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SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Appellate Case No. 2019-001486

THE STATE, ...RESPONDENT,

v.

KIERIN MARCELLUS DENNIS, ...APPELLANT.

MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING AND REHEARING EN BANC

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STATEMENT OF FACTS

Dutch Fork High School (DFHS) played its long-time rival Lexington High School (LHS) in basketball on the evening of February 17, 2014. (Nov. 2014 R. 8, 227, 246; Aug. 2019 R. 2121-22.). DFHS won the rowdy game. (Nov. 2014 R. 246, 443; Aug. 2019 R. 2125-27). Kierin Dennis ("Appellant") left the game with his 4 friends: Keith Adams, Ketura "Lucky" Cook, Will Zander, and Morgan Zander, Will's sister, all of whom were current or former students of LHS.[1] (Nov. 2014 R. 8-9, 161; Aug. 2019 R. 2127-28). Students from the 2 high schools had post-game altercations before, so extra security was on hand to separate students after the game. (Nov. 2014 R. 9-13, 160-161, 482-483). LHS students were directed to exit the gym out the front door, while DFHS students were directed out the back. (Nov. 2014 R. 9, 160; Aug. 2019 R. 2125, 2134-35). Students from DFHS were celebrating by dancing in a loosely-formed circle in the parking lot when Appellant approached them and interrupted their celebrations. (Nov. 2014 R. 161, 178, 252; Aug. 2019 R. 2181, 2598-99). Things got tense, and Appellant challenged them to meet up at the local *Cook-Out* restaurant later to settle things as police ordered everyone to leave the parking lot. (Nov. 2014 R. 247, 359-362; Aug. 2017 R. 2007-08; Aug. 2019 R. 2139, 2168-69).

Appellant left the high school driving his gold Ford Explorer Sport followed by Keith in his White Nissan Armada, and Will, Morgan, and Ketura in Will's Silver Infinity Crossover. (Nov. 2014 R. 14-15; Aug. 2019 R. 2099). They initially drove to a gas station, then to *Sonic*, then to *McDonald's*, but finally ended up at the *Cook-Out*, even though it was noticeably full. (Nov. 2014 R. 14-15; Aug. 2019 R. 2442). Keith parked by a *Petco* while Will and Appellant parked their cars further down by a car wash. (Nov. 2014 R. 14, 119; Aug. 2017 R. 1931-33; Aug. 2019 R.

[1] Keith Adams, Will Zander, and Ketura Cook were LHS graduates. (Nov. 2014 R. 7, 74, 245). Morgan Zander was a current LHS student. (Nov. 2014 R. 159).

2218-28). One of Appellant's long-time friends, Austin Sanders, was leaving the *Cook-Out* when Appellant and his friends arrived, and he told the group, "Yeah, I was in the drive-thru and a whole bunch of Dutch Fork kids were just – started getting rowdy in the drive-thru, shaking people's cars, and stuff like that." (Nov. 2014 R. 250). Appellant and his friends chose to go into *Cook-Out* anyway. (Nov. 2014 R. 250). Inside were between 30 to 40 current and former DFHS students, including Devon Chatman, Alexis Brunson, Michael James, Lamar Butler, Kenneth Williams, and the 18-year-old victim, Da'Von Capers.[2] (Nov. 2014 R. 213, 592; Aug. 2019 R. 2100).

Once Appellant was inside the restaurant, Michael James, a current DFHS student, stood up and said, "Is that all y'all brought?" (Nov. 2014 R. 37, 428). Appellant replied, "We just came here to eat." (Nov. 2014 R. 251). Surveillance footage shows the students from the 2 high schools eating quietly inside *Cook-Out* for about 17 minutes before Appellant decided to go outside. (Nov. 2014 R. 316; Aug. 2017 R. 1953-54; Aug. 2019 R. 2486-88; State's Ex. 12; Defense Ex. 3). Appellant had previously texted his cousin, Tobias Davis, that DFHS students were "trying to fight [them] at Cook-Out" and stepped outside to take a phone call from him. (Nov. 2014 R. 16, 317-319). Appellant's 4 other friends followed him outside along with Michael James, who was seen on the surveillance footage dressed in a white, long-sleeved shirt. Michael James was walking to his car when Morgan Zander, Will's sister, said something to him, so he turned around and threw his hands up, and said, "Are y'all still salty?" (Nov. 2014 R. 16-18, 80; Aug. 2017 Tr. 270).

Surveillance video shows the DFHS students then immediately came out of the restaurant. (Nov. 2014 R. 81-85, 323-324; Aug. 2017 R. 1925-33). Appellant and his friends walked to their cars, but no one assaulted or attempted to assault them as they were on their way. (Nov. 2014 R.

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[2] Devon Chatman, Alexis Brunson, and Kenneth Williams were DFHS graduates; Lamar Butler, Michael James, and Da'Von Capers were current DFHS students. (Nov. 2014 R. 442, 481, 502-503, 566; Aug. 2019 R. 2100).

448, 463). Once they were in their 3 cars, Appellant and his friends pulled up next to each other and discussed for about 5 minutes how they would exit the parking lot. (Nov. 2014 R. 126-127, 257-258). Keith left the parking lot first and turned right toward Main Street. (Nov. 2014 R. 45-46). Will Zander drove next to the DFHS crowd and stopped his car, rolled down the window, and threw money out of the car, saying, "Hey, this what y'all are worth." (Nov. 2014 R. 544, 569). Appellant, in the *Petco* parking lot, maneuvered his vehicle to face the DFHS students while Will was doing this. (Nov. 2014 R. 51, 327-328). Appellant then pointed his car at the crowd of DFHS students and rapidly accelerated his vehicle into the wrong lane of traffic and almost hit 2 Dutch Fork students, Tyreke Farrow and Devon Chatman, before finally stopping his car by the opposite curb. (Nov. 2014 R. 451-452, 543-547). Xavier Holliday had to push Tyreke out of the way to prevent Appellant's car from hitting him. (Nov. 2014 R. 547).

DFHS students then gathered around Appellant's vehicle and heated words were exchanged because Appellant had almost hit two DFHS students. (Nov. 2014 R. 412-413, 506, 547; Aug. 2017 R. 2040). Will parked his car diagonally in front of the Appellant's, exited his vehicle, and got a metal pipe out of his trunk. (Nov. 2014 R. 50, 62, 135, 151). After approximately a minute of this heated exchange, Appellant motioned in a "come here" fashion to 2 of the DFHS students, rolled his window down further, and told them, "You don't want what I got. You don't want what I got."[3] (Nov. 2014 R. 436-438, 516, 548). Appellant was leaning over in his seat, slumped toward the center console with his right hand down and out of view when he rolled the window down further, grabbed a knife from the center console, and abruptly stabbed Da'Von Capers, who was outside his driver's side window, in the chest. (Nov. 2014 R. 262-263, 285, 375-377, 453; Aug.

[3] Appellant's window was already rolled down partially before he accelerated toward the Dutch Fork crowd. (Aug. 2019 R. 2235, 2252, 2322, 2346, 2552, 2757-58).

2019 R. 2230-34). Some witnesses testified that Da'Von Capers did not reach inside Appellant's vehicle and others testified that he did, some saying it was only after Appellant stabbed Capers in the chest. (Aug. 2017 R. 1729-31, 1893-94). Appellant then sped out of the parking lot and the victim was pronounced dead at Lexington Medical Center shortly after. (Nov. 2014 R. 154, 372; Aug. 2017 R. 1907; Aug. 2019 R. 2230-31).

Appellant went home and changed his clothes then decided to bury the knife. (Nov. 2014 R. 269-271, 343-344; Aug. 2017 R. 1908-12). He did not call or talk to law enforcement until they picked him up from his house later and never told them he was afraid for his life or that he had to act in self-defense. (Nov. 2014 R. 270-271; State's Exhibits 2 and 35). Appellant admitted he stabbed the victim but, at trial, claimed he did it in self-defense because the DFHS students were reaching into his car to attack him. (Nov. 2014 R. 277-355; Aug. 2019 R. 2322, 2337-39, 2663-64; State's Exhibits 2 and 35). However, no DNA or fingerprints from DFHS students were found on or in Appellant's vehicle. (Nov. 2014 R. 293-294, 403; Aug. 2019 R. 2753-62). Appellant did tell law enforcement that his car was blocked, and he could not leave the parking lot, but surveillance footage shows 1or 2 cars driving past Appellant's vehicle while it was parked by the curb. (Nov. 2014 R. 204-208, 276-277; Aug. 2019 R. 2228-29). Law enforcement arrested the Appellant for Murder and Possession of a Weapon during the Commission of a Violent Crime. (Indictments).

