

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

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Certiorari to the Court of Appeals  
Appeal from Lexington County  
Honorable Eugene C. Griffith, Circuit Court Judge

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Opinion No. 6082 (S.C. Ct. App. Filed August 14, 2024  
Withdrawn, Substituted, and Refiled October 30, 2024)

Lower Court Case No. 2014-GS-32-01440

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THE STATE,

PETITIONER,

V.

KIERIN MARCELLUS DENNIS,

RESPONDENT.

APPELLATE CASE NO. 2024-002019

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RETURN TO PETITION FOR WRIT OF CERTIORARI  
TO THE COURT OF APPEALS

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**PETITIONER'S QUESTIONS PRESENTED**

1.

Did the Court of Appeals err in holding that after a mistrial is declared, for whatever reason, a criminal defendant is entitled to a completely new immunity hearing under the Protection of Persons and Property Act?

2.

Did the Court of Appeals further err in misapprehending the facts of record, not reviewing Judge Russo's denial of immunity after the 1<sup>st</sup> immunity hearing, and in directing the lower court to make certain findings and conclusions upon remand?

**RESPONDENT'S COUNTER QUESTIONS PRESENTED**

1.

Did the Court of Appeals correctly hold that Respondent was entitled to a new, full immunity hearing pursuant to the Protection of Persons and Property Act since the prior mistrial and pretrial immunity hearing held before the mistrial were both nullities?

2.

Did the Court of Appeals correctly understand the facts presented and hold that the circuit court erred by (1) finding that because there was conflicting evidence as to Respondent's entitlement to immunity, self-defense was a jury issue, and (2) denying Respondent immunity based upon the legally erroneous reason that Respondent had the duty to retreat?

## STATEMENT OF FACTS

### **Procedural History**

A Lexington County grand jury indicted Respondent Kierin Dennis in June 2014 for the offense of murder. R. 2939. A pretrial hearing was held pursuant to the Protection of Persons and Property Act, S.C. Code Ann. § 16-11-440(A)&(C), on November 17-19, 2014, before the Honorable Thomas Russo. Todd Rutherford and Simone Martin represented respondent. Solicitor Rick Hubbard and Assistant Solicitor Shawn Graham represented the state. R. 1. By order filed February 4, 2015, Judge Russo denied respondent immunity. R. 2905-2914.

Respondent's case was called to trial on October 3, 2016, before the Honorable Eugene C. Griffith, Jr., and a jury. R. 619-1656. Judge Griffith declared a mistrial on October 11, 2016, as the result of a hung jury. R. 1656.

When the state chose to call the case to trial again, a limited pretrial immunity hearing was held before the Honorable Robert E. Hood from August 22-24, 2017. Todd Rutherford represented respondent. Shawn Graham and Rhonda Patterson were the assistant solicitors. R. 1. Arguments on respondent's entitlement to immunity were later held before Judge Hood on September 18, 2017. Respondent filed a Brief in Support of Defendant's Renewed Motion for Hearing Pursuant to S.C. Code § 16-11-440 (A)&(C) dated September 21, 2017. R. 2926-2935. By order filed October 16, 2017, Judge Hood denied respondent immunity. R. 2915-2921.

Respondent's case was called to trial before the Honorable Eugene C. Griffith, Jr., and a jury, from August 19-27, 2019. Todd Rutherford and Nicole Simpson represented respondent. Solicitor Rick Hubbard and Assistant Solicitor Rhonda Patterson represented the state. R. 2095-2904. On August 27, 2019, the jury found respondent guilty. R. 2901, ll. 13-20. Judge Griffith sentenced respondent to thirty years' imprisonment. R. 2904, ll. 2-6.

## **Facts From First Immunity Hearing Before Judge Russo**

On the night of February 17, 2014, respondent attended a basketball game between Lexington High School, his alma mater, and rival Dutch Fork High School. R. 482, ll. 2-9. The game was held at Lexington High. Respondent's friends, Keith Adams, Lucky Cook, William Zander, and Morgan Zander also attended the game. R. 8, ll. 10-25; R. 162, ll. 19-22. Given past difficulties between students from the rival schools, additional security measures were taken as a precaution. After the game, which Dutch Fork won, Lexington High students were directed to leave the building through the front of the gymnasium, while the Dutch Fork students were required to leave through the back to prevent the comingling of students from the two schools. R. 9, ll. 1-23; R. 160, ll. 13-24; R. 359, ll. 9-16.

As respondent and his friends were walking through the front lobby to the parking lot, numerous Dutch Fork students made their way to the lobby and began taunting and harassing the Lexington students. During the ensuing chaos, respondent became separated from his friends. A student from Dutch Fork followed respondent to his car. The school resource officer pulled a taser and ordered the students to leave. Eventually all the students scattered, and respondent safely got into his car and left. R. 246, l. 5 – 247, l. 23. *Respondent never said a word to any of the Dutch Fork students in the parking lot.* R. 247, l. 24 – 248, l. 6.

