STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Lexington County
Honorable Perry M. Buckner, Circuit Court Judge
Court of Appeals Appellate Case No. 2012-212839

THE STATE,

Respondent,

vs.

DANIEL BROCKWAY,

Appellant.

MOTION TO CERTIFY THE CASE TO THE SOUTH CAROLINA SUPREME COURT

Respondent ("the State"), through its undersigned counsel, would respectfully show unto the Court as follows:

I.

In 2011, Appellant was indicted for one count of assault and battery in the second degree. On June 5, 2012, Appellant proceeded to trial. During the State's cross-examination of Appellant, the Honorable William P. Keesley granted Appellant a mistrial.

On August 27, 2012, the State called Appellant's case for trial. Appellant filed a motion to dismiss on double jeopardy grounds, but the Honorable Perry M. Buckner denied Appellant's motion. After the jury was empaneled but before the jury was sworn, Appellant moved for an immunity hearing pursuant to the Protection of Persons and Property Act. On August 28, 2012, Judge Buckner denied Appellant's motion for immunity because Appellant did not prove he was

entitled to immunity by the preponderance of the evidence. Judge Buckner suspended the trial in order for Appellant to file a notice of appeal.

On August 29, 2012, Appellant served a notice of appeal, which stated the following: "[Appellant] appeals the denial of his motion for immunity pursuant to the Protection of Persons and Property Act S.C. Code Ann. §16-11-420 (A). On June 3, 2013, Appellant served the Initial Brief of Appellant challenging the trial judge's denial of his motion to dismiss based on double jeopardy grounds and the trial judge's ruling denying Appellant immunity under the Protection of Persons and Property Act. (See Attached Brief.) As of this date, the State has not filed the Initial Brief of Respondent.

II.

Pursuant to S.C. Code Ann. § 14-8-210 and Rule 204, SCACR, the State respectfully seeks certification of this case for review by this Court. Under Rule 204, SCACR, "[c]ertification is normally appropriate where the case involves an issue of significant public interest or a legal principle of major importance." The State respectfully submits certification is appropriate in this case based on a need for clarification of the Protection of Persons and Property Act, which constitutes a matter of significant public interest and an important legal issue.

III.

Primarily, the State submits that this case warrants certification due to the significance of the statutory interpretation issue raised in this appeal. The solicitors, defense attorneys, and courts of this State are in desperate need of guidance regarding the Protection of Persons and Property Act. Further, the State intends on raising similar arguments that are currently before this Court in State v. Isaac (Appellate Case No. 2013-001464).

V.

To promote judicial uniformity and judicial economy, the State respectfully asks this Court to grant certification on this significant issue. Accordingly, the State submits certification is warranted in this case. See S.C. Code Ann. § 14-8-210 ("Certification is appropriate where the case involves an issue of significant public interest or a legal principle of major importance, or in other cases the court considers appropriate.").

WHEREFORE, Respondent prays that this Court will certify this appeal for consideration by the South Carolina Supreme Court for all purposes pursuant to S.C. Code Ann. § 14-8-210 and Rule 204, SCACR; and for such other and further relief as the Court may deem just and proper.

Respectfully submitted,

ALAN WILSON
Attorney General

JULIE KATE KEENEY
Assistant Attorney General

By: _____
Julie Kate Keeney

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

July 26, 2013

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Lexington County
Honorable Perry M. Buckner, Circuit Court Judge
Court of Appeals Appellate Case No. 2012-212839

THE STATE,

Respondent,

vs.

DANIEL BROCKWAY,

Appellant.

PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Motion to Certify the Case to the South Carolina Supreme Court on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Katherine Carruth Goode, Esquire
229 South Congress Street
Winnsboro, SC 29180

Steven M. Hisker
Hisker Law Firm, P.C.
126 Main Street
Duncan, SC 29334

I further certify that all parties required by Rule to be served have been served. This 26th day of July, 2013.

Ellen R. DuBois

ELLEN R. DuBOIS
Legal Assistant

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

EXHIBIT A

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of General Sessions
Perry M. Buckner, Circuit Court Judge

Case No. 2011-GS-32-01768
Appellate Case No. 2012-212839

State of South Carolina,

Respondent

v.

Daniel Brockway,

Appellant

INITIAL BRIEF OF APPELLANT

Steven M. Hisker
Hisker Law Firm, P.C.
126 East Main Street
Duncan, South Carolina 29334
Telephone: 864-921-1432

Katherine Carruth Goode
229 South Congress Street
Winnsboro, South Carolina 29180
Telephone: 803-799-4440

Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitutional Provisions:

Statutes:

STATEMENT OF ISSUES ON APPEAL

1. Did the circuit court err in denying appellant's motion to dismiss on double jeopardy grounds?

2. Did the circuit court err in denying appellant's motion to dismiss pursuant to the immunity provision of the Protection of Persons and Property Act?

