ORAL ARGUMENT REQUESTED

SC-2025-0623

In the SUPREME COURT OF ALABAMA

Ex Parte Mac Bailey Marquette

(In re: Mac Bailey Marquette,
Defendant-Petitioner,
v.
State of Alabama
Plaintiff-Respondent.)

On Petition for Writ of Mandamus to the
Hon. Charles B. Elliott, Circuit Judge, Eighth Judicial Circuit
Morgan Circuit Court CC-2024-09

PETITIONER'S REPLY TO THE STATE OF ALABAMA'S RESPONSE

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SUPPLEMENTAL STATEMENT REGARDING PETITIONER'S REQUEST FOR ORAL ARGUMENTS

In his opening petition, Marquette offered that the decision-making process in this case would be aided by oral arguments because it would afford this Court the opportunity to explore the law applicable to this case with an eye towards the recent codification of the "Back the Blue" Act, Act 2025-423, which became effective on October 1, 2025. Contrary to the State's response to this request, Marquette has not and is not arguing Act 2025-423 should have been applied to his case.

Instead, Marquette contends that Act 2025-423 effectively codifies arguments he made below to the circuit court and the Court of Criminal Appeals regarding Marquette's actions and the applicable analysis of a peace officer's discretionary authority in the context of tort immunity. Throughout this litigation Marquette has relied upon *Ex parte City of Selma*, 249 So. 3d 494 (Ala. 2017), and its analysis of discretionary authority under § 6-5-338(a), Ala. Code 1975. But Act 2025-423 has repealed § 6-5-338(a) and codified principles of discretionary authority already recognized by caselaw into a new code section, § 6-5-338.1, which is relied upon by both §§ 13A-3-23 and -27 for self-defense determinations. The principles now codified at § 6-5-338.1 are not new principles of

Alabama law, but rather pre-existing principles from the context now linked to criminal cases via self-defense litigation. Judge Elliott and the Court of Criminal Appeals did not fairly confront these pre-existing principles of discretionary authority in assessing Marquette's self-defense immunity request. And now, these principles are codified as law governing future self-defense requests involving law enforcement.

As such, Marquette offers that oral argument exploring this codification and how it relates to his case would aid this Court's decision-making process.

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Marquette demonstrated by a preponderance of the evidence that he acted reasonably in his capacity as a law enforcement officer when he shot and killed a man unlawfully aiming a pistol at him while Marquette was acting within his capacity as a police officer.

Judge Elliott, the State of Alabama, and the Court of Criminal Appeals have made convoluted what should be a straight-forward inquiry: was it reasonable for an on-duty police officer operating within his capacity and authority under § 6-5-338 to use deadly physical force on a person who unlawfully aimed a gun at him? The questions Judge Elliott, the State, and the court below have about Marquette and the other officers' tactics cannot, as a matter of law, lead to the conclusion that Marquette was not acting in his capacity as a police officer that night. Their focus on actions taken by Marquette and the other officers in the lead-up to Perkins storming out of his house with his pistol drawn and aimed unlawfully at tow truck driver Caleb Combs and the Marquette is misplaced. This Court should conclude that Marquette was acting in his lawful capacity as a police officer when he was present on the night in question, and that he proved by a preponderance of the evidence that his decision to shoot a man unlawfully aiming a gun both at Combs and at an on-duty officer

was reasonable under these circumstances. As such, this Court must issue the writ and direct that Marquette be immune from prosecution under § 13A-3-23(d).

A. Marquette demonstrated his actions leading up to the shooting fell within his capacity as a police officer.

Judge Elliott concluded that there were too many factual questions about Marquette's actions leading up to the shooting to conclude he met his burden of proving immunity. Specifically, as the Court of Criminal Appeals observed, "Judge Elliott found that Marquette failed to prove by a preponderance of the evidence that he was acting **in his capacity as a police officer**." *Petitioner's Exhibit 17* at 15 (emphasis added). Because Marquette demonstrated by a preponderance of the evidence that his actions fell within his discretionary authority and this showing wasn't refuted by substantial evidence, Judge Elliott clearly erred in concluding Marquette failed to prove by a preponderance of the evidence that he was acting within his capacity of a police officer that night. As such, this Court should recognize that because Marquette was present at the scene under a lawful exercise of discretionary authority and therefore his capacity as a police officer, the inquiry at hand should focus on the ultimate question:

was it reasonable for an on-duty officer working in his official capacity to shoot a man who unlawfully aimed a pistol at him?