RELEVANT PROCEDURAL HISTORY

Appellant was indicted for Murder and Possession of a Weapon during the Commission of a Violent Crime in 2014 by the Lexington County Grand Jury. The case was prosecuted by the current Solicitor Samuel "Rick" Hubbard, III, Deputy Solicitor Shawn Graham, and Assistant Solicitor Rhonda Patterson. Appellant was represented by Todd Rutherford, Simone Martin, and

Nicole Simpson, Esquires. (Nov. 2014 R. 1; Oct. 2016 R. 619; Aug. 2017 R. 1657; Sept. 2017 R. 2041; Aug. 2019 R. 2095).

The 1st Immunity Hearing

Prior to trial, Appellant made a motion for immunity from prosecution pursuant to the Protection of Persons and Property Act, S.C. Code Ann. §§ 16-11-410 to 450 (2006), and a hearing took place pursuant to the procedure set forth in *State v. Duncan*, 392 S.C. 404, 709 S.E.2d 662 (2011), from **November 17 to 19, 2014** before **Circuit Court Judge Thomas Russo** ("the 1st immunity hearing"). (Nov. 2014 R. 1-618). Fourteen (14) witnesses were called at the hearing. On February 4, 2015, Judge Russo denied Appellant immunity by Order. (R. 2905-14). The case proceeded to trial by jury on October 3, 2016, which concluded in a mistrial due to an 11-1 hung jury on October 11, 2016. It was reported by the jury the alignment was 11-1 to convict. (Oct. 2016 R. 1001, 1656).

The 2nd Immunity Hearing

Appellant moved for a new immunity hearing in June of 2017, alleging newly discovered evidence, and a second immunity hearing ("the 2nd immunity hearing") was held before Circuit Court Judge Robert E. Hood on August 22 and 24, 2017 and September 18, 2017. (June 2017 Motion, R. 1665; Aug. 2017 R. 1657; Sept. 2017 R. 2041). Seven (7) more witnesses were called at this hearing. Appellant was allowed to present his *so-called* newly discovered evidence. On October 11, 2017, Judge Hood issued a 2nd Order denying immunity. (Oct. 2017 Order; Aug. 2019 R. 2901-2902). The case proceeded to trial by jury from August 19 to 27, 2019, after which Appellant was found guilty of murder. He was sentenced by the trial judge, the Honorable Eugene C. Griffith, to 30 years' imprisonment. (Aug. 2019 R. 2904)

The Direct Appeal/the Award of a 3rd Immunity Hearing

Appellant appealed his conviction and sentence and subsequently submitted a brief in support of his appeal. Respondent filed a responsive Brief. After oral argument, a three (3) judge panel of this Court issued an opinion granting Appellant a new immunity hearing ("a 3rd immunity hearing") in the Circuit Court below. State v. Kieren Marcllus Dennis, Opinion No. 6082 (Ct. App. Filed August 14, 2024). The Court did not reverse Appellant's conviction for murder, it only granted him a 3rd immunity hearing before another Circuit Judge. Id. It is unknown who that Circuit Judge will be. The Court did not reach Appellant's 2 trial issues raised in his brief. In its Opinion, the Court inappropriately held that "after a mis-trial," a criminal defendant is entitled to a new immunity hearing before his re-trial. The Opinion contains factual errors and wrong legal conclusions as well. In its Opinion, the three (3) judge panel of this Court misapprehend certain facts and law and overlooked certain facts and law. Appellant was not entitled to the 2nd immunity hearing he obtained before Judge Hood, because he had already had a full 1st immunity hearing before Judge Russo, and because the evidence presented at the 2nd immunity hearing was not "newly discovered evidence" but available through discovery before the 1st immunity hearing. The three (3) judge panel of this Court's holding and the language used in the Opinion also has severe implications for the administration of criminal justice in this State and for judicial economy and will burden an already crowded and severely backlogged criminal justice system in this State and therefore a rehearing *En Banc* is appropriate.

WHY THE PETITION SHOULD BE GRANTED

I.

In its Opinion in this case, the three (3) judge panel of this Court misapprehended and overlooked the record in this case which led directly to an incorrect Opinion in this case. *See* Dennis, *supra*. In its recitation of the facts and procedural history of the case and in its discussion of the findings of both Judge Russo and Judge Hood below, the three (3) judge panel of this Court failed to recognize or mention that Appellant Keiren Marcellus Dennis brought on the difficulty in this case by first challenging DFHS students and fans to fight at the *Cook Out* restaurant while **still at the high school just outside the basketball arena in the parking lot.** (Nov. 2014 R. 161, 178, 247, 252, 359-62; Aug. 2017 R. 2007-08; Aug. 2019 R. 2139, 2168-69 2182, 2598-99). This critical fact drove both the decision of Judge Russo and Judge Hood to deny immunity after the first two (2) immunity hearings. While this Court mentioned in its Opinion that the lower courts found Appellant sought out DFHS students and fans at the *Cook Out*, this Court left out of its Opinion why Judge Russo and Judge Hood made the finding above, i.e. the critical fact that Appellant started the difficulty while still at the high school. (Nov. 2014 R. 161, 178, 247, 252, 359-62; Aug. 2017 R. 2007-08; Aug. 2019 R. 2139, 2168-69 2182, 2598-99). The Opinion is misleading that the lower courts had no basis to make their finding that Appellant sought out DFHS fans and students at *Cook Out*.

The 3-judge panel of this Court also misapprehended, overlooked, and left out of its Opinion that Appellant then drove from the high school to several other restaurants and then intentionally drove to the *Cook Out* looking for DFHS fans and students he had previously challenged to fight at the high school. (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). This fact also drove Judge

Russo's and Judge Hood's analysis of why Appellant was not entitled to immunity. Appellant was not without fault in bringing on the difficulty.

The 3 judge panel of this Court also misapprehended and overlooked in its Opinion that Appellant after arriving at the *Cook Out*, parked his car, entered the restaurant, spoke to DFHS fans and students, left the restaurant, reentered his car, moved his car in the *Petco* parking lot to where it was pointed toward DFHS fans and students, and then intentionally and aggressively drove his car into a group of students or fans from DFHS in the *Cook Out* parking lot, almost striking at least one (1) of them, and Appellant told two (2) DFHS students to come to his car and taunted them with what he had in his car, which further instigated and aggravated the conflict with the DFHS fans and students that Appellant started at the high school that led to the fatal stabbing of the victim. (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). These facts 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. These facts were also critical in the jury's determination Appellant was guilty of murder and did not act in self-defense.

II.

The 3-judge panel of this Court misapprehended and overlooked in its Opinion that the evidence presented at the second (2nd) immunity hearing before Judge Hood was not newly or after-discovered evidence but evidence that was available to defense counsel through discovery

provided before the 1st immunity hearing before Judge Russo and could have been discovered by reviewing the discovery or interviewing the witnesses contained in the discovery.

What Occurred Below

A. November 17-19, 2014 Immunity Hearing and February 4, 2015 Order from the Honorable Thomas A. Russo

Upon the Appellant's motion for immunity under the Protection of Persons and Property Act, a hearing was held from **November 17-19, 2014** before **Judge Russo** pursuant to the procedure established in *State v. Duncan.* Nov. (2014 R. 1-10). Judge Russo heard testimony from 14 witnesses, including Appellant, and heard closing arguments from both the defense and the prosecution. (Nov. 2014 Tr.). The State argued Appellant had brought on the difficulty by inserting himself into the DFHS circle at the high school, inviting them to the *Cook-Out* to fight, and then driving his vehicle straight at DFHS students, nearly hitting 2 of them in the parking lot of *Cook-Out.* (Nov. 2014 R. 604-614). Appellant had gone first to *Sonic*, then *McDonald's*, then *Cook-Out* to look for DFHS students, and that as he had not met his burden of proving the elements of self-defense, he had a duty to retreat before using force. (Nov. 2014 R. 614-617). The defense argued Appellant was entitled to immunity because he and his friends were outnumbered 5 to 30 or 40, they were chased out of *Cook-Out* and pursued down the hill, and that Appellant had only pulled his vehicle up to the curb, nearly hitting Dutch Fork students, in order to make sure his friend, who pulled up first and threw money out the window, was okay. (Nov. 2014 R. 589-595). They argued Appellant should be granted immunity because he was in an occupied vehicle, "in his bubble," DFHS students "stuck their hands in his windows and tried his door handle," and that he reacted out of fear by sticking his knife out of the window in order to defend himself. (Nov. 2014 R. 596-604).