STATEMENT OF THE CASE

Appellant, Daniel Brockway, was indicted in 2011 in Lexington County on a charge of assault and battery in the second degree. R. p. __ (indictment). He was tried June 5-7, 2012, before Judge William P. Keesley. 1 Tr. p. 1. The jury was sworn and the trial progressed through the state's evidence and the defense witnesses. However, the trial ended when the court granted a mistrial motion, made by the defense during the cross-examination of the defendant, because of the prosecutor's improper questions that commented on the defendant's exercise of his right to remain silent. 1 Tr. pp. 387-88.

The case was again called for trial August 27, 2012, before Judge Perry M. Buckner. 2 Tr. p. 1. The defense filed a motion to dismiss on double jeopardy grounds, on the basis that the state intentionally goaded the defense into making the mistrial motion in the first trial. Motion. The court heard argument on the double jeopardy issue and denied the motion to dismiss. 2 Tr. pp. 7-22.

The defense also moved to dismiss on the basis of immunity, pursuant to the Protection of Persons and Property Act, S.C. Code Ann. §§ 16-11-410 – 16-11-450. 2 Tr. p. 26. After conducting a pre-trial hearing, the court held the defense had not established its right to immunity by a preponderance of the evidence and denied the motion to

dismiss. 2 Tr. p. 170-71. The trial was suspended so that the defendant could pursue this immediate appeal pursuant to *State v. Duncan*, 392 S.C. 404, 709 S.E.2d 662 (2011).

PROPRIETY OF IMMEDIATE APPEAL

In *State v. Duncan*, the Supreme Court established that an order granting or denying a motion to dismiss under the Protection of Persons and Property Act is immediately appealable. *See id.*, 392 S.C. at 407 n.2, 709 S.E.2d at 663 n.2. The appeal of the immunity issue is properly before this Court.

Ordinarily, an order denying a motion to dismiss on double jeopardy grounds is not immediately appealable. *See State v. Miller*, 289 S.C. 426, 427, 346 S.E.2d 705, 706 (1986). However, an order that is not directly appealable may be considered if there is an appealable issue before the court. *See, e.g., Edge v. State Farm Mut. Auto. Ins. Co.*, 366 S.C. 511, 517, 623 S.E.2d 387, 390 (2005); *FOC Lawshe Ltd. Partnership v. International Paper Co.*, 352 S.C. 408, 413 n.1, 574 S.E.2d 228, 231 n.1 (Ct. App. 2002); *Cox v. Woodmen of the World Ins. Co.*, 347 S.C. 460, 469, 556 S.E.2d 397, 402 (Ct. App. 2001). In this case, the appellate court should address the double jeopardy claim, in the interest of judicial economy, because a decision of this issue in favor of the defendant will eliminate the need for a new trial and further appeal. *See Edge*, 366 S.C. at 517, 623 S.E.2d at 390 (invoking judicial economy and addressing additional issue in an effort to avoid another appeal in the future and potentially narrow the issues for trial)

ARGUMENT

The charge against Daniel Brockway arose from an incident that occurred in the early hours of January 22, 2011, in the parking lot of the apartments where the alleged

victim, Mike Wallar, resided. Brockway and Wallar were friends and often went out drinking together. They and other friends had met at a bar that night. Three of them, Brockway, Wallar, and Cordell Brown, had then gone to a gentleman's club. Ultimately, the three men returned to Wallar's apartment. Brown rode with Wallar, and Brockway drove his own vehicle.

After they arrived in the apartment parking lot, a physical altercation occurred. The men gave contradictory accounts of the events. Brockway testified Brown and Wallar were the aggressors. Brown pushed him from behind and, when Brockway turned toward Brown, Wallar struck Brockway in the head with a gun, causing a serious head injury. When Brockway turned and saw the gun, he wrestled Wallar back into the car and struggled with him for the gun. He punched Wallar until he could get the gun, then tossed the gun away. Brown got the gun and pointed it at Brockway, threatening to shoot him if he did not get off Wallar. Because of this threat, Brockway got up, went to his vehicle, and drove to the emergency room for treatment of his head injury.

Wallar claimed Brockway's head injury had occurred earlier, at the club, where Wallar claimed he had struck Brockway in the head with a small plastic flashlight. According to Wallar, when he and Brown arrived at the apartments, he did not see Brockway's vehicle. Brockway suddenly appeared at his driver's side window. He had been crouched down, but then stood and punched out the window with his hand. Wallar stated he got his pistol from the glove box and Brockway fought him for the weapon. He claimed Brockway bit him and struck him. He further claimed Brockway got the weapon from him, struck him with it, then threw it out of the car, got up, ran to the other vehicle, and drove away.