Judge Elliott focused his attention on the holding of *Darby v. State*, 383 So. 3d 691 (Ala. Crim. App. 2023), which held that § 13A-3-27 "made clear that there is a unique standard to be used in judging a police officer's use of deadly force in self-defense or defense of another while **acting in his capacity as a police officer**." 383 So. 3d at 701. However, Judge Elliott's analysis can best be interpreted as an assessment of Marquette's actions (as well as those of the other officers involved) in determining whether it was reasonable for the officers to be present at Perkins' house **at all** on the night in question. To Judge Elliott, if their presence was arguably unreasonable, then it is arguable that Marquette (and the others) were not acting in their capacity as law enforcement officers. Further, to Judge Elliott, if Marquette's tactics were arguably unreasonable in the moments leading up to Perkins aiming his pistol at Marquette, then Marquette didn't meet his burden of proving by a preponderance of the evidence that he was acting in his capacity as a police officer and that his actions were reasonable for police officers claiming self-defense.

These conclusions were clearly erroneous under the facts Marquette (and the State) presented.

This Court should recognize that Judge Elliott parsed Marquette's actions in an inappropriate manner to assess whether he was acting "in his capacity as a police officer." This conclusion stems from this Court's holdings considering tort claims against officers in the context of officers exercising their discretionary authority. Judge Elliott's refusal to address threshold questions of whether Marquette's actions could be considered lawful actions under Marquette's discretionary authority as a police officer was error. This Court must look at the situation through the correct lens since Judge Elliott would not.

Initially, it must be noted there is no factual dispute that Marquette was on-duty in his job as a police officer when he arrived at Perkins' house. He was not there as a private citizen or an off-duty police officer. If Judge Elliott ultimately concluded that there exists a jury question as to whether Marquette acted "in his capacity as a police officer" that day, he necessarily asked a legal, not a factual, question regarding what police officers can and cannot do generally under Alabama law – i.e., where is the outer limit to whether an on-duty officer's actions are so egregious

that he cannot avail themselves of legal protections for those officers properly acting within the scope of their duties. Put another way, Judge Elliott has concluded that there is a viable question of whether Marquette's on-duty actions were so egregious that his actions cannot legally be considered actions taken in his "capacity as a police officer" under *Darby* and § 13A-3-27. This term, however, isn't defined by § 13A-3-27 or by *Darby*. As such, the question of whether he was acting "in his capacity as a police officer" necessarily requires this Court to look elsewhere in Alabama law.

This Court should look to principles involving civil suits against police to define the legal parameters of what "capacity as a police officer" may mean. Section § 6-5-338(a), which was applicable at the time of the shooting and the time of the immunity hearing[1], should be this Court's starting point. That section provided that "Every peace officer… shall have immunity from tort liability arising out of his or her conduct in performance of any discretionary function within the line and scope of his or her law enforcement duties." This Court had interpreted this section to include

[1] This section was repealed by the "Back the Blue" Act, Act 2025-423 and replaced by § 6-5-338.1.

actions taken by an officer to "keep the peace." *See Ex parte City of Selma*, 249 So. 3d 494, 498 (Ala. 2017) (quoting *Ex parte City of Midfield*, 161 So. 3d 1158, 1163–64 (Ala. 2014) (quoting in turn *Hollis v. City of Brighton*, 950 So. 2d 300, 309 (Ala. 2006))) (recognizing § 6-5-338(a) applies to a law enforcement officer attempting to prevent a breach of the peace).

Contrary to Judge Elliott's assessment, there is no legitimate question as to whether Marquette was "acting in his capacity as a police officer" that night. Marquette was on-duty with the Decatur Police Department. He had been dispatched and authorized by his superiors to Perkins' residence for peace-keeping and investigatory purposes. Peace-keeping fell within the protection and purview of § 6-5-338(a) under *Ex parte Selma*. Moreover, the State's own lead investigator, Special Agent Jamie King of the Alabama Law Enforcement Agency, concluded that Marquette was acting in his capacity of a peace officer that night. *Petitioner's Exhibit 9* at 19. As such, Marquette established that his presence was lawful as an exercise of his discretionary authority under § 6-5-338(a) by a preponderance of the evidence. Judge Elliott's conclusion to the contrary was clearly erroneous.

