

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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THE STATE,

RESPONDENT,

S.C. Supreme Court

V.

ALIRIO ORTIZ,

APPELLANT

Appellate Case No. 2012-211933

Appeal from Richland County

Alison Renee Lee, Circuit Court Judge

Appellate Case No: 2012-211933

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, counsel for Alirio Ortiz petitions the Court for rehearing of the dismissal of the appeal based on this Court's opinion in State v. Isaac, Op. No. 27302, Shearouse Adv. Sh. No. 37 at 15-25 (filed August 21, 2013) finding that an order denying immunity under the Protection of Persons and Property Act, S.C. Code Ann. § 16-11-410, et seq. was not immediately appealable. Counsel respectfully submits that the Court overlooked the fact that the decision in Isaac constitutes a procedural change that should only be applied prospectively. Consequently, it is a denial of due process to dismiss an appeal from the trial

court's denial of immunity, properly filed under existing law, briefed, argued before this Court and pending at the time of the Isaac decision, where appellant's liberty is at stake and the dismissal denies Petitioner a substantial right.

I.

In January of 2011, the Richland County Grand Jury indicted Ortiz for two counts of assault and battery of a high and aggravated nature, indictments #2011-GS-40-580, 586. On January 12, 2012, a hearing was held before the Honorable Alison R. Lee. Attorneys James May and Kris Hines represented Ortiz. Attorneys April Sampson and Justin Williams prosecuted the case on behalf of the State. At the hearing attorneys for Ortiz asserted statutory immunity from prosecution under the Protection of Person and Property Act [the Act], S.C. Code §16-11-410, et seq. Judge Lee heard testimony and argument and then asked the parties to submit revised proposed orders. In a written order filed April 18, 2012, Judge Lee found that Ortiz was not immune from prosecution under the Act. A timely notice of intent to appeal was filed on April 25, 2012. At the time of filing, the interlocutory appeal was based on this Court's decision in State v. Duncan, 392 S.C. 404, 407, n. 2, 709 S.E.2d 662, 663 n.2 (2011).

The final brief of Appellant was filed on March 13, 2013. The brief raised six issues on appeal. On June 5, 2013, this Court heard oral argument in the case. The State did not move to dismiss on the ground that the issue was not immediately appealable. On August 21, 2012, this Court decided, in State v. Isaac, Op. No. 27302, Shearouse Adv. Sh. No. 37 at 15-25 (filed August 21, 2013), that an order denying immunity under the Protection of Persons and Property Act, S.C. Code Ann. § 16-11-410, et seq. was not immediately appealable. On August 27, 2013, the State moved to dismiss the appeal. Before Appellant had an opportunity to respond to the State's motion to dismiss, this Court, in an order dated September 6, 2013, dismissed the appeal.

II.

In State v. Duncan, 392 S.C. 404, 407, 709 S.E.2d 662, 663, n.2 (2011), this Court wrote, “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....”).” Then, two years later, in State v. Isaac, Op. No. 27302, Shearouse Adv. Sh. No. 37 at 15-25 (filed August 21, 2013) this Court wrote, “In conclusion, the language in State v. Duncan addressing appealability was dicta and regrettable. We, therefore, clarify State v. Duncan, and hold the denial of a request for immunity under the Act is not immediately appealable.” This Court’s recent unexpected holding in Isaac, that an order denying immunity under the Protection of Persons and Property Act, S.C. Code Ann. § 16-11-410, et seq. is not immediately appealable should, 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.

The petitioner, Alirio Ortiz, lives on Omega Drive in Columbia, SC. His next door neighbor is Cynthia Calef. There was a property dispute, resulting in pending civil litigation, between Ortiz and the Calefs in regard to the boundary between the two properties. On August 7, 2010, Mr. Ortiz was digging a hole with a post hole digger so that he could install a fence. Donald Calef, Cynthia Calef’s father, drove to Omega Drive and questioned Ortiz about the placement of the hole he was digging. Ortiz testified that while Donald Calef was standing in front of him, he

was kneeling down and loosening the soil with water to make the hole digging easier. (R. p. 70, lines 2-10). According to Calef, Ortiz sprayed mud on his pants. (R. p. 100, lines 9-13).

Ortiz testified that Donald's wife Maria arrived and began hitting Ortiz with her purse. (R. p. 70, lines 11-18). Maria Calef denied hitting Ortiz with her purse. (R. p. 117, lines 3-5). Maria Calef claimed that Ortiz sprayed water and mud on her also. (R. p. 118, lines 18 – p. 119, lines 1-7). According to Maria Calef, Ortiz then picked up a machete and began hitting her husband. (R. p. 119, lines 18 – p. 120, lines 1-6).

The Calefs' son David testified at the hearing as well. David had driven his mother to Omega Drive. According to David, he tried to intervene between Ortiz and his Dad. (R. p. 154, lines 2 – p. 155, lines 1-6). David claimed that his mother's hand was cut when she tried to shield him from Ortiz. (R. p. 15, lines 7-12).

Herbert Smith, a neighbor from across the street, testified that he became involved when he saw that the Calef son had become involved. (R. p. 39, lines 13-18). Smith initially thought the son may have had a weapon in his pocket. (R. p. 39, lines 16-18). Smith testified that Maria Calef was hitting Ortiz with some kind of folder. (R. p. 39, lines 5-11). Smith testified that in the process of pulling the son out of the melee, he was hit in the back with a post hole digger. (R. p. 41, lines 10-25). Ortiz testified that Mr. Calef hit Smith in the back with the post hole digger three times. (R. p. 71, lines 7-8). Smith testified that Ortiz had a machete but never hit anyone with it. (R. p. 42, lines 3-6). Ortiz testified that he feared for his life and just grabbed the machete to defend himself from all the people who were on his property. (R. p. 71, lines 12 – p. 72, lines 1-7). Ortiz was arrested at the scene.