Judge Russo issued an **Order** denying immunity on **February 4, 2015.** (Feb. 2015 Order **R. 2905-14**). In it, after establishing findings of fact, Judge Russo laid out the burden of Appellant to prove he was entitled to immunity by a preponderance of the evidence, and systematically analyzed the elements of self-defense and of S.C. Code 16-11-440(A) and (C). (Feb. 2015 Order 2905-14). He concluded Appellant was not entitled to immunity because he had not proven the elements of self-defense by a preponderance of the evidence or the requirements of Section (A) or (C). (Feb. 2015 Order 2911-14):

> The defendant claims immunity under both subsections A and C of the Act. Section A has two requirements: you are entitled to reasonable fear presumption if (1) the person against whom deadly force is used is in the process of unlawfully and forcefully entering or has unlawfully or forcefully entered an occupied vehicle; and (2) the person who used deadly force knows or has reason to know that an unlawful and forcible entry or unlawful and forcible act is occurring or has occurred.
>
> Regarding the first requirement, the Court finds that the Defendant has not met his burden of proving by the greater weight of the evidence that Da'Von Capers was in the process of unlawfully and forcefully entering an occupied vehicle or that he had unlawfully and forcefully entered an occupied vehicle.
>
> Although one witness testified that while he was standing a few dozen feet from the Defendant's vehicle, he saw what appeared to be several students reach inside the Defendant's vehicle, several other witnesses who were actually standing right next to the Defendant's vehicle testified that no one was touching the vehicle or reaching inside, but that they were simply standing next to the vehicle talking to the Defendant, albeit in a heated manner.
>
> Further, no fingerprints other than that of the Defendant were found on or in the vehicle. Based on the testimony of witnesses and other evidence, including an iPad video tape, the Court finds that the Defendant has not established the first requirement of Subsection (A) by a preponderance of the evidence.
>
> Regarding the second requirement, the Court finds that the Defendant has failed to prove by the greater weight of the evidence that the Defendant, the person who used deadly force, did not know and had no reason to believe that an unlawful and forcible entry or an unlawful and forcible act was occurring or was about to occur.
>
> The Defendant alleges that he had reason to know or believe that Da'Von Capers was in the process of unlawfully and forcefully entering his occupied vehicle. However, the Court finds that based on the totality of the circumstances in this case,

that is not credible. Again, several witnesses in the immediate area of the Defendants' vehicle testified that no one was touching or placing their hands on or inside the Defendant's vehicle, and the only fingerprints found on or in the vehicle were that of the Defendant. Therefore, the Court finds that the Defendant has not established the second requirement of Subsection (A) by a preponderance of the evidence.

In addition to failing to establish the provisions of Subsection (A) of the Act by a preponderance of the evidence, the Court finds that the Defendant has not established the elements of self-defense by the greater weight of the evidence. Regarding the first element, the Defendant has not shown by a preponderance of the evidence that he was without fault in bringing on the difficulty.

The Defendant approached a crowd of Dutch Fork students near the curb at an accelerated rate of speed in the oncoming lane of traffic, nearly hitting at least two Dutch Fork students, and with a weapon at his side. Such an act was reasonably calculated to bring about the difficulty that arose. *See Slater*, 373 S.C. at 70, 644 S.E.2d at 52.[4] Then, rather than attempting to leave, the Defendant kept his vehicle stationary.

While the Defendant testified that he was unable to leave, the Court finds that based on the totality of the circumstances in the case, that testimony is not credible. The iPad video showing the Defendant's vehicle stationed at the curb shows one or two vehicles driving past the Defendant's vehicle, indicating that he could have left, as these vehicles were clearly able to leave. Thus, the Court finds that he has not established that he was not without fault in bringing on the difficulty.

As to the third element, even if the Defendant established the second element, that he actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, the Defendant has not established by a preponderance of the evidence that a reasonably prudent man of ordinary firmness and courage would have entertained the same belief. As noted above, the Dutch Fork students who testified indicated that no one had even touched the Defendant's vehicle, nor was anyone attempting to remove the Defendant from his vehicle. Also, fingerprint analysis and DNA testing did not reveal that anyone other than the Defendant had their hands on or in the vehicle. Accordingly, the Court finds that the Defendant has not established the elements of self-defense to the satisfaction of the Court by a preponderance of the evidence. Therefore, the Defendant's Motion to Dismiss under Section 16-11-440(A) is denied.

The Defendant also claims immunity from prosecution under Subsection (C) of the Act. Even if Subsection (C) applied, the Defendant would not be entitled to immunity under that subsection because he has not established the elements of self-

[4] *State v. Slater*, 373 S.C. 66, 70, 644 S.E.2d 50, 52 (2007).

> defense by a preponderance of the evidence as noted above. Therefore, the Defendant's Motion to Dismiss under Section 16-11-440(C) is denied.

(Feb. 2015 Order 2911-14 (emphasis added)).

B. June 2017 – Defense's Motion for a New Hearing

After Appellant's first trial ended in a hung jury in October of 2016, the defense moved for a new immunity hearing in June of 2017. They alleged that Elizabeth "Beth" Bettini, **a witness who was available and who they were aware of before the 1st immunity hearing before Judge Russo**, had witnessed the attack and had called 911 while in the *Cook-Out* drive-thru, and that as neither the State nor the defense had obtained the 911 call recording prior to the 1st immunity hearing or trial, they should be allowed to present it at a new hearing.[5] (June 2017 R. 2922, 2935). They also alleged that the manager of the *Cook-Out*, Zach Lynch, also a witness they were aware of and who was available before the 1st immunity hearing, had seen Da'Von Capers reach inside the Appellant's vehicle from across the parking lot, and that this was "newly discovered" evidence, even though the defense was aware he was **a witness prior to and at the first immunity hearing before Judge Russo and at the 1st trial.** Lynch also testified at trial but failed to tell the judge he had seen Capers' alleged hand movement. (June 2017 R. 2922-23).

C. August 22 and 24, 2017: 2nd Immunity hearing before Judge Robert E. Hood

Judge Hood heard arguments from both the State and the defense before the 2nd immunity hearing as to why or why not the defense should be allowed to proffer the so-called "new" evidence. (Aug. 2017 R. 1657).

> Keep in mind I have never worked on this case before so I need a kind of a procedural history of what occurred and when it occurred so I can wrap my own mind about it . . . . I need to understand the procedural history of the case before we start.

(Aug. 2017 R. 1662). The State, referencing the written motion the defense had previously filed:

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[5] Beth Bettini's 911 call **was never obtained or presented in open court at any hearing or trial because it did not exist.**

> Your Honor, the motion that Mr. Rutherford filed is asking for an entirely new hearing and it looks like his number 4 is talking about new evidence consisting of testimony by Elizabeth Bettini stating she witnessed Da'Von Capers attack Kierin Dennis while in an occupied vehicle. Bettini then called 911 giving a detailed account of the incident based on her impressions of what she heard and we entered the dash cam into evidence.
>
> Then his fifth point talks about the 911 recordings never being produced at trial, no valid reason for giving further omission. He talks about a dash cam video during trial revealing Elizabeth Bettini's present sense impression on the attack unfolded as articulated during her testimony and that would be her testimony at trial that resulted in a mistrial.
>
> Seven talks about the manager of the Cook-Out Restaurant on duty the night in question. His name is Zachary Lynch . . . [and he] was standing outside while taking a break. He testified as to his vantage point during the attack on the defendant and recalled that Da'Von Capers was, in fact, the aggressor when Capers entered Kierin Dennis' occupied vehicle. Those are the only grounds that Mr. Rutherford is alleging in his motion as being new.

(Aug. 2017 R. 1666-67).