Thus, under *Darby* and § 6-5-338, Marquette provided a sufficient basis to conclude that he was acting within his discretionary authority – i.e., his capacity as a police officer. In the civil context, a plaintiff may refute that showing by presenting substantial evidence the state agent acted "willfully, maliciously, fraudulently, in bad faith, or beyond his or her authority" or "failed to discharge duties pursuant to detailed rules or regulations, such as those stated on a checklist." *See Ex parte Kennedy*, 992 So.3d 1276, 1282-83 (Ala. 2008); *see also Ex parte Brown*, 182 So. 3d 495, 507 (Ala. 2015) ("Because Cupps did not present substantial evidence that Officer Brown failed to comply with the police department's pursuit policy and procedure, she did not create a genuine issue of material fact as to whether Officer Brown acted willfully, maliciously, fraudulently, in bad faith, beyond his…authority, or under a mistaken interpretation of law in that regard.") (internal citations omitted); *Smith v. Alexander*, 354 So. 3d 462, 474 (Ala. 2021) (observing that once a party has established its action falls within that party's discretionary authority pursuant to 6-5-338, the opposing party must present "substantial evidence" to overcome a presumption of immunity). But the State didn't meet that burden.

There was no substantial showing by the State that Marquette's presence was anything but a lawful exercise of his discretionary authority to keep the peace in the context of a repossession. Without that showing, the State could not overcome Marquette's showing that his actions fell within his discretionary authority. Judge Elliott's conclusion that Marquette "failed to prove by a preponderance of the evidence that he was acting in his capacity as a police officer" simply cannot be supported by principles borrowed from tort law and was therefore clearly erroneous. *Petitioner's Exhibit 17* at 15.

Furthermore, in assessing the parameters discretionary authority, the Eleventh Circuit Court of Appeals has observed:

> The official acts within his discretionary authority when he "perform[s] a legitimate job-related function ... through means that were within his power to utilize." *Id*. at 1265. We examine a job-related function at "a general level rather than in [a] specific application," while taking care not to assess the function at "such a high level of abstraction" that "it becomes impossible to determine whether the employee was truly acting within the proper scope of his job-related activities." *Id.* at 1266–67.

Smart v. England, 93 F.4th 1283, 1288 (11th Cir. 2024). This principle is instructive here: it was within Marquette's power to travel to Perkins' residence for peace-keeping purposes. This was a legitimate job-related function. That Judge Elliott might second-guess the way he went about

this function does not mean that Marquette has failed to demonstrate he was acting within his discretionary authority, and, as such, was acting within his official capacity that night.

Finally, this Court should observe that concluding Marquette was not acting within his discretionary authority leads to an absurd result in the context of the ways an identical claim would now be assessed under § 6-5-338.1(2) and § 13A-3-27 as modified by Act 2025-423. Section 13A-3-27(a) now provides that "A law enforcement officer shall be justified in making any use of physical force against a person if the use of force is conduct performed within the law enforcement officer's discretionary authority and does not constitute excessive force as provided in subsection (b)." Section 6-5-338.1(2) provides:

> **Conduct performed within a law enforcement officer's discretionary authority.** Governmental conduct by a law enforcement officer performing a legitimate job-related function or pursuing a legitimate job-related goal through means that were within the law enforcement officer's plausible power to utilize. In determining whether governmental conduct was performed within a law enforcement officer's discretionary authority, a court must temporarily put aside that the conduct may have been committed for an improper or unconstitutional purpose, in an improper or unconstitutional manner, to an improper or unconstitutional extent, or under improper or constitutionally inappropriate circumstances. The court must determine whether, if done for a proper purpose, the conduct was within, or reasonably related to, the outer perimeter of

> a law enforcement officer's governmental discretion in performing his or her official duties.

The new code section defining discretionary authority would encompass Marquette's actions. The second-guessing of tactics by the State and Judge Elliott would not have taken Marquette's actions from outside the definition of his discretionary authority. This Court should recognize that the pre-Act 2025-423 body of law was not so vastly different that the Act radically changed the way discretionary authority (or "capacity as a police officer") is to be considered. If anything, the Act more clearly codified the civil concepts of discretionary authority that simply had not been applied to the criminal context in self-defense immunity requests.

