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**Sep 16 2024**

**SC Court of Appeals**

STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM LEXINGTON COUNTY  
The Honorable Eugene C. Griffith, Circuit Court Judge

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Appellate Case No. 2019-001486

THE STATE, ..... RESPONDENT,

v.

KIERIN MARCELLUS DENNIS, ..... APPELLANT.

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**AMENDED<sup>1</sup> PETITION FOR REHEARING AND REHEARING *EN BANC***

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Respondent hereby makes an Amended Petition for Rehearing and Re-hearing *En Banc* pursuant to SCACR Rules 221, 240<sup>2</sup>, & 219. A rehearing *En Banc* is necessary to secure or

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<sup>1</sup> This Amended Petition is being filed because the State inadvertently relied on Rule 221, SCACR, in the *South Carolina Rules of Court, 2024* when it filed its original Petition which had no page limit for Petitions for Rehearing. The Rule was amended April 30, 2024, and now contains a 15-page limit for a Petition for Rehearing. (See Order, S.C. Supreme Court, January 31, 2024).

<sup>2</sup> Rule 240, SCACR, provides all motions or petitions, including petitions for rehearing, shall include; (1) an affidavit of service with the date; (2) a memorandum with citation of authorities in support of the motion; (3) Affidavits or other documents in support of their positions where the Record or Appendix is not on file or the information relied upon in the motion is not contained in the Record or Appendix. Rule 240, SCACR (a) & (c)(1)(2)&(3). The memorandum is included with this Petition as required by the Rule. Rule 240, SCACR (a)&(c)(2).

maintain uniformity of this Court's decisions in this area, and/or the proceeding involves a question of exceptional importance.<sup>3</sup>

In its Opinion in this case, State v. Kierin Marcellus Dennis, Howard Advance Sheets, Opinion No. 6082 (Ct. App. Filed August 14, 2024), this Court overlooked and misapprehended several points of law and fact as set forth below:

1. This Court completely misapprehended and overlooked its recitation of the facts and procedural history of the case that Appellant brought on the difficulty in this case by **first challenging** Dutch Fork High School (DFHS) students and **to fight at *the Cookout*** restaurant while still at the high school just outside the basketball arena.<sup>4</sup> This critical fact, which drove both the decision of Judge Russo and Judge Hood to deny immunity, after 2 immunity hearings, is completely left out of this Court's Opinion and is nowhere mentioned. Dennis, *supra*.

2. This Court completely misapprehended and overlooked in its recitation of the facts and procedural history of the case that Appellant then drove to several restaurants looking for DFHS fans or students and eventually intentionally drove his car to *Cookout* looking for DFHS students or fans for the previously mentioned fight that he instigated while still at the high school while outside the basketball arena.<sup>5</sup> While this Court mentioned Judges Russo and Hood found this fact, this Court nowhere sets forth that there was actual testimony that this occurred **supporting both**

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<sup>3</sup> In State v. Kierin Marcellus Dennis, Howard Advance Sheets, Opinion No. 6082 (Ct. App. Filed August 14, 2024), a 3-judge panel of this Court found in a published decision that the Appellant was entitled to a new immunity hearing on remand, after a complete denial of immunity by the first immunity court judge pretrial, a mistrial was granted because of a hung jury of 11 to 1 to convict, and after denial of immunity by another judge after an immunity hearing, after which appellant was convicted by the re-trial jury.

<sup>4</sup> (Nov. 2014 R. 161, 178, 247, 252, 359-62; Aug. 2017 R. 2007-08; Aug. 2019 R. 2139, 2168-69 2182, 2598-99).

<sup>5</sup> (Nov. 2014 R. 14-15; 161, 178, 247, 252, 359-62; Aug. 2017 R. 2007-08; Aug. 2019 R. 2099; 2139, 2168-69 2182, 2442 2598-99).

**Judge Russo's and Judge's Hood finding that Appellant brought on the difficulty.** This is further aggravated by point 1 above, where there was no mention in this Court's Opinion that Appellant began the conflict at the High School after the game by challenging DFHS fans or students to fight or settle this at *Cookout*.