After the game, respondent and his friends went to the Cook Out. The Cook Out was a “hangout spot” for Lexington students after sporting events. It was only two to three miles from Lexington High School, and it was not a Dutch Fork “hangout.” R. 14, l. 21 – 15, l. 3; R. 222, l. 24 – 223, l. 1. Respondent, who was driving a gold Ford Explorer, parked at the carwash behind the Cook Out since the Cook Out parking lot was full. Will Zander, who was driving Morgan Zander and Lucky Cook, also parked at the carwash while Keith Adams parked at the PetSmart adjacent to the Cook Out. R. 14, ll. 9-20; R. 250, ll. 7-10.

As respondent and his friends were walking toward the Cook Out, they ran into Austin Sanders, a fellow Lexington student. R. 250, ll. 7-13. Sanders told respondent that while he was in the drive thru line, several Dutch Fork students approached and began shaking his car. The students were “rowdy” and harassed other people in the drive thru as well. R. 250, l. 13 – 251, l. 9. After speaking with Sanders, respondent and his friends entered the front door of the Cook Out. Despite the Cook Out being a Lexington High “hangout,” there were at least thirty to forty students from Dutch Fork inside. R. 17, ll. 8-16. As soon as respondent and his friends entered, Michael James, who attended Dutch Fork, approached respondent, threw his hands into the air, and asked, “That’s all y’all brought?” *Respondent calmly responded, “We just came here to eat.”* Respondent and his friends then waited in line to order food. R. 251, l. 10 – 252, l. 12 (emphasis added).

While they were waiting in line, respondent overheard Dutch Fork students “picking on Lucky [Cook] about his sweater.” R. 252, l. 13 – 253, l. 3. Michael James, the same student who confronted respondent when he entered, stood up on a chair behind Keith Adams, put his fist over Keith’s head, and motioned as if he was going to punch Keith. Respondent and his friends continued to ignore the Dutch Fork students and waited for their food. R. 253, ll. 3-13. Given the uncomfortable atmosphere, respondent told his friends, “*Let’s leave,*” and “*we just need to go,*” but his friends wanted to wait for their food since they had already ordered. Respondent received a phone call and stepped outside. R. 253, l. 19 – 254, l. 11. Keith Adams followed respondent outside because he did not want respondent “outside by himself.” R. 16, ll. 12-25. Shortly thereafter, Lucky Cook, Will Zander, and Morgan Zander also walked outside without their food. As the group of friends were standing by a trashcan outside, Michael James walked past them. R. 17, ll. 18-25. When James reached the middle of the parking lot, he turned around, threw his hands in the air, and asked, “Are you still salty?” Respondent *calmy*

responded, *“The game was thirty, thirty-five minutes ago. Y’all won. Congratulations.”* To avoid any confrontation, respondent then told his friends, *“Guys come on, let’s go”* and the group began walking toward their cars. R. 254, l. 13 – 255, l. 8 (emphasis added).

As they were walking, respondent heard “a whole bunch of noise behind” him. When he turned around, the Dutch Fork students were “rushing” out of the Cook Out. R. 19, ll. 1-3; R. 255, ll. 8-12. About thirty to forty students “poured out.” R. 84, ll. 4-21. They were yelling and “pulling their pants up . . . like they were getting ready to fight” or “jump” respondent and his friends. Da’Von Capers, the decedent, called Morgan Zander “a bitch.” R. 18, l. 21 – 19, l. 1; R. 85, ll. 2-24; R. 255, l. 12 – 256, l. 4. Respondent continued to walk backward toward his car. R. 255, ll. 14-16. Keith Adams was “speed walking” to his car while Will Zander ran to his car. R. 20, ll. 10-22. The Dutch Fork students followed closely behind. After safely reaching his car, Will picked up Morgan and Lucky Cook in the roadway near the Cook Out. R. 86, ll. 3-8.

After reaching their cars, Keith Adams and respondent met in the roadway between the PetSmart and the carwash. They parked with their driver side windows next to each other. Respondent was facing the PetSmart and Keith was facing the Cook Out. They spoke for about two to three minutes about their plans. Respondent told Keith he was going home because he had to work at 5:30 the following morning. Keith was going to his father’s house. R. 256, l. 13 – 257, l. 17. While the pair talked, Will Zander turned his car around in the PetSmart parking lot and parked behind Keith. R. 22, ll. 2-8; R. 86, l. 19 – 87, l. 4.

Keith Adams eventually drove away first. R. 23, ll. 13-17; R. 87, ll. 5-9. He pulled forward and drove through the driveway between the Cook Out and the PetSmart. R. 22, l. 19 – 23, l. 17. There were numerous students from Dutch Fork standing on the curb and in the roadway near this exit. Keith explained that he took this exit because it was closest to the

interstate where he was headed and because the other exit had a traffic light that “takes forever.” Keith eventually turned right out of the parking lot onto the main road. R. 22, l. 21 – 23, l. 19.