The State then argued the defense had no rule, statute, or case law to stand on to prove they were authorized to have a 2nd "stand your ground" hearing. (Aug. 2017 R. 1667). The State argued the defense had chosen to call the 1st hearing when they did and that it was their burden to prove by a preponderance of the evidence Appellant was entitled to immunity. That it was Appellant's choice as to who to call as witnesses and Appellant's choice of what to present as evidence at that 1st hearing before Judge Russo. (Aug. 2017 R. 1667). The State argued that Beth Bettini was listed as the *complainant* in the police report, had given a written statement to law enforcement at the time of the crime, and had given her statement on two (2) dash camera videos that were all turned over to the defense prior to the 1st immunity hearing. **(Aug. 2017 R. 1667).** The State argued that Zachary Lynch had also written two (2) statements and had given a recorded interview at police headquarters **that were also turned over to the defense before the 1st immunity hearing** and

that **their testimony in a 2nd hearing could not, in fact, be newly discovered. (Aug. 2017 R. 1668).**

The State argued alternatively that the only rule that was close enough in comparison was Rule 29(b), SCRCP, that addressed the grounds for a new trial based on newly or after-discovered evidence. (Aug. 2017 R. 1668-69). The State argued that the evidence was not newly or after-discovered and that it could have been ascertained with the exercise of reasonable diligence prior to the 1st immunity hearing before Judge Russo. (Aug. 2017 R. 1669). The State cited *State v. Harris*, 381 S.C. 539 (Ct. App. 2011)[6] to Judge Hood, where the Court held the denial of a new trial was not an abuse of discretion as the decision was well within the sound discretion of the trial judge. (Aug. 2017 R. 1671). The defense then argued why they should get a new hearing. (Aug. 2017 R. 1677-93).

Judge Hood then stated:

> I think the only way to do this and this is what I've been thinking about this now for a while, I think the only way to do this is to let Mr. Rutherford proffer all of his testimony because let's play this out. Scenario number 1 is I say no, you're not entitled to another hearing. There is no rule that permits it and I'm not gonna let you present anything. If we end up in an appellate situation at that point they could say return it for a hearing to determine whether or not the information mattered.
>
> So I'm gonna skip that step all together. I'm going to let Mr. Rutherford present this evidence, present whoever else he wants to in regards to the stand your ground issue and then if the State needs to reply to that, I will let them reply to that. If you don't need to reply to that, then I will review the entire testimony of the stand your ground hearing. Do we have that transcript?

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[6] The test for a new trial is the movant must show: (1) The evidence is such as will probably change the result if a new trial is granted; (2) The evidence has been discovered since the trial; (3) The evidence could not have been discovered before the trial by the exercise of due diligence; (4) The evidence is material to the issue of guilt; and (5) The evidence is not merely cumulative or impeaching. *State v. Harris*, 381 S.C. 539, 545, 706 S.E.2d 526, 529 (Ct. App. 2011) ("The issue comes down to a matter of the credibility of the witnesses, which we leave to the trial court's discretion"); *State v. Spann*, 334 S.C. 618, 619-620, 513 S.E.2d 98, 99 (1999).

> I will review whatever anybody wants me to review. Now, we're talking, one, seven, ten plus pages of testimony, right? Eight, nine, 10 days of testimony if I'm considering them all together so I'm not gonna be able to review it today, you know, or maybe even this week, but I will – What I want to do is create a record on what Mr. Rutherford believes he should have presented at the original hearing and let's create that so it exists, so that that factor exists. So I don't want to put us in a situation where we're creating some kind of precedent where everybody and their mother can come back and ask for a stand your ground hearing upon stand your ground hearing upon stand your ground hearing.
>
> I also don't want to create a situation where it just gets appealed for us to come back and have this, you know, quote, unquote, hearing to proffer this evidence. I think the safest way to do it is to allow the evidence to be proffered and then I can consider everything and then even at that point I can make the decision. I can make multiple decisions. I can make the decision that he's entitled to immunity. I can make the decision that he's not even entitled to a hearing and there's no rule that permits it. Or I can make the decision that he was entitled to another hearing and he's not entitled to immunity.
>
> So I'm not foregoing any of those legal arguments by allowing him to present this evidence. Does that make sense? So I'm still gonna allow the State to argue he shouldn't even be allowed to do this, there is no rule, that line of thought process, but I think the safest way to do it is to create a full and complete record of everything, let me review everything and then maybe once I've reviewed everything, we can get everybody back together and y'all can put your thoughts together and organize them the way you want to and do a hearing where there's no testimony, where it's just legal arguments once I've had a chance to process everything, okay? So that's what we're gonna do and you ready to go forward with that?

(Aug. 2017 R. 1695-1700).

Appellant then called the following witnesses at the 2nd hearing to proffer the evidence they claimed was "newly discovered": Caitlin Voravudhi, Janice Edwards Ross, M.D., Beth Bettini, Zachary Lynch, Nikki Rogers, Alexis Brunson, Devon Chatman, Marc Miramontes, Brent Carter, and Ervin Chauncy Meggett. It was not newly discovered evidence. *State v. Spann*, supra.

D. September 18, 2017 – Immunity Argument before Judge Hood

As promised, Judge Hood allowed the State and the defense to put their arguments for and against a new immunity hearing on the record a few weeks later on September 18, 2017. He began the hearing with a summary of what he had allowed on August 22 and 24, 2017 and why:

> [You] were essentially allowed to proffer that testimony so that a record was created so that one day in the future, depending on whatever happens with this case, we don't need to be guessing as to what the defense would have shown or what these witnesses would have said . . . .
>
> [T]o get them on the record, to get them cross-examined . . . . they called those witnesses along with Dr. Ross, and then I allowed the State to respond to that and then I was provided the transcripts from the original immunity hearing and the original trial . . . . I told the State that they would still be allowed to make the argument that the hearing itself isn't even proper and shouldn't even happen. I wasn't gonna preclude them from doing that and so let's start.

(Sept. 2017 R. 2043-44).

The defense then argued why their evidence was newly-discovered and the State argued why Appellant was not entitled to a new hearing. (Sept. 2017 R. 2046-79). The Solicitor first gave the judge a 15-page memorandum and then argued that S.C. Code Ann. § 16-11-450 and *State v. Duncan* laid out the procedure for a stand your ground hearing, and that neither said a defendant was entitled to multiple immunity hearings. The Solicitor told Judge Hood he had conducted research and had not been able to find a single state anywhere in the United States that allowed a second (2nd) stand your ground hearing.

> [A]t what point would it ever end? Every time the defendant comes up with a new piece of evidence that they claim changes something, you would have to have another hearing. Every time that you schedule a trial date, if the defendant came up with something new that hasn't been considered, you would have to have another hearing. You would never be able to have any finality. I think that's why it's not – I think that's why it's not allowed. It may be silent on that, but I think that's why it's not allowed and why we haven't seen it.
>
> It was their motion to seek immunity. They chose that date and time. They had their hearing on the information they chose to present. They knew about Beth Bettini and Zachary Lynch. They knew about Dr. Ross. They chose not to call them for

> whatever reason. It's not new evidence . . . . he's asking you to set new precedent with no supporting law to back it up.

(Aug. 2017 R. 2052-55).

The Solicitor then discussed the 5 factors the Court set forth in *State v. Spann*, 334 S.C. 618, 513 S.E2d 98, that a defendant would have to prove to be granted a new trial, as it was the only legal rule anywhere close to being relevant to the argument at hand.[7]

> I can't imagine a scenario for a hearing where they would be allowed to say less and to have another hearing. [*Spann* discussed] a trial where someone has been convicted. It seems like that any benefit would go to the individual who has been convicted. The purpose of the immunity statute was to allow a defendant to convince the Court that they shouldn't have to face the publicity and the rigors of a trial, and he's had that opportunity.

(Aug. 2017 R. 2056-57).

The Solicitor informed the judge that neither side had obtained a copy of the 911 call and that it was no longer available for retrieval. However, Beth Bettini's dash camera statement and her written statement **had been produced prior to the 1st hearing.** (Aug. 2017 R. 2057-59). She did not report at that point that she had called 911, had seen the stabbing, or had seen fear in the Appellant's eyes. (Id.) The Solicitor argued that went to her credibility. (Aug. 2017 R. 2096). He then analyzed the five *Spann* factors and argued why the Appellant had not met them in order to be entitled to a new immunity hearing. (Aug. 2017 R. 2057-62). He did the same thing with the alleged "newly-discovered" testimony of Zachary Lynch and argued that the testimony presented on August 22 and 24, 2017 was cumulative at best. (Aug. 2017 R. 2062-69). He concluded by

[7] Like *Harris*, *Spann* included the following factors: (1) The results would probably change if a new trial is granted; (2) The evidence was discovered since the trial; (3) It could not have been discovered through the exercise of due diligence; (4) Is material to the issue of guilt; and (5) Is not merely cumulative or impeaching. *State v. Spann*, 334 S.C. 618, 620, 513 S.E.2d 98, 99 (1999).

making an argument as to why the Appellant had not established he was entitled to immunity by a preponderance of the evidence. (Aug. 2017 R. 1688-97).

> There is no precedent for a second immunity hearing. [But if you have to, you could] adopt the five-factor test and agree that the defendant failed to establish proper testimony that entitles [him] to a new hearing. If you find [he] are entitled to a new hearing, find he has failed to prove his burden by a preponderance.