3. This Court completely misapprehended and overlooked in its recitation of the facts and procedural history of the case that Appellant after arriving at the *Cookout*, parked his car near the car wash, entered the *Cook Out* restaurant where numerous DFHS students and alumni were eating, left the restaurant, re-entered his car, drove to the *Petco* parking lot and intentionally pointed his car directly toward a group of DFHS students and then drove his car from the area of the *Petco* aggressively into a group of DFHS students or fans near the *Cook Out* almost striking 2 of them which further instigated and aggravated the conflict with the DFHS students started at the high school that led to the fatal stabbing of the victim. And, Appellant then called 2 DFHS students over to his car and further instigated the conflict by taunting the group of DFHS students that they did not want what Appellant had in his car.<sup>6</sup> These fact were also critical in both Judge Russo's and Judge Hood's determinations that Appellant was not without fault in bringing on the difficulty, did not act reasonably, had other means of avoiding the danger than to act as he did, was not in a place where he had a right to be, and had not proved he was entitled to immunity under the Act by a preponderance of the evidence. Yet, even though these facts drove the lower court's determinations of immunity, these facts are not mentioned anywhere in this Court's Opinion.

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<sup>6</sup>(Nov. 2014 R. 14, 16-18, 37, 45-46, 50-51, 62 80-85; 119, 126-27; 135, 151, 154, 250-51, 257-258, 262-63, 213, 285 316-319, 323-324, 327-28; 372; 375-77; 412-413, 428, 436-438, 448, 451-53, 463, 506, 516, 543-548, 569, ; Aug 2017 R. 270; 1729-31; 1893-94; 1907, 1931, 1925-33; 1953-54, 2040; Aug. 2019 R. 2218-28; 2230-34; 2100; 2486-88).

4. This Court completely misapprehended and overlooked in its recitation of the facts and procedural history of the case that the evidence presented at the 2<sup>nd</sup> immunity hearing before Judge Hood was not “newly discovered evidence” but evidence that was available through the discovery provided to Appellant **before the 1<sup>st</sup> immunity hearing before Judge Russo** and could have been presented **at the 1st immunity hearing that defense counsel chose not to present.** *State v. Spann*, 334 S.C. 618, 619-620, 513 S.E.2d 98, 99 (1999). The *so-called* new evidence was evidence that could have been discovered by simple investigation by defense counsel [of which Appellant had 3] using the discovery provided by the State and interviewing witnesses.

A. For example, Elizabeth Bettini, specifically discussed in the Court’s Opinion, **was called as a witness at the 1<sup>st</sup> trial by the defense.** (R. 1621-1649). Bettini was available to be called as a witness at the 1<sup>st</sup> immunity hearing. Bettini gave multiple statements to police shortly after the crime. These were **turned over to the defense before the 1<sup>st</sup> immunity hearing.** Her police body cam statements referenced by this Court in its Opinion were provided to defense counsel before the 1st immunity hearing as well. Yet, Appellant chose not to call Bettini at the 1st immunity hearing. Appellant either made a strategic decision not to call Bettini at the 1<sup>st</sup> immunity hearing or Appellant failed to interview Bettini before the 1<sup>st</sup> hearing. Regardless, the State did not prevent Appellant from interviewing Bettini and as noted in this Court’s Opinion, police only told Bettini shortly before trial not to talk *to the media.* (R. 1783, ll. 21-25). They did not tell Bettini at any time not to talk to defense counsel. (R. 1783, ll. 21-25). Bettini’s testimony was not newly or after-discovered evidence. *State v. Spann*, 334 S.C. at 619-620, 513 S.E.2d at 99.

B. The same is true of Zachary Lynch, the employee of *Cookout* discussed in this Court’s Opinion. He was also **available as a witness at the 1<sup>st</sup> immunity hearing before Judge Russo.** In fact, Lynch was called as a witness at trial before Judge Griffith by Appellant. (Tr. 1448-1475).

Police took a statement from Lynch shortly after the crime, and it was turned over to Appellant **before the 1<sup>st</sup> immunity hearing before Judge Russo**. Lynch can also be heard on Officer Caitlin Voravudhi's body cam footage the night of the crime which was also provided to defense counsel **prior to the 1st immunity hearing**. The State did not hide Lynch's purported testimony from Appellant. Despite having all this information available about Lynch prior to the 1<sup>st</sup> immunity hearing, Appellant chose not to call Lynch as a witness at the 1<sup>st</sup> immunity hearing. Appellant either strategically chose not to call Lynch at the 1<sup>st</sup> hearing or Appellant failed to interview Lynch before the 1<sup>st</sup> immunity hearing. Either way, this is not newly or after-discovered evidence as recognized by the law. *Spann*, 334 S.C. at 619-620, 513 S.E.2d at 99.