I. THE COURT ERRED IN DENYING THE MOTION TO DISMISS ON DOUBLE JEOPARDY GROUNDS.

In the first trial, the state repeatedly engaged in improper comment on the defendant's exercise of his right to remain silent. When the third such instance occurred, the defense moved for a mistrial, and the mistrial was granted. 1 Tr. pp. 372-88. In the second trial, the defense moved to dismiss based on the bar of double jeopardy. 2 Tr. pp. 7-11. That motion was denied. 2 Tr. p. 22. The second trial judge erred in not conducting the required analysis of the double jeopardy issue, and the first trial judge erred in concluding the prosecutor did not intentionally goad the defense into making the mistrial motion. This Court should reverse and dismiss the case on double jeopardy grounds.

During the defense's cross-examination of the state's lead investigator, the officer made the first comment on the defendant's exercise of his right to remain silent. Brockway denied he had broken Wallar's car window with his hand, as Wallar claimed. The defense cross-examined the officer concerning her investigation and what, if any, effort she made to determine if Brockway had an injury to his hand:

Q No, I'm just asking you if somebody told you that somebody broke a window with their bare fist, would you expect to see their fist injured?

A I --

Q Yes or no, you either would --

A Yes, I'd expect to see something.

Q And potentially even broken knuckles?

A That's why I wanted to see Mr. Brockway so I could look at him.

Q Well, when you did see him on the 30th when he turned himself in?

A I did not.

Q But you were advised that he turned himself in?

A Yes, sir, but I didn't see --

Q You could have went over there that very night and looked at his hand?

A Once I have an attorney tell me not to speak to his client, I --

1 Tr. p. 200, line 13 – p. 201, line 5. The defense objected and, out of the presence of the jury, moved for a mistrial and moved to bar re-prosecution. 1 Tr. pp. 201-02.

The mistrial motion was based on the witness's improper comment on the defendant's post-arrest exercise of his right to remain silent. The motion to bar re-prosecution was premised on the defense's contention that the comment was made intentionally and purposefully by this experienced law enforcement officer and amounted to misconduct. 1 Tr. p. 201, line 12 – p. 202, line 18; p. 207, lines 1-18; p. 208, line 3 – p. 209, line 10. The court denied the motion to bar re-prosecution, finding that the comment was not intentional misconduct. 1 Tr. p. 205, lines 7-17; p. 210, lines 19-24.

The court and the attorneys engaged in a lengthy discussion of this issue. Throughout the discussion, the judge made comments that indicated he was giving serious consideration to granting the motion for mistrial. 1 Tr. p. 203, lines 15-20; p. 205, lines 18-25; p. 213, line 19 – p. 214, line 1. Ultimately, the defense withdrew the motion for mistrial, in light of the court's determination that it would not bar re-prosecution, and chose to have the trial proceed to a conclusion. 1 Tr. p. 217, lines 17-25; p. 219, line 9 – p. 220, line 11; p. 223, line 20 – p. 226, line 23.

Before the trial resumed, at the suggestion of the prosecutor, the court admonished the witness concerning not making any further comment about the

defendant's right to remain silent in the presence of the jury. 1 Tr. p. 227, lines 1-23. The court could not have made it any clearer that further comment on this constitutional right would not be tolerated.

The treatment of this issue was extensive, covering more than 25 pages of the transcript. 1 Tr. pp. 201-27. Based on the argument of counsel and the court's comments, the nature of the objection and the potential ramifications of further comment on the defendant's exercise of his right to remain silent were apparent to everyone involved in the trial, including the prosecutor. Indeed, it was the prosecutor who requested that the court warn the officer not to "cross that line again in any way." 1 Tr. p. 226, line 25 – p. 227, line 6. However, during his cross-examination of the defendant, the prosecutor did exactly that. He crossed the line and commented on the defendant's exercise of his right to remain silent – *not once, but twice*.

After the defendant had testified to his version of the events in the parking lot, the prosecutor began his cross-examination with the first such comment:

Q This version has a lot of elements, doesn't it, your version of the story; is that correct?

A It's the truth, it's not a story.

Q Have you told this story before?

MR. HISKER: Objection, Your Honor.

THE COURT: *Sustained*.

1 Tr. p. 350, lines 16-19 (emphasis added).

Even though the court *sustained* this objection, the prosecutor concluded his cross-examination with yet another question that commented on the defendant's exercise of the right to remain silent:

Q You beat this man and then you ran, didn't you?

A That is not correct.

Q And who have you told this story to again?

MR. HISKER: Objection, Your Honor.

THE COURT: *Sustained a second time*.

MR. HISKER: Judge, I've got a motion now.

MR. SCOTT: Nothing further.

1 Tr. p. 372, line 25 – p. 373, line 6 (emphasis added).

The jury was excused from the courtroom, and the defense moved for a mistrial. The defense argued the last question was the third time the state had commented on the defendant's silence – the first being through the officer, the second being the prosecutor's initial question to which an objection was sustained, and the third being the prosecutor's final question. 1 Tr. pp. 373, 376. Trial counsel argued that this third instance reached the level of misconduct and should result in a bar to re-prosecution on double jeopardy grounds. 1 Tr. pp. 376. It was pervasive, not an isolated incident and not a slip of the tongue. 1 Tr. pp. 376, 378. The court ruled the conduct was not intentional goading of the defense into making a mistrial motion. 1 Tr. pp. 381-82.

