.E.2d 328 (1989). The testimony is undisputed that there was a large crowd waiting on the Appellant when he arrived. It is also undisputed that the Appellant's wife had been led to believe that the only people supposed to be at the meeting were the Appellant and his two sons. (R. p. 449 ln. 6-7). The surprise factor that accompanied the unexpected number of people present would cause a reasonable person apprehension.

The people who remained on scene for law enforcement initially admitted to a total of 8 people being present. The State brought out the fact that a decision was made not to mention

Brent Hamby prior to the interviews conducted by law enforcement. (R. p. 564 ln. 1-15). This deliberate falsification came to light at the hearing when Brent Hamby came forward as a witness.

Testimony from the neighbors adjacent to the incident location indicates that there were other people the on-scene witnesses failed to disclose. James King heard and saw several cars leave the scene after the shot was fired and before the police arrived. "I said—and right at that time when I was speaking to the dispatcher the car doors were shutting or closing. I could hear car doors shutting and cars starting up, and tires coming down the road. I said they're leaving now." (R. p. 169 ln. 16-21). Grady Cochoran, who works at the South Greenville Fire Department, happened to be working outside on his septic tank on the night of the incident. (R. p. 183 ln. 19 – 184 ln. 17). He heard the commotion coming from the incident location and heard the gunshot distinctly. (R. p. 184 ln. 13- 185 ln. 6). After the gunshot, he saw a number of people running from the scene. (R. p. 185 ln. 21-22). A particular individual ran from the scene through his yard and got picked up by a black SUV. (R. p. 185 ln. 25 - 186 ln. 1). In addition, Mr. Cochoran saw a number of other cars leaving the scene just after the gunshot was fired. (R. p. 187-188). He described the traffic he saw as follows: "The only time there is that much traffic is during the school year about two thirty when the school gets out." (R. p. 188 ln. 3-5).

As Monty Batson, Louanne Gregory's brother, arrived at the scene, he saw a suspicious person walking away from the incident location and notified the on-scene law enforcement personnel. "I asked him – I said, hey, are you all looking for someone, and he said, no we're not looking for nobody, and I said, well there was a guy I just passed, walking down the road, and he replied again, we ain't looking for nobody." (R. p. 162 ln. 1-5).

Louanne Gregory put the number of persons at the incident location between 15-20

persons. (R. p. 87 ln. 21-22). The number of people waiting on the Appellant and his wife gives rise to the reasonableness of Louanne Gregory's belief that she was in imminent danger.

Second, the relative sizes, ages, and weight of Louanne Gregory and the aggressors must be taken into consideration. *State v. Hendrix*, 270 S.C. 653, 244 S.E.2d 503 (1978). Louanne Gregory's physical condition has already been discussed above. Of the people that we know were on-scene, their sizes, ages, and weight are as follows:

Roger White, Sr. (48 y.o.a., 6ft. 2 in., 300 lbs.), (R. p. 297 ln. 12-17); Kellet Gregory (23 y.o.a., 6ft. 180 lbs.) (R. p. 377 ln. 9-15); Steven Gregory (20 y.o.a. 5 ft. 11 in., 172 lbs.) (R. p. 340 ln. 12-17); Justin Davis (23 y.o.a. 6 ft. 2 in., 265 lbs.) (R. p. 565 ln. 3-7); Trip Pittman (16 y.o.a. 5ft. 8in., 125 lbs.) (R. p. 215 ln. 12-20); Dustin Lackey (17 y.o.a., 5ft. 8 in., 148 lbs.)(R. p. 192 ln. 18-24); Brent Hamby (21 y.o.a.) (R. p. 527 ln. 6) ; and the Deceased (20 y.o.a., 5 ft. 10 in., 150 lbs.)(R. p. 298 ln 14-18); and Lisa Brashier. Although the Appellant is not a small man, 6ft. and 325 lbs., he was no match for the sheer number of people present. The physical appearance of all these men indicated a significant advantage physically over Louanne Gregory.

Third, words accompanied by hostile acts, may be sufficient to constitute a threat of physical attack or, in some cases, a threat of serious bodily harm. *State v. Fuller*, 297 S.C. 440, 377 S.E.2d 328 (1989). The Deceased was heard to say: "I ain't afraid of no f-ing gun; I'm going to kill you and your bitch." (R. p. 457 ln. 21-22). Louanne Gregory saw the Deceased and several others walk around the back of the truck after she had displayed the pistol, and screamed at them to "get back and let us out of here." (R. p. 91 ln. 3-4).

