

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Florence County

Thomas A. Russo, Circuit Court Judge

RECEIVED

SEP 12 2013

S.C. Supreme Court

THE STATE,

RESPONDENT,

V.

ANTHONY WADE,

APPELLANT

Appellate Case No. 2012-205686

**PETITION FOR REHEARING**

Appellant, through his undersigned counsel, petitions for a rehearing following this Court's dismissal of his appeal following its opinion in State v. Isaac, Op. No. 27302, Shearouse Adv. Sh. No. 37 at 15-25 (filed August 21, 2013), because pursuant to Rule 221 (a), SCACR, this Court may have overlooked the fact that the retroactive dismissal of appellant's appeal that was timely filed and served pursuant the existing law of State v. Duncan, 392 S.C. 404, 407, n. 2, 709 S.E.2d 662, 663 n.2 (2011), constitutes a procedural change that can only be applied prospectively. Consequently, it is a denial of due process to retroactively dismiss a properly filed appeal under existing law where appellant's liberty is at stake where a properly filed appeal was already pending from the trial court's denial of immunity, as explained below.

## I.

The instant case is an appeal from the trial court's denial of appellant's motion to find immunity from prosecution pursuant to the Protection of Persons and Property Act, S.C. Code Ann. § 16-11-410, et seq. An immunity from prosecution hearing was held on November 3, 2011 before the Honorable Thomas A. Russo. Judge Russo issued his oral ruling denying immunity that same day. R. 27, l. 4 – 30, l. 9. Appellant filed and served a notice of appeal on November 4, 2011. The transcript was ordered, and appellant filed his initial brief, Record on Appeal and then his final brief on February 26, 2013. Oral argument was held before this Court on June 19, 2013. Prior to the issuance of an opinion in the case, this Court sua sponte as to this case, issued an order on September 6, 2013 dismissing all appeals by the defendant from orders denying immunity under the Protection of Persons and Property Act.

## II.

In State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011), this Court expressly held that an order granting or denying a motion to dismiss on the grounds that a defendant was immune under the Protection of Persons and Property Act was immediately appealable. Duncan at 392 S.C. at 407, 709 S.E.2d at 663, n. 2. This Court's recent unexpected holding in State v. Isaac, Op. No. 27302 (S.C. Sup. Ct. filed August 21, 2013) Shearouse Adv. Sh. No. 37 at 15-25 that an order denying immunity under the Protection of Persons and Property Act, S.C. Code Ann. § 16-11-410, et seq. was no longer immediately appealable can only, consistent with Due Process, be applied prospectively and not retroactively to deny appellant an existing substantial right to an immediate appeal from an order denying immunity under the Act.

### III.

Appellant was indicted at the December 3, 2009 term of the Florence County Grand Jury for the offense of assault and battery of a high and aggravated nature. At the immunity from prosecution hearing held before Judge Russo, appellant was represented by Scott P. Floyd. Stephen L. Hill was the assistant solicitor. Tr. 1. Appellant testified in his own defense, and he presented the testimony of his employer, Casey Stone who was the part owner of Cue Time, a tavern. Stone testified: “[F]rom my recollection we had a fight break out inside the club. I want to say it was three to four gentlemen. I instructed security to take it outside. Mr. Wade [appellant] was my head of security.” R. 6, ll. 5-17.

Stone remembered that security “got them outside. As we were trying to get them out the door I told the bartender to go ahead and call the Sheriff’s Department to get them transported,” R. 6, 19 – p. 7, l. 2. Stone heard a man say: “I’m going to get my gun and I’ll take care of you. And I turn around, and as I’m turning around I see Mr. Wade engaged kind of locked up with one guy. I see the guy [Bacote] swinging at Mr. Wade. I can’t tell you if he hit him or he didn’t hit him. And the next thing I know Mr. Wade swings back and one hit the guy goes to the ground. R. 7, ll. 2-19.