The defense asked the court to reconsider its ruling, under the authority of *State v. Parker*, 391 S.C. 606, 707 S.E.2d 799 (2011). 1 Tr. p. 383. The defense argued that this third comment had to be intentional, in light of the earlier argument and rulings with respect to the investigator's comment and the earlier sustained objection to the prosecutor's initial question. 1 Tr. pp. 383-85. The court granted the mistrial, but it adhered to its ruling that the last question was not asked intentionally to goad a mistrial.

1 Tr. pp. 386-87. However, the court specifically noted that the defense could still make a motion based on the bar of double jeopardy. 1 Tr. pp. 387-88.

When the case was called for retrial, the defense moved to dismiss based on double jeopardy, again relying on *Parker* and arguing that the questions by the prosecutor were an intentional comment on the defendant's right to remain silent and goaded the defense into the mistrial motion. Motion, 2 Tr. pp. 7-11. The court denied the motion. 2 Tr. p. 22. This Court should reverse and find that the conduct of the prosecutor, like the conduct in *Parker*, was intentional goading to provoke a mistrial.

The Double Jeopardy Clause of the United States Constitution and its counterpart in the South Carolina Constitution protect citizens from being twice placed in jeopardy of life or liberty. *See* U.S. Const. amend. V; S.C. Const. art. I, § 12; *Parker*, 391 S.C. at 612, 707 S.C. at 801. "'Under the law of double jeopardy, a defendant may not be prosecuted for the same offense after an acquittal, a conviction, or an improvidently granted mistrial.'" *Parker*, 391 S.C. at 612, 707 S.E.2d at 801, *quoting State v. Coleman*, 365 S.C. 258, 263, 616 S.E.2d 444, 446 (Ct. App. 2005).

Jeopardy attaches when the jury has been empaneled and sworn. *Crist v. Bretz*, 437 U.S. 28, 38 (1978); *Mackey v. State*, 357 S.C. 666, 668, 595 S.E.2d 241, 242 (2004); *State v. Mathis*, 359 S.C. 450, 458, 597 S.E.2d 872, 876 (Ct. App. 2004). Once jeopardy has attached, a defendant has a "'valued right to have his trial completed by a particular tribunal.'" *Arizona v. Washington*, 434 U.S. 497, 503 (1978) (footnote omitted). This "valued right" exists because of multiple ways that a second prosecution may be "grossly unfair." *Id.* "The danger of such unfairness to the defendant exists whenever a trial is aborted before it is completed. Consequently, as a general rule, the prosecutor is entitled

to one, and only one, opportunity to require an accused to stand trial." *Id.*, 434 U.S. at 503-05 (footnotes omitted).

Not all governmental misconduct that results in a mistrial will bar re-prosecution. "Only where the governmental conduct in question is intended to 'goad' the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion." *Oregon v. Kennedy*, 456 U.S. 667, 675-76 (1982); *Parker*, 391 S.C. at 612, 707 S.E.2d at 802. A defendant may invoke the bar of double jeopardy where "the conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial." *Kennedy*, 456 U.S. at 679; *Mathis*, 359 S.C. at 460, 597 S.E.2d at 877. In this case, the prosecutor's continued questions that commented on the defendant's exercise of his right to remain silent were clearly intended to provoke and goad the defendant into moving for a mistrial.

The Supreme Court's decision in *State v. Parker* is instructive and controlling. In *Parker*, the solicitor committed three separate acts of misconduct. First, she showed the jury an unredacted videotape that included graphic images of the victim, rather than the redacted copy that had been provided to defense counsel. *Parker*, 391 S.C. at 609, 707 S.E.2d at 800. Second, in closing argument, she accused defense counsel of unethical conduct. *Id.* Third, in closing argument, she urged the jury to convict based on a duty to the community. *Id.* The Supreme Court held that the totality of what occurred in the first trial led to the conclusion that the solicitor intended to goad defense counsel to move for a mistrial. *See id.*, 391 S.C. at 615, 707 S.E.2d at 803.

The *Parker* decision sets out the analytical framework for reviewing a claim of intentional goading. Under the procedure established by *Parker*, it was the responsibility of the second trial judge to determine what the first trial judge held and then determine whether that finding was supported by the facts. *Id.*, 391 S.C. at 614, 707 S.E.2d at 803. In the court below, trial counsel argued that the second judge should examine the record to determine whether the facts supported the first judge's conclusions, citing the language of *Parker*. 2 Tr. p. 10, lines 3-11. The written motion quoted the relevant passage from *Parker*, as follows:

> In cases of this type, the second trial judge makes a double jeopardy determination based on what the previous court actually held. *The second trial judge should have determined what the first trial judge held and then determined whether that finding was supported by the facts*.