Counsel for Petitioner Ortiz moved for a finding of immunity from prosecution pursuant to the Protection of Persons and Property Act, [the Act] S.C. Code §16-11-410 et seq. During the pre-

trial hearing, counsel for Ortiz argued that subsection (A) of the Act should apply to Ortiz, although he was not inside a dwelling, residence or occupied vehicle, because the General Assembly's intent in passing the law was to codify the Castle Doctrine and the Castle Doctrine, under the common law, applied to a person on their property, including their yard. (R. pp. 16-24).

In the order denying immunity the trial judge wrote, "Dwelling is defined by the statute as a 'building or conveyance of any kind, including an attached porch, whether the building or conveyance is temporary or permanent, mobile or immobile, which has a roof over it, including a tent, and is designed to be occupied by people lodging there at night.' S.C. Code §16-11-430. This section does not apply to the facts at hand because, by all accounts, the dispute occurred outside of a dwelling and did not involve an occupied vehicle." (Order p. 3, R. p. 192).

In the order of dismissal, as additional grounds to deny immunity, the trial judge made factual findings that Ortiz was not attacked on his property, was acting unlawfully, finding that he may have been trespassing and squirted the Calefs with water, and that the use of deadly force was not necessary to prevent death or great bodily harm. Counsel argued that the factual findings were not supported by the testimony.

Additionally the trial judge found the Act inapplicable because Ortiz only brandished the machete and did not intentionally strike anyone with it. In the order denying immunity the trial judge wrote, "Defendant denied using force towards the Calefs at all. When questioned by his attorney, Defendant denied hitting anyone with the machete, stating that 'he just had it in [his] hand.' Defendant's contention that no force at all was used would further make the Act inapplicable to the present set of facts."

IV.

The effect of the order of dismissal in this case is to retroactively apply a newly announced judicial procedural rule that deprives Petitioner 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. The change of course taken by the Court in Isaac, finding that a denial of an immunity grant is not immediately appealable despite the clear language in the footnote from Duncan stating that both the grant and the denial of immunity is immediately appealable, “violates the principle of fair warning.”

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.¹ Id. at 453-56. The Court 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

¹ 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.

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 observed, in 1975, that the Michigan Legislature 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 Methrish 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."

“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.

This Court’s decision in Isaac holding that an order denying immunity under the Protection of Persons and Property Act was an unexpected departure from its 2011 opinion in Duncan. As noted above, this Court in Duncan found 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

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. Now, based on the holding in Isaac, an accused who previously would avoid the rigors of a trial by successfully pleading his rights under the statute will now undergo one. The denial of an immediate appeal to Petitioner, under the limited and unusual procedural posture in which this case reached the Court, denies Petitioner his right to due process of law.

By dismissing the current appeal, the trial courts are left to struggle with the issues presented to this court such as whether the Act applies to curtilage and whether an intentional battery rather than a show of force is necessary in order to qualify for immunity under the Act. Additionally, dismissal of the appeal leaves for another day the question of whether questions of fact, in an appeal of a decision in regard to immunity, should be decided *de novo* by this Court, an issue discussed during the oral argument of this case. Both sides have briefed and argued the issues and Petitioner asserts that the interests of judicial economy weigh in favor of this Court deciding these issues given the unique procedural posture of the appeal.

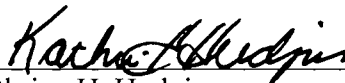
Finally, appellant testified in his own defense at the immunity hearing and he has shown the State his defense, to his detriment, while relying on the fact that if Judge Lee denied him immunity under the statute that he would have an immediate right to appeal under Duncan. That is a vastly different 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 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 (5th 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).

In contrast to the Issac case, Petitioner has a valid claim to immunity under the Act and presents valid issues in regard to the interpretation of the Act. This Court should decide this case and the limited number of cases that reached this Court by way of appeal pursuant to Duncan prior to the decision in Issac. It would be unfair to deny this right to the limited group of litigants after those litigants detrimentally relied upon the denial of immunity as being immediately appealable. Arguably the dismissal of the appeals at this stage sets the framework for possible ineffective assistance of counsel claims based on potentially inculpatory statements made during the immunity hearing, the denial from which is no longer immediately appealable. As the Court characterized the language in Duncan in regard to immediate appealability for both the grant and the denial of immunity as regrettable dicta, counsel should not have assumed that a finding in regard to immunity was immediately appealable and should have advised accordingly.

Based on the above arguments, Petitioner respectfully seeks rehearing and reinstatement of the appeal pursuant to Duncan.

Respectfully submitted,



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This 13th day of September, 2013.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Richland County
Alison Renee Lee, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

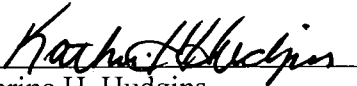
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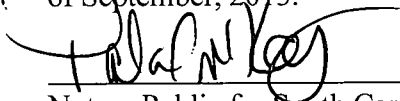
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Julie Kate Keeney, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 this 13th day of September, 2013.


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ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 13th day
of September, 2013.


_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2013.