While the witnesses on the scene suffered a common memory problem when it came to hostile words from their own mouths, the neighbors adjacent to the scene had no such problem. James King described the shouting and cursing from the crowd as follows:

> I was outside working in my building, just fiddling around. It was dark and it was quiet, and I heard a bunch of argument, cursing, and I seen people –there were several people out there at the scene. I couldn't see anything, but I heard them.
>
> It kept on and on, and I kept listening to it, and then I could tell there was an altercation going on and an argument. . . .
>
> It got louder and louder, and I heard somebody say something about a gun, he's got a gun, you know, and then I heard a pop.

(R. p. 168 ln. 9-23).

Mr. Cochoran described what he heard similarly:

> Loud screaming, hollering. I couldn't honestly tell you the words I heard. It was just like being at a football game.

(R. p. 184 ln. 13-15).

That hostile words were being used by the aggressors is well supported in the record. Accompanying these words were the hostile acts of continuing to advance on the Appellant and Louanne Gregory and actually engaging in a physical altercation with the Appellant.

Fourth, the continuing nature of the threat from the assailants despite Louanne Gregory's and Appellant's display of a pistol is also a factor for the Court to consider. *See, State v. Hendrix*, 270 S.C. 653, 244 S.E.2d 503 (1978) (continuing nature of threat despite action by the Appellant). The individuals present continued their advance towards the Appellant's truck after Louanne Gregory displayed the pistol in the cab of the truck. Their advance, even according to their own testimony, continued even further after the Appellant produced the pistol in plain sight of everyone. By displaying the pistol, the Appellant and his wife manifested a clear indication that they felt threatened. Each of the individuals at or near the truck ignored this warning and escalated their response by physically attacking the Appellant and his truck.

Some explanation for this bravado, aside from intoxication, comes from Lisa Brashier. Lisa Brashier, the Appellant's ex-wife, testified that she did not really think the Appellant would shoot anybody. (R. p. 262 ln. 17-20). "The Terry I knew wouldn't do that." (R. p. 262 ln. 22).

Fifth, the Court must consider that the Deceased physical assault of the Appellant was unprovoked. *See, State v. Davis*, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984) (unprovoked aggression and violence by the assailant threatening Appellant is relevant to reasonableness of belief of danger). The Deceased and the Appellant had not exchanged words. The Deceased and the Appellant had nothing to do with one another until the Deceased attempted to take the pistol. The Deceased's physical assault of the Appellant in the face of a loaded weapon makes his intentions crystal clear.

Finally, an important consideration is Louanne Gregory's perception regarding the demeanor of the individuals present. "You could smell alcohol, you could see their eyes red and glassy, and we knew something bad was going to happen." (R. p. 92 ln. 23-25). The Appellant knew that the Deceased was "definitely on something." (R. p. 458 ln. 3-4). "He was — his eyes were wild looking." *Id.* The toxicology of the Deceased confirms Louanne Gregory's and Appellant's perception. (R. p. 508-509). Steven Gregory and Brent Hamby had been at a party earlier drinking heavily. (R. p. 544-545). Additionally, Kellet Gregory admitted to also drinking vodka on the night of the incident. (R. p. 402 ln. 14-19). Steven Gregory admitted to possession of the marijuana and pipe found in his truck on the night of the incident. (R. p. 358 ln. 24- p. 359 ln. 1). Roger White, Sr. admitted to drinking prior to the incident. (R. p. 303 ln. 5-6). Lisa Brashier also admitted to drinking before the incident. (R. p. 250 ln. 4-5).

The objective facts, i.e. the neighbors' testimony of the level of noise, the neighbors' testimony of the persons fleeing the scene, the toxicology of the Deceased, the vodka and beer in Kellet Gregory's truck, and the marijuana present in Steven Gregory's truck, make it clear that the incident location was exactly as Louanne Gregory described it. It was a scene filled with

young men that were high and drunk, yelling and cursing, advancing on the Appellant's truck in a hostile manner.