Id. (emphasis added); *see* R. p. ___ (motion p. 7). In response to counsel's argument, the second judge noted the first sentence of the passage quoted above, but his earlier and subsequent comments reveal that he questioned his authority to review the first judge's decision. *See* 2 Tr. p. 9, lines 16-21; p. 10, lines 20-25. These comments indicate the second judge did not understand his responsibility, pursuant to the procedure established in *Parker*, to review the holding of the first judge and determine if it was supported by the facts. In fact, the second judge did not conduct any such review, but simply denied the motion to dismiss. 2 Tr. p. 22, line 13. The second judge erred in not conducting this review and making an independent determination whether the first judge's conclusion as to the prosecutor's intent was supported by the facts.

In *Parker*, the Supreme Court reviewed the determinations of both trial judges with respect to the intent of the solicitor. The Court held there was no evidence in the record to support the second judge's finding the solicitor did not intend to elicit the

mistrial motion, and it further held there was evidence in the record to support the first judge's finding that the defendant was goaded into seeking the mistrial. *Id.*, 391 S.C. at 614, 707 S.E.2d at 803. This Court should conduct a similar review of the first judge's determination in this case, and it should find the conclusion of the first judge concerning the prosecutor's intent is not supported by the evidence.

The first judge's determination that there was no intentional goading was based on the prosecutor's explanation of his reason for asking the improper questions. 1 Tr. p. 373-74. The court clearly disagreed with the prosecutor's reasoning, stating, "You and I have a fundamental disagreement about this." 1 Tr. p. 374, lines 12-13. The court went even further, stating, "That's a nonsensical argument." 1 Tr. p. 374, line 25. Nonetheless, the court premised its finding of no intentional goading on the "nonsensical" explanation. 1 Tr. p. 386, lines 4-10. The first judge's finding of lack of intent to provoke a mistrial is not supported by the evidence.

As trial counsel argued in the court below, this case presents an even more egregious example of goading a mistrial than the circumstances in *Parker*. There, the mistrial was granted on the basis of three separate occurrences, the playing of the unredacted video and two unrelated comments during closing argument. *See id.*, 391 S.C. at 610, 707 S.E.2d at 800-01. *Parker* did not involve the kind of misconduct present in this case – a prosecutor proceeding with an inappropriate question *knowing* he was crossing the line.

The record clearly demonstrates the prosecutor was on notice that the state could not comment on the defendant's right to remain silent. The first instance of such comment, by the lead investigator, almost resulted in a mistrial. It led to a lengthy

discussion of the inappropriateness of such a comment. The court indicated that in cases involving such a comment, if there were "any question that there might be lingering prejudice after a curative instruction, I've always granted a mistrial." 1 Tr. p. 203, line 15 -20. The court indicated it was likely to grant the mistrial before the defense withdrew the motion. 1 Tr. pp. 203, 205, 213-14. The investigator's improper comment was so prejudicial that it required a two-page curative charge. 1 Tr. pp. 228-29. The prosecutor understood any further comment was off limits – he asked the court to warn the officer not to "cross that line" and expressed his belief that she had "learned her lesson." 1 Tr. p. 227, lines 3-6. Against this backdrop, the prosecutor had to know and intend that his improper questions would provoke another mistrial motion.

Contrary to the first judge's ruling, the prosecutor's "nonsensical" explanation does not excuse his knowing misconduct in proceeding with these questions. Even if he personally believed the questions were appropriate, as he claimed, that belief could not justify his disregarding the court's ruling that *sustained* the objection to his first such question. After that ruling was made, the *only* explanation for his again asking the forbidden question was that he intended to goad the defense into the mistrial motion.

The motivation of the prosecutor to provoke this mistrial was that his case was not going well. This charge, assault and battery in the second degree, required proof, as an essential element of the offense, that moderate bodily injury occurred or could have occurred. *See* S.C. Code Ann. § 16-3-600(D)(1)(a). The statute defines "moderate bodily injury" as "physical injury requiring treatment to an organ system of the body other than the skin, muscles, and connective tissues of the body, except when there is penetration of the skin, muscles, and connective tissues that require surgical repair of a

complex nature or when treatment of the injuries requires the use of regional or general anesthesia." *See* S.C. Code Ann. § 16-3-600(A)(2). The state did not call as a witness any treating physician or health care provider who could testify to the nature of Wallar's alleged injury. The state presented no evidence to bring the injury within the statutory definition.

The defense moved for a directed verdict based on this lack of proof of the nature of the injury. 1 Tr. pp. 244-48. Although the court denied the directed verdict motion, the argument of trial counsel at the directed verdict stage put the state on notice of the rationale the defense would argue to the jury – that there was reasonable doubt as to the existence of an injury within the statute's definition and that it would be purely speculative whether such an injury could have resulted from the alleged assault. Later in the trial, the issue was again argued, and it was clear that the defense strategy would involve an attempt to convince the jury that the state did not meet its burden with respect to the moderate bodily injury element of the offense. 1 Tr. pp. 299-301. The motivation of the prosecutor to have this trial aborted so that the state could present a medical witness at the second trial is apparent, since the state in fact changed its approach to the case and gave notice to the defense that it would call the emergency room doctor as a witness in the second trial. 2 Tr. pp. 12-14, 21. A further motivation of the prosecutor was to be able to bring additional witnesses he was not prepared to call in the first trial, in an effort to discredit the defendant's testimony. 2 Tr. p. 20.

