

## FYI: McCLURE v. STATE and PENNINGTON v. STATE

*The Georgia Supreme Court holds that a criminal defendant is not required to “admit” anything in order to raise an affirmative defense; it is sufficient for the defendant to accept, for the sake of argument, that he or she committed the act alleged in the charge.*

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In *McClure v. State*, Case No. S18G1599 (Oct. 7, 2019), McClure was convicted of two counts of aggravated assault. The evidence showed that McClure aimed a lever-action BB rifle at the two victims. The trial court refused to give McClure’s requested instructions on justification on the basis that McClure, who testified that he carried the BB gun during an encounter with the victims but denied pointing the gun at them, could not both deny that he performed the act of pointing the gun at someone and at the same time argue that he was justified in performing that act. The Court of Appeals affirmed, reasoning that, because McClure did not admit to aiming the BB gun at the victims, an element of aggravated assault as charged, he was not entitled to an instruction on any affirmative defense. *McClure v. State*, 347 Ga. App. 68, 70-71 (2) (2018). The Court granted certiorari and reversed.

The Court stated that in order to raise an affirmative defense, a criminal defendant need not “admit” anything, in the sense of acknowledging that any facts alleged in the indictment or accusation are true. Rather, in asserting an affirmative defense, a defendant may accept certain facts as true *for the sake of argument*, and the defendant may do so for the limited purpose of raising the specific affirmative defense at issue. A defendant is entitled to a requested jury instruction regarding an affirmative defense when at least slight evidence supports the theory of the charge, whether in the State’s evidence or evidence presented by the defendant, and regardless of whether the theory of the affirmative defense conflicts with any other theory being advanced by the defendant. Consequently, a trial court errs in denying a defendant’s request for a jury instruction on an affirmative defense solely on the basis that the defendant did not admit for all purposes the truth of the allegations in the indictment or accusation regarding the allegedly unlawful act. And, the Court decreed, all previous appellate decisions affirming such rulings, where the affirmative defense was supported by at least slight evidence, are hereby overruled to that extent.



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In so holding, the Court also stated that it has held that the following jury instruction is a correct statement of the law: “An affirmative defense is a defense that admits the doing of the act charged but seeks to justify, excuse, or mitigate it. Once an affirmative defense is raised, the burden is on the State to disprove it beyond a reasonable doubt.” Suggested Pattern Jury Instructions, Vol. II: Criminal Cases, 3.00.00 (4th ed., 2007, updated January 2019). However, the Court suggested, in light of its holding and because the phrase “admits the doing of the act charged” can be easily misinterpreted, trial courts should use wording more in line with its holding.

Turning to the merits of the case, the Court held that the trial court erred in failing to give McClure’s requested instructions. As long as the theory of the affirmative defense was supported by at least slight evidence, McClure was entitled to argue both that the State failed to carry its burden of proving that he assaulted the victims by pointing the gun at them, a material allegation of the indictment, and also argue in the alternative that, if the jury credited the victims' testimony that he pointed the gun at them over his testimony that he did not do so, the evidence nevertheless showed that he was justified in that act. Similarly, the Court of Appeals erred in affirming the trial court's failure to give the requested jury instructions on justification solely on the basis that McClure did not admit pointing the BB gun at the victims. Accordingly, the Court vacated the judgment and remanded to the Court of Appeals for consideration of whether the trial court erred in failing to give the requested instructions regarding the affirmative defenses of justification, that is, whether the theory of the instructions was supported by at least slight evidence, and, if so, whether any such instructional error was harmful.

In a companion case, *Pennington v. State*, S18G1495 (10/7/19), Pennington and Briele were found guilty of possessing with intent to distribute methamphetamine within 1,000 feet of an elementary school, in violation of OCGA § 16-13-32.4 (a). At trial, Pennington and Briele requested that the jury be instructed on an affirmative defense provided in OCGA § 16-13-32.4 (g), specifically, that the conduct prohibited by OCGA § 16-13-32.4 (a) took place entirely within a private residence, that no minors were present in the residence at any time during the commission of the offense, and that the prohibited conduct was not carried on for financial gain. The trial court denied the request and, in denying Pennington's motion for a new trial, explained that the court refused to instruct the jury on the affirmative defense because Pennington and Briele, neither of whom testified at trial, did not admit doing the act charged, that is, possessing with intent to distribute methamphetamine, and because neither the State nor either defendant presented any evidence that the "active meth lab" in Pennington's residence was not being used for financial gain. The Court of Appeals affirmed Pennington's convictions, reasoning that, because he did not admit that



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he possessed with intent to distribute methamphetamine near a school, he was not entitled to the affirmative defense he requested. *Pennington v. State*, 346 Ga. App. 586, 591 (3) (2018).

Based on its holding in *McClure*, the Court held that the Court of Appeals erred in affirming the trial court's denial of Pennington's request for a jury instruction on the affirmative defense set out in OCGA § 16-13-32.4 (g) solely on the basis that Pennington did not admit that he possessed with intent to distribute methamphetamine near a school. Accordingly, like *McClure*, the Court vacated the judgment and remanded the case to the Court of Appeals for consideration of whether the trial court erred in failing to give the requested instruction, that is, whether the instruction was supported by at least slight evidence, and, if so, whether any such instructional error was harmful.