Taking these different factors in combination, the conclusion that Louanne Gregory's fear was reasonable is beyond contradiction.

(ii.) The fatal blow was warranted to save Appellant's wife from being shot when the Deceased attempted to physically remove the pistol from the Appellant and to keep the crowd from gaining access to her inside the truck.

The fatal blow was warranted. This conclusion is especially true when viewed from the standpoint of Louanne Gregory. Louanne Gregory "did not have to wait before acting in self-defense." *State v. Nichols*, 325 S.C. 111, 117, 481 S.E.2d 118, 121 (1997). In other words, Louanne Gregory did not have to wait until the Deceased got the drop on the Appellant before exercising her right of self-defense with deadly force. *State v. Rash*, 182 S.C. 42, 50, 188 S.E. 435 (1936) (Appellant need not "wait until his assailant gets the drop on him" in order to exercise right of self-defense by use of deadly force); *State v. Sales*, 285 S.C. 113, 328 S.E.2d 619 (1985).

Several outcomes were possible when the Deceased attempted to take the pistol from the Appellant. First, the Appellant could shoot the Deceased. Second, an accidental discharge could have occurred during the struggle for the pistol. Finally, the Deceased could have successfully disarmed the Appellant.

Under the first scenario, Louanne Gregory is still protected from the Deceased and the crowd. Under the second scenario, Louanne Gregory is potentially in the line of fire. Under the third scenario, the pistol is now in the hands of a highly intoxicated 20 year old who has already proven his propensity for physical assault and highly risky behavior. Under the second or third

scenario, the Appellant is now without any real means of protecting his wife from the Deceased or any of the other 15-20 people present who are screaming and "hollering" as loud as a football game.

The Appellant succinctly summarized the necessity of the fatal blow:

> I was concerned that they was able to get the gun away from me and they could do bodily harm to me and to her. . . . That unless I could remain in control of the gun it could go off and hit anyone.

(R. p. 427 ln. 6-13).

Absent the fatal shot, Louanne Gregory faced subjecting herself to the accidental discharge of the pistol or the whims of the Deceased and the crowd gathered around the truck. In effect, she would have been trapped within the truck with no means of escape and little hope of offering any physical resistance to the Deceased or the gathered crowd.

The fact that the fatal shot was almost not enough to deter the crowd from physical violence is evidenced by the comments in the background on the 911 recordings. Even after the fatal shot, the Appellant and Louanne Gregory are being threatened. "You're dead. You're dead. You're dead." is clearly heard. (Def.'s Ex. 3 at p. 23 ln. 8); (Def.'s Ex. 2, Recording at 1:19-1:24). "Wait until you don't have that fucking gun." (Def.'s Ex. 2, Recording at 12:00-12:31); (Def.'s Ex. 3 at p. 16).

Louanne Gregory continued to relay this information to the 911 operator: "Can you hear them out there threatening him right now?" (Def.'s Ex. 2; Def.'s Ex. 3 at p. 5 ln. 21-22). "You better be ready to hold them all back when you get here." (Def.'s Ex. 3. at p. 16 ln. 25 – p. 17 ln. 1).

The inevitable conclusion is that the fatal blow was warranted.

d. Appellant's wife had no other means of avoiding the danger.

The fourth element is satisfied by the fact that Louanne Gregory was seated inside the cab of the Appellant's truck and had no means of escape. "My husband's standing here between the door and the seat with the gun in his hand keeping them back, and I'm sitting in the truck." (Def.'s Ex. 3 at p. 18 ln. 15-17.) There simply was no place for her to go. As a result, Louanne Gregory had no other means of avoiding the danger.

Having concluded that Louanne Gregory meets all of the requirements for the lawful exercise of self-defense, it is clear that the Trial Court erred in failing to analyze the defense of another from the standpoint of Louanne Gregory. The Trial Court's conclusions were controlled by that error of law. Therefore, with the appropriate analysis, the Appellant is entitled to immunity under the common law doctrine of defense of another.

3. THE TRIAL COURT ERRED IN CONCLUDING THAT THE APPELLANT DID NOT PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT HE WAS NOT AT-FAULT IN BRINGING ON THE DIFFICULTY.