Moreover, the defense did not merely rely on the state's failure to meet its burden of proof. Instead, it presented evidence to refute the state's evidence: (1) testimony that contradicted the state's witnesses' account of the altercation, (2) evidence of the serious

injury suffered by Brockway, consistent with his testimony that Wallar struck him with a gun, (3) evidence of a financial motivation of the alleged victim in bringing this charge, (4) evidence of a prior incident between Brockway and Wallar, in which Wallar made threatening gestures and Brockway calmly turned away from any confrontation, (5) evidence of the character and peaceful demeanor of Brockway and his tendency to avoid confrontations, (6) evidence of Wallar's determined, demanding, and manipulative disposition and tendency to pout and show himself out, and (7) evidence of Brown's motivation to confront Brockway and provoke an altercation. 1 Tr. pp. 272-74, 277, 291-95, 303-08, 314-15, 322-44, 347-50. Based on this attack on the state's case, and in light of the state's lack of a medical witness to establish the moderate bodily injury element, the state had a clear motivation for seeking to have the case end in a mistrial. Under these circumstances, the evidence does not support the first judge's finding that the prosecutor did not intend to goad the defense into a mistrial motion by asking the final question – a question the prosecutor *knew* was not allowed. Rather, as in *Parker*, the totality of what occurred in the first trial leads to the conclusion that the prosecutor intended to goad the defense to move for a mistrial. *Cf. Parker*, 391 S.C. at 615, 707 S.E.2d at 803. This Court should reverse and find that re-prosecution of this offense is barred by double jeopardy.

II. THE COURT ERRED IN DENYING THE MOTION TO DISMISS ON IMMUNITY GROUNDS.

The court conducted a pre-trial hearing on the immunity issue pursuant to *State v. Duncan*, 392 S.C. 404, 709 S.E.2d 662 (2011). The court denied the motion to dismiss upon a finding that the defense failed to establish immunity by a preponderance of the evidence. 2 Tr. pp. 170-71. This Court should reverse, because the preponderance of the

evidence established the defendant's entitlement to immunity under the Protection of Persons and Property Act. *See* S.C. Code Ann. § 16-11-450. The evidence before the court is summarized below.

Brockway and Wallar met through the Veterans Administration, become friends, and often went out drinking together. 2 Tr. pp. 31-32. Usually, they and others gathered at Wallar's apartment to drink before going out and returned there afterward for more drinking. 2 Tr. p. 32.

On this particular occasion, Brockway, Wallar, and others met at a bar, Liberty, around 11:00 or 11:30 p.m. 2 Tr. pp. 33-35, 84. While there, Wallar became agitated because Brockway was associating with a woman with whom Wallar had had a disagreement. 2 Tr. pp. 35, 85. Some time between 1:00 and 2:00 a.m., Brockway and four others decided to go to a gentleman's club, but only Brockway, Wallar, and Brown actually showed up. 2 Tr. pp. 36, 86. Wallar was still agitated with Brockway over the woman at Liberty, and the men exchanged words and "[g]ot in each other's face." 2 Tr. p. 36. Brockway denied they had any physical altercation at the club. He testified that, when they decided to leave, they shook hands and made up, and Wallar invited him back to his house for drinks. 2 Tr. p. 37. Brown rode with Wallar, and Brockway drove separately.

The altercation that led to the assault charge occurred in the parking lot of Wallar's apartment. According to Brockway, he got out of his vehicle and approached Wallar's car. 2 Tr. p. 41. As he did, Brown was rounding the back of Wallar's car, cursing at Brockway. 2 Tr. pp. 38, 41. Brockway did not know why Brown was agitated with him, and he ignored Brown and approached Wallar's driver's side door. 2 Tr. pp.

38, 41-42. As Wallar was getting out of the car, Brown shouted at Brockway and pushed him from behind. 2 Tr. p. 42. Brockway turned to fend Brown off and felt something hit him in the back of the head. 2 Tr. p. 42. He turned back and saw Wallar with a gun in his hand. 2 Tr. p. 42. They wrestled over the gun and Brockway tackled Wallar back into the car. 2 Tr. p. 42. In an effort to wrest the gun from Wallar, Brockway bit and punched him and succeeded in getting the gun from him. 2 Tr. p. 43.