(Aug. 2017 R. 2080). The Court then stated, "No one can say anything anyone of us did was right or wrong without making a record of it. That's why I did that and that's why I did it that way. I did it that way so that we could be clear." (Aug. 2017 R. 2091).

Analysis

After the first trial ended with an 11-1 hung jury in favor of conviction, Appellant moved for a 2nd immunity hearing based on "newly-discovered evidence," even though the Solicitor later established that all of the evidence that Appellant argued was "new" had been turned over to Appellant prior to the first hearing and trial. Judge Hood, the 2nd immunity hearing judge, erred when he granted a 2nd immunity hearing because the *so-called* new evidence was not newly or after-discovered evidence at all, and could have been discovered or introduced at the 1st immunity hearing before Judge Russo. The 2nd hearing judge, Judge Hood, heard testimony from Appellant's additional witnesses that purportedly had "new" evidence to bring forth in order to avoid a future post-conviction relief (PCR) issue and to preserve the record for appeal, and incorporated the transcript from Judge Russo's hearing into his analysis of whether the Appellant was entitled to immunity. Even so, Judge Hood after considering the so-called new evidence and the prior hearing record, also denied Appellant immunity by Order.

The 3-judge panel of this Court inappropriately granted Appellant a 3rd immunity hearing. The Court found that Appellant was entitled to a 3rd immunity hearing at which the 3rd immunity hearing judge would have to hear all of the evidence again and judge its credibility. The problem

and error with the 3-judge panel's analysis is Appellant was not entitled to a 2nd immunity hearing to begin with. Appellant already had a full and fair immunity hearing before Judge Russo where he was denied immunity, and that determination was final. Further, Appellant did not show, and could not show, that the so-called new evidence he wanted admitted at a 2nd immunity hearing was newly or after discovered evidence under the law. It was evidence he could have discovered or presented at the 1st immunity hearing as it was contained in the discovery given to Appellant before the 1st immunity hearing. The 2nd hearing was gratuitous, and Appellant still failed to prove he was entitled to immunity **because he instigated and brought on the whole difficulty** and could have left *Cook-Out* before anything occurred. Instead, he remained and further instigated and brought about the whole conflict and murdered a human being.

Appellant cannot complain of an issue his own actions induced. Appellant failed to discover or elucidate the "new" testimony at the 1st hearing and was not entitled to a second (2nd) "bite at the apple" just because he failed to thoroughly review properly disclosed discovery or interview witnesses before his 1st immunity hearing or because he made a strategic decision not to present certain witnesses for whatever reason. No case law, statute, or regulation exists that would entitle Appellant to a new immunity hearing, whether a 2nd or a 3rd immunity hearing. Appellant himself moved for the 2nd hearing and Judge Hood's actions of allowing Appellant to proffer his "new" evidence cannot be shown to have prejudiced Appellant in any way, as he was allowed to present additional evidence that he claimed could have established the elements of self-defense by a preponderance of the evidence. He was given a *second* immunity analysis and Order by a Circuit Court judge: something no South Carolina defendant has ever been allowed to have.[8] The 3-judge panel of this Court should have held that Judge Hood improperly, yet harmlessly, held

[8] Pursuant to the thorough, yet open to correction, research of the State.

a 2nd immunity hearing and issued a 2nd immunity Order. And, this Court should have established a bright-line rule that defendants are not entitled to a "second bite" at the immunity apple. To date, no court, not Judge Hood, or the 3-judge panel of this Court has found that Appellant has made a sufficient showing of newly or after-discovered evidence as recognized by law to be entitled to a 2nd immunity hearing, much less a 3rd immunity hearing. This was error.

The *so-called* new evidence was presented at the 1st immunity hearing **or** could have been presented at the 1st immunity hearing before Judge Russo. The *so-called* new evidence could have been discovered by simple investigation by defense counsel, of which Appellant had 3 attorneys, using the discovery provided by the State. For example, this Court discusses the testimony of Elizabeth Bettini extensively in its Opinion in its discussion of the *so-called* new evidence when Ms. Bettini was known as a witness and available as a witness before the 1st immunity hearing before Judge Russo. Bettini gave multiple statements to law enforcement shortly after the crime which were **provided to defense counsel before the 1st immunity hearing**. Her body cam audio-recorded statements discussed by the Court in its Opinion were provided to defense counsel as well **before the 1st immunity hearing before Judge Russo** and were available for Appellant and his defense attorneys to listen to before the 1st hearing before Judge Russo. Bettini's testimony is not newly or after-discovered evidence. *State v. Spann*, 334 S.C. at 619-620, 513 S.E.2d 98.

Similary, Zachary Lynch, the employee of *Cook Out*, discussed in the Court's Opinion, was also known as a witness to Appellant and available at the 1st immunity hearing before Judge Russo or could have been called. Police also *took a statement from Lynch* shortly after the crime, and *he can be heard on Officer Caitlin Voravvudhi's voice recording* which were both also provided to defense counsel **prior to the 1st immunity hearing** and were available for defense

counsel to listen to. But, defense counsel chose not to call Lynch as a witness at the 1st immunity hearing. Again, this is not newly discovered evidence. *State v. Spann.*

Additionally, Bettini's 911 call mentioned in the Court's Opinion was never recorded, as the Court mentions, however, it was not withheld or hidden from Appellant because it was never recorded. Appellant could have questioned Bettini at the 1st immunity hearing before Judge Russo about her 911 call, but he chose not to call a witness he was aware of, and Appellant had been provided with her previous statements to law enforcement before the 1st immunity hearing. And Bettini, could have been questioned at the 1st immunity hearing before Judge Russo about what she can be heard saying on the officer body cam video recording as defense counsel received the same in discovery. Appellant made a strategic decision not to call Bettini, or Appellant failed to interview her before the 1st immunity hearing. But the substance of her 911 call is not newly or after-discovered evidence. *State v. Spann*, 334 S.C. at 619-620, 513 S.E.2d at 99.

Further, Dr. Janice Ross, mentioned in the Court's Opinion **was available** at the 1st immunity hearing before Judge Russo. She performed the autopsy. Appellant and his defense counsel simply chose not to subpoena or call Dr. Ross at the first hearing or examine her. Again, this is not newly discovered or after-discovered evidence. *State v. Spann*, 334 S.C. at 619-620, 513 S.E.2d at 99.

Officer Caitlin Varavudhi, also mentioned in this Court's Opinion, was also available before and at the 1st immunity hearing. Appellant simply failed to call her as a witness even though he had been provided with the police and investigative file and her body cam footage of Bettini and Lynch before the 1st 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 1st immunity hearing before Judge Russo. Both the State and Appellant chose to call her at the trial before Judge Griffith

(R. 630-31; 1439-44). Appellant either made a strategic decision not to call Varavudhi at the 1st immunity hearing or Appellant failed to interview her before the 1st immunity hearing. Either way, her testimony was not newly discovered or after discovered evidence. *State v. Spann.*

Additionally, this Court mentions in its Opinion that one of Appellant's arguments for a new [2nd] immunity hearing was information Ervin Meggett told police [actually the Solicitor's Office] in August of 2016.[9] The Court mentions nowhere in the Opinion what Meggett actually testified to at the 2nd immunity hearing. (R. 2020-2032). Meggett testified he 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* parking lot. (R. 2020-2032). Regardless, it would not change the outcome at trial. Meggett testified at the 2nd immunity hearing that the victim **did not lean or reach into Appellant's car** and **the victim 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 2nd 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*, 334 S.C. at 619-620, 513 S.E.2d at 99. It would have further confirmed the State's case and contradicted Appellant's defense at trial. Appellant did not call Meggett at the 1st trial or at the 2nd trial.

In summary, the three (3) judge panel's Opinion is misleading because it implies Appellant did not receive a fair 1st immunity hearing before Judge Russo because evidence was perhaps

[9] 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).

withheld, hidden, not disclosed, or newly discovered before the 2nd hearing in front of Judge Hood. This is not true as set forth in Respondent's brief on direct appeal. (FBOR). The information Appellant presented at the 2nd hearing, Appellant could have discovered by simply interviewing Bettini or Lynch before the 1st immunity hearing and calling them at the 1st hearing, or by interviewing Officer Voravudhi or calling Voravudhi as a witness at the 1st hearing. Appellant could also have called Dr. Ross at the 1st hearing. Appellant and his multiple attorneys chose not to do any of these things. These were decisions Appellant and his defense counsel made before the 1st immunity hearing. They were not the fault of the State, the police, some agency, or circumstance. Appellant was not denied a fair 1st immunity hearing, he simply chose not to call certain witnesses for strategic reasons, or he chose not to present certain evidence. If Judge Russo was deprived of any evidence at the 1st immunity hearing, it was of Appellant's choosing and that of his defense attorneys. 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 that if this evidence was not presented at the 1st immunity hearing it was Appellant's fault. Appellant was given a gratuitous 2nd immunity hearing with no finding that the evidence he wished to present and did present at the 2nd immunity hearing was newly or after-discovered evidence as required by law. This Court also erred in finding Appellant was entitled to a new immunity hearing without a finding that Appellant met the standard of newly or after-discovered evidence. *Spann.* This Court should have reviewed on appeal from Appellant's conviction Judge Russo's Order denying immunity after the 1st hearing.