Appellant testified and he confirmed that he was the head bouncer at the tavern. R. 17, l. 15 – p.18, l. 10. While appellant was inside the bar talking to a man and a woman and the disturbance occurred “in the back of the club where the - - where the dance floor is.” Appellant assisted in removing the people who were fighting from the club to the parking lot. R. 18, l. 19 – p. 19, l. 5. There were four other security people involved besides him. R. 19, ll. 6-8.

Bacote was “one of the first ones brought out. I was asking him, you know, what happened, who did he have an altercation with, what was going on, because I wanted to make sure all the parties involved were removed, you know, from the establishment. At that particular point, you

know, Mr. Bacote said, you know, I don't want to talk to you, I don't have to talk to you. I said that was fine. The security was still escorting people out, okay. Mr. Bacote started saying as soon as I get away from here *I'm gonna go to my car, and I'm going to go to my car and I'm gonna shoot everybody out here, and you first.*" R: 20, ll. 3-17. (emphasis added). Appellant remembered: "I just looked at him. Once he said that though he made the initiative to turn like he was getting ready to return, okay. He was standing to my left. So when he went to run from me I grabbed, I reached for his shirt. As I reached for his shirt he swung and hit me on the left side of my jaw. In reflex I hit him back." R. 20, l. 19 – p. 21, l. 19. Appellant cut a tendon in his hand and the police took pictures of his hand. R. 22, ll. 3-10.

Two months later the police came to the bar and arrested appellant for ABHAN. R. 22, ll. 13-25. Defense counsel argued that S.C. Code Section 16-11-440(C) protected a person from prosecution where the person was not engaged in unlawful activity and who was attacked in a place where he had a right to be, which included his place of business. That person, here, appellant, was not required to retreat and had the right stand his ground and meet force with force, including deadly force if necessary. R. 25, l. 14 – p. 27, l. 3. Defense counsel pointed out that appellant was a bouncer and he was doing his job in providing security when the altercation occurred. R. 26, l. 5 – p. 27, l. 3.

Despite no opposing argument from the solicitor, the judge nonetheless ruled that the presumption of reasonable fear and imminent peril in S.C. Code Section 16-11-440 only applied where deadly force was used. The judge ruled: "Mr. Wade [appellant] reacted as I probably would have done and hit him back. That just doesn't fit this statute. He may very well have an outstanding self-defense defense." However, the judge ruled appellant was not immune from prosecution under the statute. R. 27, l. 14 – p. 30, l. 9.

#### IV.

Judge Russo issued his oral ruling denying immunity from prosecution after the evidentiary hearing. R. 27, l. 4 – 30, l. 9.

#### V.

By order of September 6, 2013 this Court dismissed all eight pending appeals by defendants under the Protection of Persons and Property Act, S.C. Code Ann. § 16-11-410, et seq.

#### VI.

This effect of this order is to retrospectively apply a newly announced judicial rule to appellant which deprives him of a substantial existing right. This Court has recognized that “although the *ex post facto* clause itself does not apply to actions of the judicial branch, judicial decisions applied retroactively can violate the Due Process Clause.” State v. Collins, 329 S.C. 23, 28, 495 S.E.2d 202, 205 (1998).

The United States Supreme Court has placed due process limitations on the retroactive application of judicial interpretations of criminal statutes and the alteration of common law offenses. See Rogers v. Tennessee, 532 U.S. 451 (2001). In particular, the Court ruled that a judicial interpretation or alteration may not be given retroactive effect where it “violates the principle of fair warning” and is “unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.” Rogers at 462.

