THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Court of General Sessions
Edward W. Miller, Circuit Court Judge

Appellate Case No. 2017-000481

The State, ...Respondent

v.

Ontavious Plumer,.....Appellant.

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, Ontavious Plumer petitions for rehearing because this Court overlooked or misapprehended the matters set forth in this pleading.

Question 1

Did the trial judge err as a matter of law by denying Ontavious Plumer's request for a jury instruction on self-defense when the jurors acquitted Mr. Plumer of armed robbery and direct and circumstantial evidence established the elements of self-defense?

This Court "conclude[d] the trial court did not err by refusing to charge the law of self-defense because the record contains no evidence that Plumer was without fault for bringing on the difficulty." *State v. Plumer*, No. 2017-000481, 2021 WL 800607, at 4 (S.C. Ct. App. Mar. 3, 2021). In reaching this conclusion, this Court committed three errors of law.

First, this Court shifted the burden to Mr. Plumer to prove self-defense when it held:

> To establish self-defense in South Carolina, four elements must be present: (1) the defendant must be without fault in bringing on the difficulty; (2) the defendant must have been in actual imminent danger of losing his life or sustaining serious bodily injury, or he must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) if his defense is based upon his belief of imminent danger, defendant must show that a reasonably prudent person of ordinary firmness and courage would have entertained the belief that he was actually in imminent danger and that the circumstances were such as would warrant a person of ordinary prudence, firmness, and courage to strike the fatal blow in order to save himself from serious bodily harm or the loss of his life; and (4) the defendant had no other probable means of avoiding the danger.

Id. (citing *State v. Slater*, 373 S.C. 66, 69-70, 644 S.E.2d 50, 52 (2007)). Although citing *Slater* for the "elements" of self-defense, these "elements" have been part of our state's jurisprudence going back, at least, to *State v. Hendrix*, 270 S.C. 653, 657–58, 244 S.E.2d 503, 505-06 (1978). It is elementary that "elements" identify what a party must prove in order to prove a claim or offense. Indeed, our Supreme Court decided *Hendrix* during an error when an accused had the burden of proving self-defense. Today, a "defendant need not establish self-defense by a preponderance of the evidence but must merely produce evidence which causes the jury to have a reasonable doubt regarding his guilt." *State v. Bellamy*, 293 S.C. 103, 105, 359 S.E.2d 63, 64-65 (1987), *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991); *see also In re Winship*, 397 U.S. 358 (1970). "Once raised by the defense, the State must disprove self-defense beyond a reasonable doubt." *State v. Bixby*, 388 S.C. 528, 553, 698 S.E.2d 572, 585 (2010) (citing *State v. Burkhart,* 350 S.C. 252, 260, 565 S.E.2d 298, 302 (2002)). Thus, this Court erred by shifting the burden to Mr. Plumer to prove self-defense.

Second, in reaching its holding, this Court reasoned, "Of the three individuals present when the shooting occurred, only Wells testified at trial," *Plumer*, at 4, thereby imposing a requirement that an accused testify or call witnesses in order to receive a self-

defense instruction. An accused is entitled to a self-defense instruction if there is any evidence to support the instruction. *State v. Light*, 378 S.C. 641, 651, 664 S.E.2d 465, 470 (2008); *see also Stone v. State*, 294 S.C. 286, 287, 363 S.E.2d 903, 904 (1988) ("petitioner presented sufficient evidence at trial to entitle him to a jury instruction on self-defense"). There is not requirement that the evidence supporting any jury instruction—including a self-defense jury instruction—come from the accused or a witness called by the accused.

Third, despite identifying evidence in the record supporting providing a self-defense instruction, this Court held, "[T]he trial court did not err by refusing to charge the law of self-defense because the record contains no evidence that Plumer was without fault for bringing on the difficulty." *Plumer*, at 4. This Court's opinion recognized Mr. Plumber brief identified

> the following facts would have supported an inference that Wells was the first person to introduce a firearm and was therefore responsible for bringing on the difficulty: (1) Wells admitted he was prepared to use his gun during the drug transaction and placed himself in a position that would allow him to stand up and reach his gun; (2) according to Investigator Kay, Wells stated he reached for his gun before Plumer fired any shots; (3) according to Dr. Ladd, Wells would have fallen down when the bullet struck his femoral neck, meaning he stood up and retrieved his handgun before Plumer fired that shot; (4) Wells and Ms. Wells conspired to hide the gun and cover up his culpability; (5) Plumer retreated from the violence; and (6) the jury acquitted Plumer of armed robbery, which removed the motive to commit murder.