C. Further, Bettini's 911 call mentioned in the Court's Opinion was never recorded, as the Court mentioned briefly. Importantly, the 911 call was not hidden from Appellant by the State or any government agency, it was simply never recorded by the 911 agency involved. The 911 tape was not played at the 2nd immunity hearing either, because it did not exist. (R. 1702-1866). It was not suppressed by the State. Bettini's testimony about her 911 call recited by the Court in its Opinion was available to Appellant before and at the 1st immunity hearing as **her previous statements were provided to Appellant in discovery before the 1<sup>st</sup> immunity hearing**. Appellant either made a strategic decision not to call her as a witness at the 1<sup>st</sup> immunity hearing or Appellant failed to interview Bettini before the 1<sup>st</sup> hearing. Either way, her testimony was not newly discovered or after discovered evidence. *Spann*.

D. Officer Caitlin Varavudhi, also mentioned in this Court's Opinion, was also available before and at the 1<sup>st</sup> immunity hearing. Appellant simply failed to call her as a witness even though he had been provided with the police and investigative file, her name is listed on the police report, and her body cam footage of Bettini and Lynch was turned over to Appellant before the 1<sup>st</sup>

immunity hearing. The State did not hide her existence or the substance of her testimony from Appellant. Appellant simply chose not to call her at the 1<sup>st</sup> immunity hearing. Both the State and Appellant chose to call her at the 1<sup>st</sup> trial (R. 630-31; 1439-44). Appellant either made a strategic decision not to call Varavudhi at the 1<sup>st</sup> immunity hearing or Appellant failed to interview her before the 1<sup>st</sup> hearing. Either way, her testimony was not newly discovered or after discovered evidence. *Spann*, 334 S.C. at 619-620, 513 S.E.2d at 99.

E. Further, Dr. Janice Ross, mentioned in the Court's Opinion, was available before and at the 1st immunity hearing as well. She was the pathologist who performed the autopsy on the victim. She was called as a witness in the 1<sup>st</sup> trial itself. (R. 1270-81). The State did not hide her testimony or findings from Appellant. Appellant simply chose not to call her as a witness at the 1<sup>st</sup> immunity hearing. Appellant made a strategic decision not to call Dr. Ross at the 1<sup>st</sup> immunity hearing or Appellant failed to interview Dr. Ross before the 1st immunity hearing. Either way, Dr. Ross's testimony is not newly or after-discovered evidence as defined by the law. *Spann*.

F. Additionally, this Court mentions in its Opinion that one of Appellant's arguments for a new [2<sup>nd</sup>] immunity hearing was information Ervin Meggett told police [actually the Solicitor] in August of 2016.<sup>7</sup> The Court mentions nowhere in the Opinion what Meggett actually testified to at the 2<sup>nd</sup> immunity hearing. Meggett could not remember stating what was contained in a Solicitor's Officer's summary of speaking with him in August of 2016, that *allegedly* the victim was in the wrong when he approached Appellant's vehicle when Appellant was leaving the *Cook Out*. (R. 2020-2032). Regardless, it would not change the outcome at trial. Meggett testified at the 2<sup>nd</sup> immunity hearing that the victim **did not lean or reach into Appellant's car and the victim**

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<sup>7</sup> Meggett was captured in a surveillance video from the time of the actual crime. He was with the victim when the victim was stabbed by Appellant. (R. 2023-2025).

was standing straight up or erect and outside Appellant's vehicle when Appellant reached outside of his vehicle and stabbed the victim and then drove off. (R. 2020-2032). At the 2<sup>nd</sup> immunity hearing, Meggett actually contradicted the 2 other witnesses mentioned by this Court in its Opinion, Bettini and Lynch. (R. 2020). The testimony from Meggett does not meet the definition of newly or after-discovered evidence either, because it would not have changed the result at trial. *Spann*. It would have further confirmed the State's case and contradicted Appellant's defense at trial. Appellant did not call Meggett at the 1<sup>st</sup> trial or at the 2<sup>nd</sup> trial.