In concluding that the Appellant had not proved self-defense by a preponderance of the evidence, the Trial Court concluded that the Appellant "was not without fault in bringing on the difficulty." (R. p. 10). This conclusion was based on the Trial Court's finding that the Appellant had provoked his sons Steven Gregory and Kellet Gregory to meet and continue hostilities. (R. p. 8). This conclusion was further based on the Trial Court's finding that the Appellant agreed to meet his sons, Kellet Gregory and Steven Gregory, "for the purpose of an altercation." *Id.*

These findings of fact regarding self-defense are controlled by an error of law, and are unsupported in the record. *State v. Williams*, 326 S.C. 130, 135, 485 S.E.2d 99, 102 (1997).

The Appellant asserts two errors of law. As discussed above, the Trial Court has analyzed the "at fault" portion of self-defense as it related to the Appellant and his sons. This analysis is flawed. The proper analysis requires a focus on the interaction between the Appellant and the Deceased. *State v. Burnett*, 210 S.C. 348, 42 S.E.2d 710 (S.C. 1947) ("In order to successfully plead self-defense, one must prove by the preponderance of the testimony that he himself was without fault in bringing on the alleged immediate encounter charged in the indictment.").

Once the proper focus is employed, it is undisputed that there was no previous interaction between the Deceased and the Appellant. "They had never met." (R. p. 328 ln. 9). To the extent that fault can be attributed to the Appellant, those circumstances have no connection to the Deceased. The Deceased inserted himself into the situation at the very point in time when the Appellant's actions might have permitted the Appellant and his wife to leave. In short, the Court has gone too far back from the moments preceding the encounter between the Appellant and the deceased.

Therefore, the Appellant reincorporates the argument made above showing that Louanne Gregory was not at fault in bringing on the controversy. It was the Deceased, with his impaired judgment, that brought on the immediate encounter between himself and the Appellant after the Appellant presented his pistol.

In addition, the Appellant asserts that the Trial Court erred in ending its inquiry into self-defense after concluding that the Appellant had an agreement "to meet his son for the purpose of an altercation." It is true that if the Appellant provokes or initiates the assault against the deceased, or an innocent bystander, he cannot invoke self-defense; however, he may restore his right to self-defense if he withdraws from the conflict and communicates that decision to his adversary. *State v. Bryant,* 336 S.C. 340, 345, 520 S.E.2d 319, 322 (1999).

As a practical matter, the Trial Court gave its finding on this matter the force of a finding of "mutual combat." *See* (R. p. 8) (finding Appellant agreed "to meet his sons for the purpose of an altercation."). First, to the extent that "mutual combat" is implicated, it is legally inapplicable. In South Carolina, the application of the law on mutual combat is "restricted" to a very limited scenario and is specifically not applicable to an agreement to meet for a fist-fight. *State v. Taylor*, 356 S.C. 227, 234, 589 S.E.2d 1, 4 (2003). Second, whether analyzed under "mutual combat" or the at fault element of self-defense, the Trial Court should have considered whether the Appellant's attempt to withdraw from the controversy restored his right to self-defense. *State v. Graham*, 260 S.C. 449, 450, 196 S.E.2d 495, 496 (1973) (holding that a party can withdraw from the implications of mutual combat when he "endeavors in good faith to decline further conflict, and, either by word or act, makes that fact known to his adversary."); *Bryant*, 336 S.C. at 345, 520 S.E.2d at 322.

The Trial Court did not address the Appellant's attempts to withdraw from the conflict. Louanne Gregory's and the Appellant's testimony is that they both told everyone to get back and let them leave. Regardless of whether the Trial Court found that testimony credible, there simply is no disputing the fact that the Deceased and the other assailants saw Louanne Gregory present the pistol and, subsequently, saw the Appellant present the pistol. *See, e.g. State v. Hendrix*, 270 S.C. 653, 659 n.3, 244 S.E.2d 503, 504 n.3 (1978) ("the appellant's act of ordering deceased away would have constituted a withdrawal after aggression which was communicated to the deceased and which would have restored appellant's right of self-defense.").

Appellant's presentation of his firearm after he was rushed and pinned between the door and cab of his truck is a clear indication he wanted the assailants to back off. *See* (R. p. 400 ln.