In Rogers, the Court rejected the petitioner’s claim that the Tennessee Supreme Court erred in retroactively abolishing the common law year and a day rule.<sup>1</sup> Id. at 453-56. The Court

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<sup>1</sup> The “year and a day rule” is a common law rule providing that no defendant could be convicted of murder unless the victim died by the defendant’s act within a year and a day of the act. Rogers at 453.

held that the Tennessee Supreme Court's abolition of the rule was not unexpected and indefensible, since the rule was widely viewed as an outdated relic of the common law; the rule was not part of Tennessee's statutory criminal code; it had only been mentioned three times in all reported Tennessee cases – each time in dicta; and it had never served as a ground of decision for a murder case in Tennessee. *Id.* at 462-64. In affirming the decision, the Court described the Tennessee Supreme Court's decision as “[f]ar from a marked and unpredictable departure from prior precedent, the court's decision was a routine exercise of common law decisionmaking in which the court brought the law into conformity with reason and common sense.” *Id.* at 467.

In a more recent case, *Metrish v. Lancaster*, 133 S.Ct.1781 (2013), the Supreme Court held, in a federal habeas corpus case, that the retroactive application of a Michigan Supreme Court decision, *People v. Carpenter*, 464 Mich. 223, 627 N.W.2d 276 (2001), abolishing the diminished capacity defense did not violate due process and was not an unreasonable application of federal law.

When the defendant in *Lancaster* was retried in 2005, the Michigan Supreme Court had previously disapproved a series of Michigan Court of Appeals decisions recognizing the diminished-capacity defense. In rejecting the defense, the Michigan Supreme Court had observed, in 1975, that the Michigan Legislature had enacted “a comprehensive statutory scheme concerning defenses based on either mental illness or mental retardation.” That scheme, the Michigan Supreme Court concluded, “demonstrated the Legislature's intent to preclude the use of any evidence of a defendant's lack of mental capacity short of legal insanity to avoid or reduce criminal responsibility” *People v. Carpenter*, 464 Mich at. 235, 627 N.W.2d at 282 (2001). See *Metrish v. Lancaster*, 133 S.Ct. at1785.

In Lancaster's appeal to the Michigan Court of Appeals he asserted that the retroactive application of the Michigan Supreme Court's decision in People v. Carpenter, 464 Mich. 223, 627 N.W.2d 276 (2001) violated his right to due process. "[D]ue process concerns prevent retroactive application [of judicial decisions] in some cases," the court acknowledged, "especially... where the decision is unforeseeable and has the effect of changing existing law." However, the Court of Appeals reasoned that the Michigan Supreme Court's decision in People v. Carpenter, 464 Mich. 223, 627 N.W.2d 276 (2001) "did not involve a change in the law" since "it concerned an unambiguous statute that was interpreted by the [Michigan] Supreme Court for the first time." Metrish v. Lancaster, 133 S.Ct. at 1786.

The Supreme Court observed that it had never found a due process violation where a State Supreme Court, squarely addressing a particular issue for the first time, rejected a consistent line of lower court decisions based on the state supreme court's reasonable interpretation of the language of a controlling statute. Metrish v. Lancaster, 133 S.Ct. at 1792.

There can be no doubt that this Court's decision in Isaac that an order denying immunity under the Protection of Persons and Property Act was an unexpected departure from its 2011 opinion in Duncan. This Court in Duncan held that an order granting or denying immunity under the protection of persons and properties act was immediately appealable. "We find an order granting or denying a motion to dismiss under the Act is immediately appealable, as it is in the nature of an injunction. See S.C. Code Ann. §14-3-330 (4) (Supp.2010) ("The Supreme Court ... shall review upon appeal ... an interlocutory order or decree ... granting, continuing, modifying, or refusing an injunction....")." Duncan at 392 S.C. at 407, 709 S.E.2d at 663, n. 2. This Court, only two years later, with no intervening statutory or court decisions, in Isaac has now held that

in order denying immunity is not immediately appealable. Isaac is a marked and unpredictable departure from Duncan.