III.

In its Opinion, the Court misapprehended or overlooked the State's argument as to appealability. The State was not arguing that Appellant was precluded from receiving a new

immunity hearing because he failed to appeal the denial of immunity immediately after the first immunity hearing and Order. (Opinion at p. 6). The State submitted that the remedy was for Appellant Dennis to appeal the first immunity hearing determination 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 entitled to only one (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 to clean up what defense counsel did not present and could have presented at the 1st hearing. Appellant failed to show and there was no finding below of "after-discovered" or "newly-discovered evidence" which would entitle Appellant to a 2nd immunity hearing. Calling something new does not make it newly discovered or after-discovered evidence under the law. *Spann*. The immunity hearing 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, which was all Appellant was entitled to.

IV.

This Court also misapprehended or overlooked the record finding a "new" hearing was not allowed by Judge Hood. The Court early in its Opinion states that Judge Hood did not allow a 2nd immunity hearing when the record shows that he did. In fact, the statement of facts and procedural history of the case in this Court's Opinion is a recitation of the evidence presented at that 2nd immunity hearing before Judge Hood. Judge Hood allowed Appellant to present any so-called new witnesses or evidence Appellant claimed he discovered since the first immunity hearing even though it was not "newly discovered evidence" under the law. Judge Hood also considered any portions of the previous immunity hearing transcript that either side wished for him to review.

Later in its Opinion, this Court then discusses Judge Hood held a 2nd immunity hearing and what occurred at that hearing. And, the Court discusses Judge Hood's Order finding after the 2nd immunity hearing that Appellant had not proven by a preponderance of the evidence that he was entitled to immunity under the Act. The Court's Opinion contradicts itself and Appellant in fact had a 2nd immunity hearing before Judge Hood that was denied by Order of Judge Hood.

V.

The 3-judge panel of this Court misapprehended and overlooked the fact that this Court has now given Appellant a third (3rd) immunity hearing after only one (1) conviction. Dennis, *supra*. Appellant was only entitled to one (1) immunity hearing which he received from Judge Russo, and who denied immunity in an Order which should have been reviewed on appeal. First, the Appellant was not entitled to a 2nd immunity hearing under South Carolina law. There is no case law, statute, or regulation that would allow him one because the judicial system has a compelling interest in finality.

> Finality in the criminal law is an end, which must always be kept in plain view . . . . At some point, the criminal process, if it is to function at all . . . . [or if it is] worth having and enforcing, it must at some time provide a definite answer to the question litigants present or else it never provides an answer at all. No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment . . . [that is] tomorrow and every day thereafter . . . subject to fresh litigation on issues already resolved.
>
> A rule of law that fails to take account of these finality interests would do more than subvert the criminal process itself. It would seriously distort the very limited resources society has allocated to the criminal process. While men languish in jail, not uncommonly for over a year, awaiting a first trial on their guilt or innocence, it is not easy to justify expending substantial quantities of time and energies of judges, prosecutors, and defense lawyers litigating the validity under present law of criminal convictions that were perfectly free from error . . . .

Anderson v. Leeke, 271 S.C. 425, 441-442, 248 S.E.2d 120, 123 (1978).

The proper remedy for a party who disagrees with the outcome of an immunity hearing is a direct appeal to this Court after conviction. The determination of whether a party may immediately appeal an order issued before or during trial is governed by statute. *Pocisk v. Sea Coast Const. of Beaufort*, 380 S.C. 584, 587, 671 S.E.2d 98, 100 (Ct. App. 2008).[10] The Protection of Persons and Property statute does not provide for an interlocutory appeal because the defense is not precluded from arguing self-defense at trial. S.C. Code §§ 16-11-410 to 450 (2006). *See Brown v. County of Berkely*, 366 S.C. 354, 358, 622 S.E.2d 533, 362 (2005) (The trial court's interlocutory order denying the Appellant's Motion to Dismiss based on a qualified immunity claim was not an order involving the merits of the case or an order that affected a substantial right and as such could not be immediately appealed.); *State v. Isaac*, 405 S.C. 177, 187, 747 S.E.2d 677, 682 (2013) (Order denying the defendant's request for an immunity hearing on charges of murder under the Protection of Persons and Property Act was not a final determination and thus was not an immediately appealable interlocutory order.). As an immunity hearing ruling cannot be immediately appealed to this Court, the Appellant certainly was not entitled to a new 2nd hearing and ruling below before a final judgment had been rendered at all. Instead of waiting to exercise his legal remedy of a direct appeal after trial (if he had been found guilty at the 2nd trial), the Appellant instead attempted to and halfway successfully convinced Judge Hood to redo the immunity hearing altogether, making superfluous the court's expenditure of time and effort by hearing testimony that had already been presented for the record over the course of multiple days, wasting the witnesses' time, only prejudicing the State, and bypassing this Court's usual direct

[10] S.C. Code Ann. § 14-5-440 (1976) sets forth the categories of interlocutory orders from which a party may immediately appeal: Those affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action; (b) grants or refuses a new trial; or (c) strikes out an answer or any part thereof or any pleading in any action.

appeal process. This confusion led directly to this Court's Opinion in this case. There was no and is no legal purpose to conduct a 2nd hearing and the Appellant was not entitled to a 2nd ruling on whether he was entitled to immunity. Judge Hood improperly, yet harmlessly, held a 2nd immunity hearing and issued a 2nd judgment regarding the Appellant's non-entitlement to immunity. To rule any other way would create mass chaos in the Courts of General Sessions.

Second, Appellant complains that the 2nd immunity judge, Judge Hood, improperly incorporated the testimony and findings of Judge Russo in his decision and argues he should have been entitled to an entirely new immunity hearing where he would present the testimony of the 14 witnesses who had already testified for the record, plus the additional 7 witnesses he called at the 2nd hearing. As has been argued, Appellant was not entitled to a new 2nd hearing at all. Instead, he only benefitted from the 2nd trial judge allowing him to proffer testimony from an additional 7 witnesses a 2nd time and only benefitted from the 2nd trial judge's second ruling on immunity entitlement, as the second holding very well could have gone a different way. He had nothing to lose. Now, the 3-judge panel of this Court has granted Appellant a 3rd immunity hearing when he was not entitled to a 2nd immunity hearing.

Appellant himself chose the witnesses for the 1st immunity hearing and complains he did not have the chance to call them all over again to proffer the exact same testimony. Appellant himself moved for the new 2nd hearing over the objection of the State and now complains it was conducted incorrectly. Appellant cannot complain of an error which his own conduct has induced. *State v. McCrary*, 242 S.C. 506, 508, 131 S.E.2d 687, 688 (1963). Appellant, also, cannot complain on appeal that he received the relief in the trial court for which he asked. *State v. Brown*, 389 S.C. 84, 697 S.E.2d 622 (Ct. App. 2010); *State v. Sinclair*, 275 S.C. 608, 610, 274 S.E.2d 411, 412 (1981) (holding that where the defendant had received the relief requested from the trial court,

there is no issue for the appellate court to decide.). This Court should find Judge Hood improperly issued a second, albeit harmless, immunity ruling and affirm Judge Russo's denial of immunity as Appellant was only entitled to 1 immunity hearing, which he received. He is not now entitled to a 3rd immunity hearing.

VI.

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, 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 2nd immunity hearing, a second bite at the apple, on the question of immunity because of a mistrial with his first jury. The 2nd 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 second (2nd) immunity hearing otherwise if the defendant received multiple mistrials, for whatever reasons, he would be entitled to three, four, five .... innumerable immunity hearings, which would make no sense, would not serve judicial economy, and would be redundant. It could 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 second (2nd) immunity hearing, and now actually a third (3rd) hearing. Appellant was only entitled to one (1) immunity hearing, the one he had before Judge Russo, the 1st immunity hearing, and was appropriately denied immunity. Appellant was entitled to appeal that ruling once he was convicted by a jury and sentenced by Judge Griffith.