16-19). His forbearance in firing the fatal bullet between when he presented the pistol until after the deceased was physically on top of him proves he was seeking no further conflict. *See id.*

Under the proper analysis, the Appellant's manifestation of his desire to withdraw from the conflict is a fact that required the Trial Court to find that the Appellant was not at-fault in bringing on the controversy with the Deceased despite the finding Appellant agreed "to meet his sons for the purpose of an altercation."

4. THE TRIAL COURT ERRED IN ITS INTERPRETATION OF THE PHRASE "NOT ENGAGED IN UNLAWFUL ACTIVITY" CONTAINED IN S.C. CODE §§ 16-11-440(B) AND 440(C).

In denying the Appellant's assertion of immunity under S.C. Code §§ 16-11-440(B) and (C), the Trial Court concluded that the phrase "not engaged in unlawful activity", while not precisely the same, "is very closely akin to the common law notion that one must be without fault in bringing about the difficulty in a case of Self-Defense." (R. pp. 7-8).

The statutory Defense of Vehicle and Stand Your Ground immunities require that certain facts **must not** be present. This negative requirement acts as a bar to immunity under both sections. Specifically, sections 440(A) and 440(C) are deemed inapplicable if the person using deadly force was "engaged in unlawful activity" at the time of the use of deadly force. *S.C. Code* §§ 440(B) and 440(C). Therefore, the Trial Court was required to review the Appellant's acts to determine if he was "engaged in unlawful activity" when he fired the fatal shot.

In doing so, the Trial Court has improperly expanded the plain meaning of the terms "not engaged in unlawful conduct" in section 16-11-440(C) to include conduct which does not violate any criminal statute and encompasses conduct over a period of time that was irrelevant to the interaction between the Appellant and the Deceased. *See, Hitachi Data Sys. Corp. v. Leatherman*, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992) (noting the words of the statute

must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit **or expand** the statute's operation). Specifically, the Court's conclusion that the terms "not engaged in unlawful conduct . . . . [are] very closely akin to the common law notion that one must be without fault in bringing about the difficulty in a case of self-defense" expands the operation of the terms "engaged in unlawful activity" and is without support.

The Trial Court's expansion of the interpretation of these terms has equated fault with "unlawful activity" and has eliminated the concept of timing contained within the terms "engaged in". The term "unlawful activity" is not coterminous with being "at fault". A person can be at "at fault in bringing on a controversy" without having engaged in "unlawful activity." "Unlawful activity" clearly means activity that violates the law. *See Black's Law Dictionary*, 6th Ed. at p. 1068 (Defining "unlawful act"). The term "engaged in" is more limiting with respect to time than the concept of being "at fault in bringing on the controversy." The term "engaged" indicates that a person is involved at that moment. *See Black's Law Dictionary*, 6th Ed. at p. 366 (Defining "engaged"). Therefore, the Trial Court should have focused its analysis on whether the Appellant was violating the law, i.e. "unlawful activity", at the moment when he was standing his ground and/or defending his vehicle.

Just prior to the fatal shot, the Appellant displayed his pistol. Pointing and presenting a pistol is potentially illegal. *See S.C. Code* § 16-23-410. However, pointing and presenting a firearm is subject to the affirmative defenses associated with self-defense. *See State v. Davis*, 309 S.C. 56, 419 S.E.2d 820 (Ct. App. 1992) (self-defense applies to pointing and presenting when the evidence is presented as to self-defense). In addition, S.C. Code § 23-31-210(6), excludes the presentation of a weapon when needed for self-defense, defense of others, and the protection of real or personal property from the prohibitions for a "concealable weapon".

Furthermore, the Appellant has a right under South Carolina Code § 16-11-440(C) to stand his ground and meet force with force.

Both the Appellant and his wife were licensed Concealed Weapons Permit ("CWP") holders by the State of South Carolina. (Def.'s Ex. 10). The pistol in their possession when they occupied the incident location was a lawful firearm registered to the Appellant. (Def.'s Ex. 11). The firearm was not placed in the Appellant's truck for the purpose of the meeting. (R. p. 76 ln. 12-16). The pistol had been stored in the glove compartment of the Appellant's truck for a number of months prior to the incident. *Id.*

Given the number of people present at the scene advancing toward the Appellant and his truck, the presentation of the pistol was for the purpose of meeting force with force. Therefore, the Appellant was not engaged in unlawful activity when he presented the firearm as a warning to the crowd on the scene that he felt threatened.