Id., at 3. Thus, this Court erred by overlooking these facts.

Question 2

Did the trial judge err as a matter of law by denying Ontavious Plumer's motion to relieve his trial counsel from representation and allowing Mr. Plumer to represent himself?

Although recognizing Mr. Plumer had the constitutional right to represent himself, this Court held Mr. "Plumer did not clearly assert his right to self-representation." *Plumer,* at 5. Mr. Plumer argued to this Court:

> [T]he attorney-client relationship had deteriorated because of the lack of communication. The trial judge incorrectly told Mr. Plumer his only options were to plead guilty or continue the trial. Mr. Plumer correctly informed the trial judge his only choice as to continue trial. Had Mr. Plumer allowed the trial judge to persuade him to plead guilty, then the jurors would not have acquitted Mr. Plumer of armed robbery, and this issue—and the other issues raised in the brief—would not have been preserved for appeal. Continuing the trial presented the trial judge two options. First, trial counsel would continue representing Mr. Plumer through the conclusion of the trial. Second, after giving Mr. Plumer his *Faretta*[1] warnings, the trial could have continued with Mr. Plumer representing himself. The trial judge chose the former option, which denied Mr. Plumer his Sixth Amendment right to represent himself.

Brief of Appellant, at 15 (footnote added).

The trial judges have an obligation to "safeguard the rights of litigants." *State v. Langford*, 400 S.C. 421, 429, 735 S.E.2d 471, 475 (2012). Here, safeguarding Mr. Plumer's rights included providing him the *Feretta* warnings and allowing him to represent himself.

Question 3

Did the trial judge err as a matter of law when by not qualifying Dr. Robert Bennett as expert in gunshot residue when the record establishes the witness has the necessary education, training and experience, and the exclusion of this expert testimony denied Ontavious Plumer his constitutional right to present a complete defense?

This Court held "this issue is unpreserved for appellate review because Plumer made no request or attempt to proffer Dr. Bennett's testimony at trial." *Plumer*, at 6. However, the error Mr. Plumer asked this court to address occurred during the first two

[1] *Faretta v. California,* 422 U.S. 806 (1975).

prongs of *Watson v. Ford Motor Co.*, 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010). Mr. Plumer requested alternate relief from this Court:

> This Court, accordingly, should order a new trial. In the alternative, this Court should remand this case for a hearing to determine whether Dr. Bennett's testimony is admissible under the third prong of *Watson*. *See, e.g., State v. Hughes*, 346 S.C. 339, 343, 552 S.E.2d 35, 37 (Ct. App. 2001) ("remand[ed] for an evidentiary hearing to determine whether Hughes was entitled to access to the notes as outlined in Rule 612," SCRE.). If the trial court find Dr. Bennett's testimony admissible and its exclusion impaired Mr. Plumer's defense, then the trial court should be allow[e]d to grant a new trial. *Hughes*, 346 S.C. at 343-44, 552 S.E.2d at 37.

Brief of Appellant, at 18. This Court overlooked ruling on Mr. Plumer's motion for a remand.

CONCLUSION

For the foregoing reasons, this Court should rehear this matter, withdraw its opinions, reverse the trial court, and remand for a new trial.

IT IS SO MOVED.

Respectfully submitted,

By *E. Charles Grose, Jr.*

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March 11, 2021
Greenwood, South Carolina

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Certificate of Service

I certify that I have served a copy of this pleading on the State of South Carolina, pursuant to South Carolina Supreme Court Order No. 2020-12-16-01, Section (c)(13), by emailing at copy to counsel, at their AIS email address, as reflected below:

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March 11, 2021

The Honorable Jenny Abbott Kitchings
Court, S.C. Court of Appeals
P.O. Box 11629
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Re: *State of South Carolina v. Ontavious Plumer*
Appellate Case Number 2017-000481

Dear Ms. Kitchings:

Enclosed please find Mr. Plumer's petition for re-hearing, along with a certificate of service.

Thank you for your attention to this matter. Please let me know if you have any questions or require additional information.

With kindest regards, I am

Yours very truly,

s/*E. Charles Grose, Jr.*
E. Charles Grose, Jr.

cc: Mr. Ontavious Plumer
Mark R. Farthing, Esquire