In summary, the Court's Opinion is factually incorrect and misleading because it implies Appellant did not receive a fair 1st immunity hearing before Judge Russo because evidence was either hidden, not disclosed, or newly discovered before the 2nd immunity hearing before Judge Hood. This is incorrect as set forth in Respondent's brief. (FBOR). The information Appellant presented at the 2nd immunity hearing from Bettini and Lynch, Appellant could have discovered simply by interviewing Bettini or Lynch before the 1st hearing or calling Bettini or Lynch at the 1<sup>st</sup> hearing, or interviewing Officer Voravudhi or calling Officer Voravudhi at the 1st hearing. Appellant could have called Dr. Ross at the 1<sup>st</sup> immunity hearing as well. Appellant chose not to. These were decisions that Appellant and his defense counsel made before the 1st hearing. They were not the fault of the State, the police, some agency, or circumstance.

Omission of critical facts also leads to a misleading impression. Chauncey Meggett testified he did not remember telling the Solicitor's Office what was contained in a Solicitor's summary of an interview with him, but he did clearly remember the victim was outside Appellant's car and standing straight up when Appellant stabbed the victim by reaching out his car window and stabbing the victim. Appellant was not denied a fair 1st immunity hearing, he simply chose to call different witnesses or not present certain evidence. The Court's Opinion fails to acknowledge

or point this out. The Opinion implies Appellant was somehow deprived of this information and fails to acknowledge if this was not presented at the 1st immunity hearing it was Appellant's fault.

5. This Court also failed to apply the proper standard of review to Judge Russo's factfinding and legal conclusions. Judge Russo, after hearing evidence and argument, found Appellant failed to carry his burden. Further, this Court failed to apply the proper standard of review to Judge Hood's determination either. Regardless, neither this Court nor Judge Hood found Appellant had met the elements of newly or after-discovered evidence entitling him to a new immunity hearing. *Spann*. And, as discussed previously above, Appellant did not make that showing. *Id.*

6. This Court misapprehended or overlooked the State's argument as to appealability. The Court first stated that it rejected the State's argument that "...Dennis was precluded from receiving a new immunity hearing because he failed to appeal the denial of immunity after the first immunity hearing." (Opinion, p. 6). The Court addressed an argument the State did not make. The State submitted that the remedy was for Dennis **to appeal the 1st immunity hearing Order after judgment** (conviction by the second jury that found him guilty), precisely what State v. Isaac, 405 S.C. 177, 182, 747 S.E.2d 677, 679 (2013), provides. The State's argument is Appellant was only entitled to 1 immunity hearing, the hearing he had before Judge Russo, who denied him immunity under the Act by Order. He was not entitled to the 2nd immunity hearing before Judge Hood, which was gratuitous. The immunity hearing determination this Court should have reviewed on appeal from Appellant's conviction of murder, was the 1st immunity hearing denial of immunity by Judge Russo in his Order (R. 2905-2914), which was all Appellant was entitled to.

7. This Court also misapprehended the record finding a "new" hearing was not allowed by Judge Hood. The Court first says Judge Hood did not allow a 2nd immunity hearing when the record shows he actually did. In fact, the statement of facts and procedural history of the case in

the Court's Opinion, is a recitation of the evidence presented at the 2nd immunity hearing before Judge Hood. Judge Hood allowed Appellant to present any *so-called* new witnesses or evidence Appellant claimed he had discovered since the 1st immunity hearing even though it was not newly or after-discovered evidence as defined by the law. Judge Hood also considered any portions of the previous immunity hearing transcript that either side requested he review. Later in its Opinion, this Court then discusses Judge Hood held a 2<sup>nd</sup> immunity hearing and what occurred at that hearing. And, the Court discusses Judge Hood's Order finding that after the 2nd immunity hearing, Judge Hood denied immunity under the Act. This Court's Opinion contradicts itself and Appellant in fact had a 2nd immunity hearing before Judge Hood that was denied by Order (R. 2915-2921).

8. The Court misapprehends or overlooks the fact that this Court has now given Appellant a 3<sup>rd</sup> immunity hearing after only 1 conviction. Appellant was only entitled to 1 immunity hearing and Order, which he received from Judge Russo, (R. 2905-2914) which should have been reviewed on appeal. Further, as the record shows, Judge Russo appropriately denied immunity as appellant instigated the conflict, further aggravated the conflict, goaded DFHS students, sought out the conflict, was not without fault in bringing on the difficulty, did not act reasonably or as a reasonable man in the circumstances, had other means of avoiding the difficulty than employing deadly force, could have retreated and failed to prove he was entitled to immunity under the act by a preponderance of the evidence.