VII.

This Court misapprehended and overlooked that it ruled the 1st immunity hearing was a nullity. 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 ultimately denied immunity in an Order filed on February 10, 2015. 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 first immunity hearing, and the February 2015 Order denying immunity from that hearing, are not only available; they are 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" when the first trial ended in a hung jury. The Court erred in not reviewing Judge Russo's Order Denying Immunity which was supported by the record and should have been affirmed as shown below.

Standard of Review

South Carolina law provides for a pretrial hearing to determine whether a defendant is entitled to immunity from prosecution under the Protection of Persons and Property Act ("the Act"). *State v. Manning*, 418 S.C. 38, 43, 791 S.E.2d 148, 150 (2016); S.C. Code Ann. §§ 16-11-410 to 450 (2006). The appellate court reviews an immunity determination for abuse of discretion. *Id.* at 45, 791 S.E.2d at 151. A trial court abuses its discretion when its ruling is based on an error of law, or when its factual conclusions are without evidentiary support. *State v. Jones*, 416 S.C. 283, 290, 786 S.E.2d 132, 136 (2016). "[T]he abuse of discretion standard of review does not allow [the appellate court] to reweigh the evidence or second-guess the [circuit] court's assessment of witness credibility." *State v. Douglas*, 411 S.C. 307, 316, 768 S.E.2d 232, 237-38 (Ct. App. 2014).

Relevant Law and Analysis

The Protection of Persons and Property Act ("The Act") provides immunity from criminal prosecution for a person who has used deadly force if the trial court, after a *Duncan* hearing, finds the person was justified in using such force. S.C. Code Ann. §§ 16-11-410 to 450 (2006); *Duncan*, 392 S.C. at 410, 709 S.E.2d at 665 (setting forth the procedure, standard of review, and burden of proof for an immunity determination). To obtain immunity, a defendant must either satisfy all four (4) elements of self-defense by a preponderance of the evidence, to the trial court's satisfaction, or three (3) of the elements plus Sections (A) and (B) or Section (C) of the Act if it applies. *State v. Glenn*, 429 S.C. 108, 838 S.E.2d 491 (2019). A preponderance "stated simply is that evidence which convinces us as to its truth." *Semken v. Semken*, 379 S.C. 71, 75, 664 S.E.2d 493, 496 (Ct. App. 2008). The trial court must consider the elements of self-defense in determining whether a movant has met his burden:

> (1) he was without fault in bringing on the difficulty; (2) he actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger; (3) if his defense is based upon his actual belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief; and (4) the defendant had no other probable means of avoiding the danger of losing his life or sustaining serious bodily injury than to act as he did in this particular instance.

State v. Davis, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984).

If the judge finds a defendant has failed to satisfy one (1) of the first two (2) elements of self-defense, he may deny immunity and the case may proceed to trial. *See State v. Bixby*, 388 S.C. 528, 554, 698 S.E.2d 572, 586 (2010) ("It is an axiomatic principle of law that the defense has not been established if any one element is disproven."). However, if a trial court finds a defendant has only failed to prove reasonable fear, if the defendant was attacked while attempting to remove another from a dwelling, residence, or occupied vehicle that belonged to him, the Act provides a rebuttable presumption of reasonable fear of imminent peril and the judge must apply it

accordingly. S.C. Code §§16-11-440(A) and (B) (2006). However, if the place of the event was not a residence, dwelling, or occupied vehicle, and/or the victim also had an equal right to be where the defendant was when the event occurred, the defendant is not entitled to the presumption of reasonable fear and must apply and analyze Section (C) at his hearing and prove (1) he was not engaged in unlawful activity; (2) he was attacked; (3) he was in a place he had the right to be; and (4) he reasonably believed the use of deadly force was necessary to prevent death or great bodily injury to himself or others. S.C. Code § 16-11-440(C) (2006); *Jones*, 416 S.C. at 294–97, 301, 786 S.E.2d at 138–39, 142. If he proves all of the above elements, the court must conclude he had no duty to retreat and had the right to meet force with force, including deadly force. *Id.* The standard for determining whether the belief was reasonable is objective rather than subjective. *Douglas*, 411 S.C. at 320, 768 S.E.2d at 239.

Judge Russo properly found Appellant did not meet his burden of proving the elements of self-defense by a preponderance of the evidence. "Th[e elemental structure of self-defense] places the burden on the defendant to produce some evidence to support the existence of each element." *State v. Williams*, 427 S.C. 246, 249, 830 S.E.2d 904, 906 (2019). Judge Russo correctly found Appellant had not proven by a preponderance of the evidence that the victim was unlawfully entering his vehicle at any time before or while Appellant stabbed him as no fingerprints or DNA from the victim or any DFHS student or former student was found on or in Appellant's vehicle. Further, the testimony of whether the victim had put his hand inside Appellant's window varied wildly. Judge Russo found Appellant's testimony **was not credible** regarding his belief that unlawful or deadly force was about to or was occurring and that he had not proven by a preponderance of the evidence that he was not without fault without the difficulty. Specifically, Appellant challenged the DFHS students to a fight at the *Cook-Out* while they were all still at the

high school, he voluntarily went into the *Cook-Out* even though it was full of DFHS students, and he accelerated his vehicle directly at DFHS students, and he called DFHS students to his car and taunted them. Judge Russo found his actions were reasonably calculated to bring on the difficulty, that no reasonable man would have believed he was in danger, and, as a result, he had a duty to retreat before meeting force with force. And, the record showed he had numerous avenues of retreat and could have avoided the difficulty altogether by not going to *Cook Out* after instigating the conflict, by not going into the restaurant and antagonizing those he had challenged to fight at the high school, and by not driving his car into a group of DFHS students but simply left the parking lot where he parked, and by not calling DFHS students over to his car and taunting them and by pulling away before stabbing anyone. Judge Russo properly analyzed the elements of self-defense and Sections (A) and (C) of the Act and properly denied immunity. This Court should have affirmed Judge Russo's determination. And, Appellant was not entitled to another hearing.

Even though Appellant was not entitled to a 2nd immunity hearing, similarly, Judge Hood also appropriately denied Appellant immunity as Appellant had not proven elements one and two of self-defense by a preponderance of the evidence. Judge Hood properly found Appellant had not proven he was not without fault in bringing on the difficulty and he had a duty to retreat as a result but failed to. He properly found Appellant could have left the scene of *Cook-Out* by any number of available exits. This conclusion was proper under the law. This Court should have accorded both judges the deference they are due and affirm as both judges properly analyzed the elements of self-defense according to their discretion and properly and correctly found Appellant was not entitled to immunity because he failed to meet his burden by a preponderance of the evidence.

Neither Judge Russo nor Judge Hood erred in denying Appellant immunity. Both judges properly analyzed whether Appellant was entitled to immunity by individually analyzing whether Appellant had met the four (4) elements of self-defense and Sections A and C of the Protections of Persons and Property Act for the record and **in their published Orders**. Both circuit judges correctly found Appellant had not established he was without fault in bringing on the difficulty by a preponderance of the evidence. As a result, both judges properly found, Appellant, therefore, had a duty to retreat under the law before meeting force with force. Both circuit judges listed conflicting evidence as a reason for denying immunity, but both made it clear that they were denying Appellant immunity *because* Appellant did not meet his burden by a preponderance not because conflicting evidence simply existed. This Court should affirm Judge Russo's denial of immunity. The Court must grant the petition for rehearing and rehearing *en banc* and correct this error.

VIII.

This Court also misapprehended or overlooked the fact that in both Georgia cases which this Court cited 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.[11] 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

[11] The Appellant in this case actually received 2 immunity hearings and 2 orders denying immunity. In neither Georgia case had the appellant ever received an immunity hearing much less an order denying immunity.

proposition in its Opinion but refuses to follow *Hamilton* for another proposition in the same Opinion. (See *Dennis*, supra). The cases cited from Georgia are simply not authoritative in this setting. Appellant is not entitled to another, third (3rd), hearing and another, third (3rd), determination of immunity.

IX.

This Court also misapprehended or overlooked 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," or issue 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. And, the fact that the Circuit Court made used the language quintessential jury question, did not affect its' immunity analysis which was conducted as required by South Carolina law.

X.