Brockway intended to hold Wallar down in the car until the police came. 2 Tr. p. 45. Wallar kept trying to get the gun back, so Brockway decided to get rid of it. 2 Tr. p. 45. He took the clip out and tossed both the gun and clip out of the car. 2 Tr. pp. 45-46. Wallar then yelled for Brown to get the gun and shoot Brockway. 2 Tr. p. 46. Brown got the gun, pointed it at Brockway, and repeatedly yelled "get off him" and "I'm going to shoot you." 2 Tr. p. 46. Brockway decided to get out of there, got in his vehicle, and immediately drove to the emergency room because he was bleeding profusely from his head injury. 2 Tr. pp. 43, 46.

Brockway suffered a two-and-a-half-inch laceration on the back of his head that required 12 to 13 stitches, as well as other injuries. 2 Tr. pp. 43, 47-49. The defense introduced photographs of his injuries taken the following day. 2 Tr. pp. 44, 47-49; Exhibits 2-8. Brockway affirmed that the injuries did not happen earlier, but occurred when Wallar struck him with the gun and during the ensuing struggle. 2 Tr. pp. 45, 49.

Brockway testified that his intent during the altercation was to get the gun from Wallar. 2 Tr. p. 51. He was in fear and believed there was no other way to avoid the situation safely. 2 Tr. p. 51.

Brockway denied that he shattered the window of Wallar's door. 2 Tr. p. 42. He believed he was welcome at Wallar's apartment and did not go there for a confrontation. 2 Tr. pp. 42-43. He later learned why Brown had come after him in the parking lot – Wallar had told Brown about some negative comments Brockway had made about Brown. 2 Tr. p. 38. Brown acknowledged the comments had made him furious, and he acknowledged sending Brockway an angry text message that night about the comments Brockway had made. 2 Tr. pp. 121-22, 138-39. The message read,

> First off bro I'm not using mike .... so don't f---in put me in yo sh-- .... I don't like that ... u may that u high class but u not .... its good to have friends that look out for u during times that u have less .... but I'm not using mike for nothing ... I'm here if u got something to say to me plus u have my number be a man and if u have something on your chest then be up front with me

Def. Exhibit 1 (profanity redacted). In his initial statement to police, Brown failed to include anything about this disagreement and his text message to Brockway. 2 Tr. pp. 136-38.

Brockway attempted to make a police report the next day, after he was home from the hospital. 2 Tr. p. 50. A friend called the police for him, but the police indicated they would not allow him to file a separate report because Wallar and Brown had already filed a report. 2 Tr. p. 50.

Wallar and Brown contradicted Brockway's account. Wallar denied he was angry at Brockway over the woman at Liberty. 2 Tr. p. 85. After they were at the gentleman's club, he claimed Brockway became upset with him for talking to a particular woman and began giving him verbal abuse. 2 Tr. pp. 89-90. Wallar testified he lost his cool and shoved Brockway over a table. 2 Tr. p. 90. Wallar struck the first blow, and Brockway fell to the ground. 2 Tr. p. 90. He said Brockway did not fight back but simply got up

and walked away. 2 Tr. p. 90. After Brockway came back, Wallar flipped Brockway's hat off, and Brockway again just disappeared. 2 Tr. p. 90. However, Wallar claimed Brockway returned, came up behind him, and knocked his glasses off. 2 Tr. p. 91. Wallar looked for his glasses, using a tiny plastic flashlight one of the girls had given him. 2 Tr. p. 91. Wallar testified Brockway told him he had the glasses, and Wallar became furious and struck Brockway on the head with the flashlight. 2 Tr. pp. 91-92. Wallar testified he was the aggressor in every physical act except Brockway's knocking his glasses off. 2 Tr. p. 92. Brown did not observe the alleged physical altercation at the club. 2 Tr. p. 119.

Wallar testified that he did not invite Brockway back to his apartment. 2 Tr. p. 99. Once they were there, Brockway was suddenly at his car door and shattered the window with his bare fist, striking Wallar in the head. 2 Tr. pp. 93-94. He claimed Brockway then came in on top of Wallar, bit him, and fought him for a pistol he had retrieved from his glove box. 2 Tr. p. 94. Brockway was able to get the pistol, and Wallar claimed Brockway struck him with it. 2 Tr. p. 94. Brockway then threw the pistol out, got up, ran to his vehicle, and drove away. 2 Tr. p. 95. Brown's testimony about these events was similar to Wallar's. 2 Tr. pp. 123-29.

Wallar testified Brockway's head injury may have been caused by the tiny flashlight he hit him with at the club. 2 Tr. pp. 101-02. He acknowledged that Brockway's injury required more stitches than his own, and he could not explain why a small plastic flashlight would cause a more serious injury to Brockway than the injury Wallar allegedly suffered from what he claimed were repeated blows to his head with a gun. 2 Tr. p. 103.