Judge Elliott may have disagreed with the officers' tactics that night, but his disagreement does not give rise to a true factual question about whether Marquette's presence on scene was lawful. Based on the foregoing, Marquette was acting in his official capacity under *Darby*, § 13A-3-27, and § 6-5-338. This Court's precedents demonstrate that Marquette's presence at the Perkins' residence on the night in question fell within the purview of his discretionary authority. As such, Judge Elliott clearly erred in his conclusion that Marquette failed to prove by a preponderance

of the evidence that he was acting in his capacity as a police officer that night.

B. Marquette was otherwise justified in acting in self-defense under either the Stand-Your-Ground or common law versions of self-defense.

Alabama law authorized Marquette to act in self-defense when Perkins unlawfully aimed a gun at Marquette, who was on-duty and acting within his scope of duty on the night in question. Marquette's arguments to the circuit court and this Court in his opening petition explained how he was entitled to a finding of immunity pursuant to § 13A-3-23(d) under either the Stand-Your-Ground provision of § 13A-3-23(b) or the common-law "duty to retreat" version of self-defense. The State's response, however, merely parrots Judge Elliott's misguided and incomplete focus. The State in no way demonstrated Marquette wasn't authorized to act in self-defense. The State in no way refuted Marquette's showing that his actions were proper under either a Stand-Your-Ground or common-law self-defense theory. This isn't surprising because the State had an impossible task: the law and undisputed facts make clear that, under one theory or another, Marquette could act in self-defense.

There is no legitimate factual question about whether Marquette reasonably perceived the need to use deadly physical force or that he could not retreat without imperiling himself. Yet again, Agent King of ALEA, the State's lead investigator, reached the same conclusion. *See Petitioner's Exhibit 9* at 20 ("Officer Marquette had reasonable belief that Perkins was going to use deadly physical force against the tow truck driver or himself when he exited form his house with a pistol pointed in the direction of the tow truck driver before turning the pistol in the direction of Officer Marquette.") Marquette's showing exceeded his preponderance-of-the-evidence burden of demonstrating the reasonableness of his actions. In those critical moments, it was beyond reasonable for a police officer to believe deadly physical force was about to be used against him and that he couldn't retreat without increasing his peril.

Marquette easily cleared his burden of demonstrating the reasonableness of his actions through the lens of a reasonable police officer in similar circumstances. Both Judge Elliott's and the Court of Criminal Appeals' interpretation of the evidence have unreasonably elevated Marquette's burden of showing his actions were reasonable. For example, The Court of Criminal Appeals found that Judge Elliott's observations that

"Perkins actions of pointing his pistol skyward, when finally notified of the officers' presence, could have been consistent with surrender" was sufficient for Judge Elliot to conclude there were open questions about the reasonableness of Marquette's actions. *Petitioner's Exhibit 17* at 13. This conclusion, however, does nothing more than second-guess an officer's decision he was forced to make in a fraction of a second. This Court should reject such an intolerably narrow view of what is reasonable for a police officer in that situation.

Marquette was an on-duty police officer fulfilling his duties to his community when someone unlawfully aimed a pistol at a third party and then unlawfully aimed the gun at himself. Marquette was forced to make a split-second decision that anyone staring down the barrel of a gun-wielding person would reasonably make, let alone any reasonable police officer. Marquette was acting in compliance with Alabama law; Perkins was not. That Perkins may have moved his gun skyward in a fraction of a second does not change the reasonableness of Marquette's actions in that moment. Such second-guessing of police action is completely unwarranted and incredibly dangerous. As such, when Marquette shot Perkins, Marquette's actions were justified under Alabama's self-defense law.

Because Marquette has shown by the preponderance of the evidence that he was justified in acting in self-defense, the circuit court abused its discretion in denying him immunity under § 13A-3-23(d).

CONCLUSION

Because the circuit court erred in denying Marquette's immunity request, this Court should issue a writ of mandamus directing an entry of immunity pursuant to § 13A-3-23(d).

Respectfully submitted on October 31, 2025.

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CERTIFICATE OF COMPLIANCE

I certify that this filing contains 2,801 words and is written in 14-point Century Schoolbook in compliance with the requirements and limitations of Rules 21(d) and 32(b)(3), Ala. R. App. P.

/s J.D. Lloyd
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CERTIFICATE OF SERVICE

I hereby certify that on October 31, 2025, I electronically filed the foregoing and served a copy via email on:

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