9. This Court misapprehended and overlooked the legal ramifications of a mistrial. A mistrial does not entitle a defendant to another, 2nd, or 3rd immunity hearing. An immunity hearing is a statutory right to seek immunity **from prosecution**. It goes neither to evidence or defense, nor is it renewed or reconsidered during the trial. *See State v. Duncan*, 392 S.C. 404, 410, 709 S.E.2d 662, 665 (2011) ("we find that, by using the words 'immune from criminal prosecution,'

the legislature intended to create a true immunity, and not simply an affirmative defense.”). *See also State v. Isaac*, 405 S.C. 177, 183, 747 S.E.2d 677, 679 (2013) (“An order denying an immunity request is not an order involving the merits in that it does not finally determine a substantial cause of action or defense.”); *id.*, at 184, 747 S.E.2d at 680 (“denial of a request for immunity under the Act is analogous to the denial of a motion to dismiss a criminal case on the ground of double jeopardy”); *State v. Curry*, 406 S.C. 364, 373, 752 S.E.2d 263, 267 (2013) (“the trial court had denied Appellant immunity, and section 16–11–440(C) should not have been charged to the jury”). *Compare State v. Blackwell*, 420 S.C. 127, 137, 801 S.E.2d 713, 718 n. 9 (2017)(Thus, like other pre-trial determinations, such as the denial of a defendant's claim of immunity under the South Carolina Protection of Persons and Property Act, we find the issue is proper for our review). *Cf. Curry*, 406 S.C. at 370, 752 S.E.2d at 266 (“A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard, which this court reviews under an abuse of discretion standard of review.”). The denial of immunity under the Act by Judge Russo, by Order (R. 2905-2914), after the 1st immunity hearing, was appealable after Appellant was convicted of murder as he was in this case. He was not entitled to a 2<sup>nd</sup> immunity hearing, a second bite at the apple, on the question of immunity because of a mistrial. The 2<sup>nd</sup> immunity hearing was gratuitous. The determination of immunity is not a determination of the admissibility of evidence such as drugs or a confession during the trial. *See Keels v. Powell*, 213 S.C. 570, 572–73, 50 S.E.2d 704, 705 (1948)(“The effect of the mistrial was to leave the parties in status quo ante, with the cause still *pending for trial* in the circuit court. The overruling of the motion for a directed verdict and the rulings made with reference to the admissibility and competency of the testimony resulted in no binding adjudication of the rights of the parties. Therefore the appeal is prematurely brought, and jurisdiction thereof cannot be retained.”). The Legislature did not intend for the defendant to

be granted a 2nd immunity hearing otherwise if the defendant received multiple mistrials, for whatever reasons, he would be entitled to two, three, four, five .... [innumerable] immunity hearings which would make no sense, would not serve judicial economy, and would be redundant. It could also result in the defendant being granted immunity after multiple mistrials, when multiple previous trial judges had denied immunity considering the same or similar evidence. The denial of immunity is a determination separate from the trial of the case. In fact, it is a determination whether the defendant has to go through a trial or not. As a result, this Court misapprehended the law in ruling Appellant was entitled to a 2nd immunity hearing, and now actually a 3rd hearing. Appellant was only entitled to 1 immunity hearing, the 1 he had before Judge Russo and was appropriately denied immunity.<sup>8</sup>

10. This Court misapprehended and overlooked that it essentially ruled the 1st immunity hearing was a nullity without any finding of error, much less reversible error. Judge Russo held a complete immunity hearing on November 17-19, 2014. The record shows that testimony was received from multiple witnesses [14 in all]. Judge Russo denied immunity in an Order filed on February 10, 2015. (R. 2905-2914). A jury trial was held in October 2016. The jury could not return a verdict (reporting that they were 11 to 1 in favor of conviction). The November 2014 immunity hearing transcript, the 1st immunity hearing, and the February 2015 Order denying immunity from that hearing, are not only available, but they are also in the record before this Court. (See ROA 1-586 and 2905-2914). This Court erred in determining that Appellant was entitled to “a new, full immunity hearing” simply because the first trial ended in a hung jury.

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<sup>8</sup> In order to be entitled to a new immunity hearing after a mistrial or reversal an appellant would have to show a previous *Brady* violation relevant to immunity before the last immunity hearing or newly or after discovered evidence as defined by the law. See Rule 29, SCRCrim.P. (motion for a new trial based on after-discovered evidence; S.C. Code Ann. Section 17-25-45(c)(2<sup>nd</sup> PCR action based on after-discovered evidence); *McCoy v. State*, 401 S.C. 363, 737 S.E.2d 623 (2013).