The decision in Isaac also, respectfully, does not bring the law into conformity with “reason and common sense” as did the decision of the Tennessee Supreme Court in Rogers, supra. A defendant denied immunity can now be put to trial with its attendant costs and strain, be convicted of murder or another serious criminal offense, be sentenced, incarcerated, and only then raise immunity as a defense after the substantial damage has already been done. The purpose of immunity is to save the defendant from all of the above because the Legislature deemed that citizens are entitled to such protection when acting lawfully in a place where they had the right to be, including on their own property. See S.C. Code Ann. § 16-11-410, et seq.

Further, unlike the decision in Lancaster the issue here is not to be measured under an extremely deferential federal habeas standard. The right to an immediate appeal from the denial of immunity in the lower court under the Protection of Persons and Property Act is the only way to assure true immunity from prosecution, where a defendant lawfully protects himself or his property pursuant to S.C. Code Ann. §16-11-410, et seq.

A denial of an immediate appeal to appellant, who was already lawfully on appeal pursuant to Duncan, and where the incident occurred while Duncan was in effect, denies appellant his right to due process of law. An accused who previously would avoid the rigors of a trial by successfully pleading his rights under the statute will now undergo one.

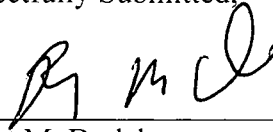
The accused would thus be deprived, retroactively, of a very significant right. Moreover, no case currently extant indicates that trial judges will charge, e.g. that the duty to retreat has been modified when the accused does stand trial. Thus, a significant statutory right has been abrogated to the prejudice of the accused, here appellant.

Finally, appellant testified in his own defense at the immunity hearing and he has shown the state his defense to the prosecution to his detriment while relying on the fact that if Judge Russo denied him immunity under the statute that he would have an immediate right to appeal under Duncan. That is a vastly different strategic decision than the situation of facing the jury immediately being called into the courtroom if the motion was denied. To now deny appellant that appeal, after he has briefed the issue, filed his Record on Appeal, his Final Brief, and oral argued his case before this Court under Duncan, which he relied on to his detriment where that right to appeal was the law at the time of the immunity hearing violates the essential demands of fairness. See State v. Jones, 343 S.C. 562, 541 S.E.2d 813 (2001) (fundamentally unfair to promise to give a particular reasonable doubt instruction prior to closing argument and then change it to defense counsel's detriment following his closing argument stressing that promised reasonable doubt instruction); Knox v. Collins, 928 F.2d 657 (5<sup>th</sup> Cir. 1991) (trial court violated defendant's right to due process by promising to give a parole ineligibility instruction and then refusing to give that instruction where defense counsel relied on it in utilizing his peremptory challenges); Doyle v. Ohio, 426 U.S.610 (1976) (it is a violation of due process to implicitly promise that a defendant's silence will carry no penalty and to then question his post-arrest silence on cross-examination).

The Court's ruling that Isaac's case arose before the passage of the statute and was not covered by it was sufficient to dispose of the case. Also, it is no secret that Isaac's claim fell within neither the letter or spirit of the statute. Hard cases are said to make bad law; ridiculous cases should not drag legitimate claimants down with them.

WHEREFORE, counsel for appellant petitions the court for rehearing in the above-entitled appeal, and requests the reinstatement of his timely appeal under Duncan.

Respectfully Submitted,



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ATTORNEY FOR APPELLANT

September 12, 2013

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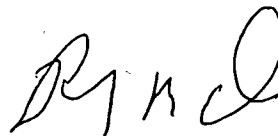
APPELLANT

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**CERTIFICATE OF SERVICE**

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I certify that a true copy of the Petition for Rehearing in the above case has been served upon Donald J. Zelenka, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 12th day of September, 2013.




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Robert M. Dudek  
Chief Appellate Defender

Attorney for Appellant

SUBSCRIBED AND SWORN TO before me  
This 12<sup>th</sup> day of September, 2013.

  
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(L.S.)  
Notary Public for South Carolina  
My Commission Expires: August 21, 2023