This Court misapprehended and overlooked that it cannot make evidentiary findings on appeal as if it is a Circuit Court in an immunity hearing and instruct a Circuit Court on whether it should find certain facts favorable to the Appellant on remand or grant Appellant certain inferences on remand. (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. *See Nash v. Tindall Corp.*, 375 S.C. 36, 40-41, 650 S.E.2d 81, 83 (Ct. App. 2007) (explaining "dictum 'is a statement on a matter not necessarily involved in the case, ... is not binding as authority ..., [and] is not the court's decision.' " (quoting 21 C.J.S. *Courts* § 227 (2006)). Dictum is not the law. *Gordon v. Lancaster*, 425 S.C. 386, 395, 823 S.E.2d 173, 177 (2018)(Few, J. concurring). This portion of the Court's Opinion should be struck for this reason.

Second, and even more troubling, these evidentiary and legal findings of this Court in this section of the Opinion and directions to the Circuit Court to follow them, pp. 11-15, 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. *S.C. Code Ann.* Sections 16-11-410 to 450 (2006); *State v. Manning*, 418 S.C. 38, 43, 791 S.E.2dd 148, 150 (2016); *State v. Isaac*, 405 S.C. 177, 187, 747 S.E.2d 677, 682 (2013); *State v. Duncan*, 392 S.C. 404, 709 S.E.2d 662 (2011); *State v. McCarty*, 437 S.C. 355, 878 S.E.2d 902 (2022). This Court and our Supreme Court have repeatedly held a Circuit Court may not abdicate its fact finding and legal conclusion determinations in an immunity hearing to another body. *State v. McCarty*, 437 S.C. 355, 372, 366, 878 S.E.2d 902, 911 (2022)("[T]he circuit court must weigh the evidence and make its own credibility and factual findings before reaching a decision as to immunity"); *State v. Chhith-Berry*, 437 S.C. 527, 542-43, 878 S.E.2d 352, 360 (Ct. App. 22)("[T]he [trial court's [immunity ruling must be based solely on the evidence presented at the pretrial hearing[.]"); *State v. Cervantes-Pavon*, 426 S.C. 442, 452827 S.E.2d 564, 569 (2019); *State v. Glenn*, 429 S.C. 108, 116, 838 S.E.2d 491, 495 (2019); *McCarty*, 437 S.Ct. at 375, 878 S.E.2d at 913 ("the circuit court is in the best position to assess witness credibility and make the necessary findings of fact"); *State v. Gray*,

488 S.C. 130, 141, 882 S.E.2d 469, 475 (Ct. App. 2022)("[T]he trial court must sit as the fact-finder at this hearing, weigh the evidence presented, and reach a conclusion under the Act." And, it must not abdicate its role); *State v. Ford*, 439 S.C. 261, 886 S.E.22d 710 ("[T]he circuit court, sitting as fact-finder, must make specific fact findings that support its immunity decision.").

This Court's duty is to conduct appellate review of the Circuit Court's immunity determination not to dictate to the Circuit Court what to find or what inference to grant to appellant on remand. *State v. Jones*, 416 S.C. 283, 290, 786 S.E.2d 132, 136 (2016)("A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard, which [appellate courts review [] under an abuse of discretion standard of review."), quoting *State v. Curry*, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013). Respectfully, this Court exceeded its appellate review and authority in this section of the Opinion. (pp. 11-15).

Further, this Court's findings and legal conclusions in this section of the Opinion, pages 11-15, are incorrect and are contradicted by other evidence presented at the first 2 immunity hearings. As stated previously, Appellant began and instigated the difficulty between himself and students and fans of DFHS beginning outside the basketball arena in the parking lot **at the high school**. There, Appellant challenged students and fans of DFHS to a fight [to settle it] at the *Cook-Out* restaurant. Appellant then eventually drove to the *Cook-Out* and further instigated the conflict. Appellant first went inside in the presence of DFHS students after first challenging them to a fight at the high school. After going inside in the presence of DFHS students, Appellant then walked to his vehicle, while in the Petco parking lot maneuvered his vehicle to where it was pointed in the direction of DFHS students, and again sought out Dutch Fork High School students or fans by driving his car aggressively and directly into several DFHS students at the *Cook Out* almost striking at least one student or fan. This escalated the conflict Appellant started even further,

resulting in the stabbing. Appellant also yelled out to Dutch Fork High School fans and students that they did not want something he had for them in his car, and in essence invited and goaded them to or into his vehicle. There was evidence at the hearing that Appellant signaled at least 2 DFHS fans or students to his car. There is evidence Appellant instigated the conflict and difficulty and lured DFHS fans and students to just outside his car or into his car whereupon he stabbed the victim. There was testimony and evidence the victim did not touch Appellant's car *or* lean into it. The crime also occurred where cars were visible passing Appellant's parked car indicating the conflict that Appellant started, Appellant could have easily driven away from, i.e. he had other means of avoiding the difficulty. It must be remembered Appellant had been in and left the interior of *Cook Out* and gone to his vehicle and maneuvered it in the *Petco* parking lot. And, Appellant could have left the parking lot before he drove into the DFHS students. Appellant's friend had left the *Cook-Out* parking lot in his car. Two (2) different Circuit Courts hearing the same or similar evidence denied immunity under the Act. This Court erred in giving the Circuit Court instructions on what it should find below on remand and what inferences it must apply in Appellant's favor on remand, 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. The fact that Appellant was in his car **does not mean he was in a place where he had a right to be.** Appellant had already been in the restaurant and walked to his parked car. He then drove his car aggressively into a crowd of DFHS fans or students at *Cook Out*. This portion of this Court's Opinion, pp. 11-15, is erroneous and should be stricken for all of the reasons set forth above.

X1.

This Court also misapprehended or overlooked that it did not grant Appellant relief from his conviction [a new trial] but in the same instance refused to rule on his evidentiary issues since they might change upon re-trial. (Opinion, p. 15 citing State v. Mekler, 379 S.C. 12, 17, 664 S.E.2d 477, 479 (2008)(affirming this court's decision reversing defendant's conviction and granting a new trial, but finding it unnecessary to address another issue concerning admission of evidence decided by this court, noting whether the issue would arise on retrial and its resolution would depend upon evidence and testimony presented, and would be for the trial judge's consideration) and Futch v. McAllister Towing of Georgetown, Inc, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999)(holding an appellate court need not address remaining issues on appeal when its determination of a prior issue is dispositive). Appellant was not granted a new trial, and his conviction was not vacated or reversed. Only a third (3rd) immunity hearing was granted to Appellant. This Court must grant rehearing and rule on Appellant's 2 evidentiary issues raised on appeal from his conviction for murder which is final.

XII.

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 third (3rd) immunity hearing was granted. (Opinion, p. 15, last sentence). The Petition for Rehearing and Rehearing En Banc must be granted, and the Opinion corrected.

XIII.

Respondent submits that *En Banc* review is necessary because consideration of the full Court is necessary to secure or maintain uniformity of the Court's decisions in this area, and the proceeding involves a question of exceptional importance. Rule 219, SCACR. The 3-judge panel of this Court issued the Opinion in this case which was published. The Opinion holds that upon

mistrial or new trial the parties start all over and a criminal defendant is entitled to an entirely new immunity hearing, even when the evidence does not change or does change, and even in the absence of a showing of true newly or after-discovered evidence under the law. The Opinion has grave implications for the administration of criminal justice in this State and an already backlogged criminal docket in this State, and for numerous frivolous and unnecessary hearings that the Legislature did not intend. Respondent can foresee numerous instances where this Opinion could be used to justify another immunity hearing simply because the defendant is granted a mistrial or a new trial for some trial or evidentiary related reason, or even after reversal on appeal where reversal was granted for some trial or evidentiary reason which had nothing to do with the immunity determination. Respondent can for foresee our trial court's being forced to grant a new immunity hearing where the evidence is exactly the same as at the first hearing. For this reason, Respondent moves for Rehearing *En Banc*. Rule 219, SCACR.

CONCLUSION

For the above stated reasons, this Court must grant the Petition for Rehearing and Rehearing *En Banc*, vacate the prior Opinion, affirm Judge Russo's denial of immunity to Appellant and address Appellant's evidentiary issues raised in his brief and argued at the oral argument.

Respectfully submitted,

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September 16, 2024.

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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

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

THE STATE,

Respondent,

v.

KIERIN M. DENNIS,

Appellant.

Appellate Case No. 2019-001486

PROOF OF SERVICE

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. and to lcaudy@sccid.sc.gov as well to their assistants kwarren@sccid.sc.gov and to smcinnis@sccid.sc.gov.

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

This 16th day of September, 2024.

s/ Donna D'Alessio
Donna D'Alessio
Legal Assistant to J. Anthony Mabry
Senior Attorney General