The defense attacked Wallar's and Brown's accounts of the events that night. The initial statement Wallar gave to the investigating officer was inconsistent with his trial testimony. He did not tell her he was the aggressor in the altercation with Brockway or include anything about what he claimed happened earlier at the gentleman's club. 2 Tr. pp. 71-72. His claim about the physical altercation at the club was also internally inconsistent. Although he claimed to be the aggressor, he testified the club allowed him to stay but required Brockway to leave. 2 Tr. pp. 104-05. Although he claimed Brockway had knocked off and/or taken his glasses, he was nonetheless able to drive home. 2 Tr. p. 106. He acknowledged Brockway knew he owned a pistol and possibly knew he had it in his car, but he could not explain why Brockway would put up with his assaults at the club when he was not armed and then would come to attack him when he might have his pistol. 2 Tr. p. 109. He acknowledged he spoke with an attorney soon after the incident about a civil action. 2 Tr. pp. 111-12.

Brown also did not give the police a complete account of what had gone on that night. As noted above, he did not reveal anything about his anger over the comments Brockway had made and the text message he had sent Brockway. 2 Tr. pp. 136-38. Brown had called 911 and claimed he repeated everything that was happening as it occurred during the 911 call. 2 Tr. pp. 149-50. The 911 recording reflects that Brockway had gotten the gun, because it recorded Brown saying to Wallar, "he's got the gun in his hand." 2 Tr. p. 148. Brown could not explain why he would need to tell Wallar Brockway had the gun if Brockway was hitting Wallar with the gun. 2 Tr. p. 149. Significantly, although he said he repeated everything that was happening during the 911

call, the recording reveals Brown never said Brockway was hitting Wallar with the gun. 2 Tr. pp. 149-50.

One other witness saw part of the incident from his apartment. However, he did not see what led to the altercation, did not see Brockway break the car window, did not see him enter the vehicle, and never saw him strike Wallar with the gun. 2 Tr. p. 160. He did see Brockway voluntarily throw the gun out of the car. 2 Tr. p. 161.

The defense met its burden of establishing immunity by a preponderance of the evidence. Admittedly, there are contradictions in the witness accounts. However, the evidence of the comparative seriousness of the two men's injuries supports Brockway's account that it was Wallar who struck Brockway with the gun, provoking Brockway's response and the ensuing struggle for the gun. Brown's account on the 911 tape does not include any reference to Brockway striking Wallar with the gun, although he claims he related everything as it was occurring. Brown's admitted anger about Brockway's comments to Wallar and the text message Brown sent Brockway confirm that Brown was prepared to confront Brockway, which is consistent with Brockway's account that Brown came out of the car cursing at him and started the confrontation by pushing him from behind. There was no evidence of any injury to Brockway's hand, which is inconsistent with the claim that he shattered the window with his bare fist. The only disinterested witness did not see how the altercation started and did not see Brockway strike Wallar with the gun. These facts, independent of the witnesses' accounts, support the version of events related by Brockway, not the version claimed by Wallar and Brown.

Under *Duncan*, the defense was required to establish Brockway's claim of immunity by a preponderance of the evidence. *See Duncan*, 392 S.C. at 411, 709 S.E.2d

at 665. The defense met this burden, by eliciting these independent facts that corroborated Brockway's version of the events, and thereby established his right to immunity under the Protection of Persons and Property Act. This Court should reverse the lower court's finding to the contrary, and dismiss this case under the immunity provision of Section 16-11-450.

CONCLUSION

For the foregoing reasons, the Court should reverse the lower court and dismiss the charge against the defendant.

Respectfully submitted,

Steven M. Hisker
Hisker Law Firm, P.C.
126 East Main Street
Duncan, South Carolina 29334
Telephone: 864-921-1432

Katherine Carruth Goode
229 South Congress Street
Winnsboro, South Carolina 29180
Telephone: 803-799-4440

Attorneys for Appellant

RECEIVED
JUL 26 2013
SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of General Sessions
Perry M. Buckner, Circuit Court Judge

Case No. 2011-GS-32-01768
Appellate Case No. 2012-212839

State of South Carolina,

Respondent

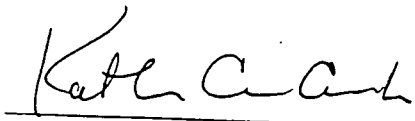
v.

Daniel Brockway,

Appellant

PROOF OF SERVICE

I certify that I have served the initial brief of appellant and designation of matter to be included in the record on appeal, by mail, to respondent's attorney, Senior Assistant Deputy Attorney General Salley W. Elliott, Office of the Attorney General, P.O. Box 11549, Columbia, South Carolina 29211, on June 3, 2013.



Katherine Carruth Goode
229 South Congress Street
Winnsboro, South Carolina 29180
Telephone: 803-799-4440
Attorney for Appellant

ALAN WILSON
ATTORNEY GENERAL

July 26, 2013

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RE: State v. Daniel Brockway – Court of Appeals Appellate Case No. 2012-212839

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Motion to Certify the Case to the South Carolina Supreme Court, along with proof of service, for filing in the above-referenced appeal.

Sincerely,

Julie Kate Keeney
Assistant Attorney General
Bar Number 100145

JKK/
Enclosures

cc: ~~Honorable Jenny A. Kitchings~~
Katherine Carruth Goode
Steven M. Hisker
Victim Services