11. This Court also misapprehended or overlooked the fact that in both Georgia cases which this Court cited in its Opinion for the proposition that Appellant was entitled to a new immunity hearing after a mistrial, those cases are not controlling, instructive, or even persuasive, because in neither of those cases did the appellant receive an immunity hearing before trial and an order denying immunity as Appellant did in this case.<sup>9</sup> See *State v. Hamilton*, 839 S.E.2d 560 (Ga. 2020); *State v. Remy*, 840 S.E.2d 385 Ga. 2020). Here, Appellant received an immunity hearing before Judge Russo, an Order denying immunity from Judge Russo, a 2nd immunity hearing before Judge Hood, and another order denying immunity from Judge Hood. Further, this Court cites *Hamilton* for one proposition but refuses to follow *Hamilton* for another. (See Opinion). The cases cited from Georgia are simply not authoritative in this setting. Appellant is not entitled to another, third, hearing and another, third, determination of immunity.

12. This Court also misapprehended the lower court's ruling on Appellant's immunity claim. The Circuit Court found Appellant's claim of immunity failed because Appellant's claim of immunity was not credible; therefore, Appellant failed to prove he was entitled to immunity under the Act by a preponderance of the evidence. The Circuit Court specifically addressed the elements of self-defense and the elements under the Act and found Appellant was not entitled to immunity. In stating the case presented a "quintessential jury question," the Circuit Court was not abdicating its' responsibility, but was stating that after it made its credibility determination, found specifically that the elements of self-defense were not met, and found that Appellant failed to meet his burden of proof he was entitled to immunity under the Act by a preponderance of the evidence, given all of the witnesses and testimony, the case was one for the jury to decide. See *State v.*

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<sup>9</sup> In neither Georgia case had the appellant ever received an immunity hearing much less an order denying immunity. Appellant here received 2 of each in this case.

Andrews, 427 S.C. 178, 830 S.E.2d 12 (2019). And, the fact that the Circuit Court made this statement did not affect its' immunity analysis which was conducted as required by South Carolina law. Moreover, this statement was made regarding the 2<sup>nd</sup> hearing. As noted above, Appellant already had a full hearing before Judge Russo. A statement by Judge Hood could not undermine the finding of Judge Russo.

13. This Court misapprehended and overlooked that it cannot make evidentiary findings on appeal as if it is a Circuit Court and instruct a Circuit Court on whether it should find certain facts favorable to the Appellant on remand or grant Appellant certain inferences. (See "Duty to Retreat/Avoid the Danger" section of the Opinion, pp. 11-15). First, this portion of the Opinion is entirely *dicta* as it was unnecessary to the decision made in this case, and it should be struck for that reason. Second, and even more troubling, these evidentiary and legal findings of this Court and directions to the Circuit Court to follow them would require the Circuit Court, which is the sole determiner of the facts and elements at an immunity hearing, to follow the factual findings and legal conclusions of this Court which would abdicate the Circuit Court's statutory role in immunity proceedings to this Court. This would also violate this Court's role of appellate review.

Further, as demonstrated, this Court's findings and legal conclusions in this section of the Opinion are incorrect and are contradicted by other evidence presented at the first 2 immunity hearings.<sup>10</sup> The fact that Appellant was in his car does not mean he was in a place where he had

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<sup>10</sup> Appellant began and instigated the difficulty between himself and DFHS students beginning at the high school where he challenged them to a fight at the *Cook-Out*. Appellant drove to the *Cook-Out* and further instigated the conflict by going inside the *Cook Out* in the presence of DFHS students after challenging them to a fight at the high school. He then walked to his car, parked near the car wash, and again sought out DFHS students or fans by driving to *Petco*, maneuvering his car to where it pointed at DHFS students, and drove his car directly into several DFHS students almost striking 2 near *the Cook Out*. This action escalated the conflict Appellant started even further. There was also evidence presented the victim did not lean into or touch Appellant's car. And Appellant signaled the DFHS students to come to his car and lured the victim to his car where

a right to be. This Court erred in giving the Circuit Court instructions on what it should find below and what inferences it must apply in Appellant's favor, as the credible record does not support that Appellant was without fault in bringing on the difficulty, that he acted reasonably after instigating the conflict, that he had no other means of avoiding the difficulty, or that he even was in a place he had a right to be. This portion of this Court's Opinion is erroneous and should be struck.