At the moment he pulled the trigger, there is no dispute that the Deceased was attempting to take the gun from the Appellant's hand. As discussed previously, the contact wound, the bullet trajectory, the blood drops, the witnesses' testimony, and the crime scene photos are all consistent with the fact that the Deceased had the Appellant backed into the apex of the driver's side door and was attempting to grab the pistol.

The Appellant's belief that he was facing a serious threat was not only supported by the facts as they transpired, but was also based on the CWP training that the Appellant had received. (R. p. 427 ln 24 – 428 ln. 1). This training is consistent with training that law enforcement officers receive, (R. p. 574 ln. 5-8), and is consistent with training military personnel receive, (R. p. 378 ln. 23 - 379 ln. 10). As the Appellant stated, once the Deceased tried to grab the pistol he had no choice but to shoot. (R. p. 423 ln. 19-20).

The Deceased, on the other hand, was engaged in illegal conduct. At a minimum, the Deceased engaged in an assault and battery. Although there has been some testimony that the Deceased said: "you're not going to shoot my mother", (R. p. 282 ln. 17-18), there was no legal basis for the Deceased to attempt to take the Appellant's gun. Presumably, the theory would be that the Deceased was defending Lisa Brashier. This analysis would entail the common-law defense of another and place the Deceased in the position of Lisa Brashier. To the extent that this analysis is necessary, it is ended quickly by the fact that Lisa Brashier had advanced toward the Appellant after she saw the pistol, (R. p. 261 ln. 24-25), and that Lisa Brashier tacitly admitted that there was nothing stopping her from walking away from the confrontation. (R. p. 261 ln. 18-23). In addition, Lisa Brashier said that she didn't believe that the Appellant would actually shoot anyone. (R. p. 262 ln. 17-21). Therefore, Lisa Brashier was not in fear of imminent danger. Instead of moving away, she chose to start kicking the Appellant's door. (R. p. 262 ln. 12-15). Consequently, Lisa Brashier was not within the elements of self-defense and the Deceased, standing in her shoes, cannot make a claim for defense of another. *See Douglas v. State*, 332 S.C. 67, 73, 504 S.E.2d 307, 310 (1998) (facts insufficient for defense of others charge); *State v. Long*, 325 S.C. 59, 480 S.E.2d 62 (1997) (facts insufficient for defense of others charge).

Therefore, there is no evidence that the Appellant was engaged in unlawful conduct when he presented his firearm and fired the fatal shot. At a minimum, the Trial Court erred in its conclusion that the Appellant was not entitled to immunity pursuant to S.C. Code § 16-11-440(C) which permits a person to stand his ground and meet force with force.

CONCLUSION

The Appellant is entitled to have the Trial Court's Order denying immunity pursuant to S.C. Code § 16-11-450(A) reversed and the indictments dismissed. The Trial Court erred in failing to find that the immunity statute included coverage for the common law defenses of self-defense and defense of another. In addition, the Trial Court erred in failing to analyze defense of another from the standpoint of the person being defended, the Appellant's wife. The Trial Court also erred in finding the Appellant at fault in bringing on the difficulty between the Appellant and the Deceased. Finally, the Trial Court erred in finding that the Appellant was engaged in an "unlawful activity" when he fired the fatal shot.

Respectfully submitted,

March 13, 2013

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The undersigned certifies that this Final Brief complies with Rule 211(b), *SCACR*.

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March 13, 2013

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions

Robin B. Stilwell, Circuit Court Judge

Appellate Case No.: 2012-208587

The State,.....Respondent.

v.

Terry Dean Gregory,.....Appellant.

PROOF OF SERVICE

I certify that I have served the Final Brief of Appellant and Final Reply Brief of Appellant on Alphonso Simon, Jr. and William W. Wilkins, III by depositing a copy of it in the United States Mail, postage prepaid, on March 14, 2013, addressed to Alphonso Simon, Jr., Office of the Attorney General, P.O. Box 11549, Columbia, South Carolina 29211-1549 and addressed to William W. Wilkins, III, 13th Circuit Solicitor's Office, 305 E. North Street, Suite 325, Greenville, South Carolina 29601.

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