14. This Court misapprehended or overlooked it did not grant Appellant relief from his conviction but in the same instance refused to rule on his evidentiary issues since they might change *upon re-trial*. (Opinion, p. 15). Appellant was not granted a new trial, and his conviction was not vacated or reversed. Only a 3<sup>rd</sup> immunity hearing was granted. This Court must grant rehearing and rule on Appellant's 2 evidentiary issues raised on appeal **from his conviction**.

15. This Court also misapprehended and overlooked that at the conclusion of its Opinion, this Court erroneously stated, "We reverse Dennis's conviction...", when his conviction was not reversed, and only a 3<sup>rd</sup> immunity hearing was granted. (Opinion, p. 15, last sentence). The Petition for Rehearing and Rehearing En Banc must be granted, and the Opinion corrected.

16. *En Banc* review should be granted because consideration of the full Court is necessary to secure or maintain uniformity of this Court's decisions in this area, and/or because this proceeding involves a question of exceptional importance. Rule 219, SCACR. The 3-judge panel of this Court issued a published Opinion in this case, which has precedential value if it remains unaltered. The 3-judge panel held for the first time that a criminal defendant upon mistrial or new trial is entitled to an entirely new immunity hearing regardless of the reason for reversal, mistrial,

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Appellant was armed with a deadly weapon, a knife. Appellant provoked the stabbing. The stabbing also occurred where cars were visible passing Appellant's parked car indicating the conflict that he started, he could have easily driven away from, i.e. he had other means of avoiding the difficulty. Appellant had already been inside the restaurant, and returned to his car before he drove into the group of DFHS students or fans. Appellant could have left long before the incident.

or grant of new trial. The holding has severe implications for the South Carolina criminal justice system, the administration of justice, and an already overly crowded criminal docket and does not serve judicial economy.<sup>11</sup> Our lower courts will be required to conduct new immunity hearings which may last several days up to a week or longer and render the first immunity hearing, which was entirely proper, a nullity and a complete waste of time and judicial resources.

### CONCLUSION

For the above stated reasons, and the reasons set forth in the Memorandum in Support of the Petition for Rehearing and Rehearing *En Banc*, this Court should grant the Petition for Rehearing or Rehearing *En Banc*, vacate the Court's original Opinion, and affirm Judge Russo's denial of immunity to Appellant, and proceed with review of Appellant's evidentiary issues previously fully briefed and argued by both parties.

Respectfully submitted,

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<sup>11</sup> One can easily foresee lower courts being required to conduct a new immunity hearing when there has been no showing of newly or after-discovered evidence, **such as in this case**, or when the same evidence is to be presented again which was already presented once before and denied. In fact, one can foresee a trial judge being required to conduct a new immunity hearing when he heard the exact same evidence before and denied the same and the grant of a mistrial or reversal had absolutely nothing to do with the pre-trial immunity hearing or the denial of immunity.

September 16, 2024

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By: s/ J. Anthony Mabry  
J. ANTHONY MABRY  
ATTORNEYS FOR RESPONDENT

RECEIVED

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SC Court of Appeals

STATE OF SOUTH CAROLINA  
In the Court of Appeals

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Appeal from Lexington County  
The Honorable Eugene C. Griffith, Jr., Circuit Court Judge

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THE STATE,

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KIERIN M. DENNIS,

Appellant.

Appellate Case No. 2019-001486

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**PROOF OF SERVICE**

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I, **Donna D'Alessio**, am an employee of the Respondent, hereby certify that as per the March 20, 2020 Order of the Chief Justice, the Response in Opposition to Motion to Strike; Amended Petition for Rehearing and Rehearing En Banc and Memorandum in support has been forwarded to Appellant's counsel, Robert M. Dudek, Esq. and Lara Caudy, Esq. via email today, September 16, 2024 to [RDudek@sccid.sc.gov](mailto:RDudek@sccid.sc.gov) and to [lcaudy@sccid.sc.gov](mailto:lcaudy@sccid.sc.gov) as well to their assistants [kwarren@sccid.sc.gov](mailto:kwarren@sccid.sc.gov) and to [smcinnis@sccid.sc.gov](mailto:smcinnis@sccid.sc.gov).

I further certify that all parties required by Rule to be served have been served.

This 16<sup>th</sup> day of September, 2024.

*s/ Donna D'Alessio*

Donna D'Alessio

Legal Assistant to J. Anthony Mabry  
Senior Attorney General