Will Zander, who was directly behind Keith, followed the same path past the group of Dutch Fork students who were standing on the curb and in the roadway. Will explained that he did not take the other exit near the Cook Out drive thru because it was “too congested” and he “always” took the exit between the Cook Out and the PetSmart. As Will was driving to the exit, he heard the Dutch Fork students in the roadway yelling. Will’s driver’s side window was already down. Will stopped his car, dug in his pocket, grabbed four dollars in cash and coins, and threw it out the window. R. 87, l. 5 – 88, l. 23. There was testimony Will said: “Hey, this is what y’all are worth.” R. 543, l. 2 – 546, l. 15. Several students from Dutch Fork, including Devon Chatman and Tyreke Farrow, ran into the road to pick up the money. R. 89, ll. 7-20; R. 451, ll. 19-25.

After Keith Adams and Will Zander pulled away, respondent backed his car up so he could likewise leave through the main exit between the PetSmart and the Cook Out. After he reversed, respondent put his car back in drive and looked forward. When he looked up, he saw Will’s car stopped in the roadway. It was surrounded by Dutch Fork students. R. 258, l. 7 – 259, l. 2. Respondent did not know at the time that Will had thrown money into the road. He feared the Dutch Fork students were going to attack Will. Respondent sped forward to make sure Will was alright. R. 258, l. 12 – 259, l. 24. He stopped behind Will’s car. As soon as respondent stopped, Dutch Fork students surrounded his vehicle and approached his window, which was still about halfway down from when he was talking to Keith. R. 281, ll. 3-7. The students were yelling at respondent, ordering him to get out of the car, and calling him names – “pussy” and “bitch.” R. 260, ll. 8-13; R. 262, ll. 10-15. Hands started reaching into respondent’s window. He thought they were trying to attack him and “forcefully” pull him out of the car. With his foot

still on the brake, respondent leaned as far into the car as possible to get away from the Dutch Fork students. R. 260, ll. 13-19.

Respondent was scared and he feared for his life. R. 260, ll. 19-20. He could not leave because Will's car was parked in front of him and there were Dutch Fork students in front and around his car. R. 265, l. 22 – 266, l. 17. Respondent had a knife in his center console. He grabbed it, reached across his body with his right hand, struck, and then drove away. R. 262, l. 22 – 263, l. 2. He did not realize he had stabbed anyone. R. 268, ll. 15-20.

Joshua Brooks, who attended Lexington High, was at the Cook Out. R. 222, l. 11 – 223, l. 1. He watched as a “whole bunch” of Dutch Fork students crowded around respondent's car in the roadway. R. 224, ll. 13-25. The students were “banging” on respondent's car “trying to scare him.” Others were reaching in respondent's window. R. 225, ll. 1-3. Respondent could not leave because Will Zander's car was parked directly in front of him. R. 226, ll. 14-21. Brooks saw Will get out of his car. Brooks told Will “to leave, get out of here, you don't want any problems.” He knew Will and respondent were greatly outnumbered and they “were being threatened” by the Dutch Fork students. Will eventually got back into his car. Brooks watched respondent drive off followed by Will. R. 224, l. 13 – 225, l. 15.

Kenneth Williams, who attended Dutch Fork, was standing on the curb by the roadway at the Cook Out. He saw Will Zander stop in the middle of the road and throw money out his window. Several Dutch Fork students, including Tyreke Farrow and Devon Chatman, ran into the road to pick up the money. Williams said respondent pulled up “pretty fast” behind Will and claimed that he almost hit Farrow and Chatman. This upset the Dutch Fork students. They all “lined up” outside respondent's window. Although Williams never approached respondent's window, he maintained that he saw respondent's hand come out of his window and strike Da'Von Capers, the decedent. He thought respondent just pushed Capers until Capers said,

“they got me” and ran to a vehicle. R. 449, l. 20– 453, l. 24. Williams later admitted that he saw Capers reach into respondent’s window, but he strangely maintained it was after respondent had stabbed him. R. 469, l. 4 – 470, l. 5.

Devon Chatman, who attended Dutch Fork, was also standing on the curb. He saw Will Zander pull up, stop his car, and throw money out the window. Chatman ran into the road to pick up the money. R. 485, l. 13 – 486, l. 7. When Chatman was in the middle of the road with several other students, respondent sped around the corner, pulled forward, and almost struck Chatman in the leg. Chatman claimed that if he had not jumped out of the way, he would have been hit. R. 488, ll. 4-19. Numerous Dutch Fork students surrounded respondent’s window and confronted respondent. Chatman was not one of the students who approached respondent’s window. R. 490, l. 1 – 491, l. 13.

Alexis Brunson, who also attended Dutch Fork, did approach respondent’s car after she maintained he almost hit several students in the roadway. She confronted respondent and yelled, “What are you doing? Are you crazy? You almost ran over some of our students.” R. 512, l. 5 – 513, l. 21. Brunson was livid. She claimed she did not see anyone touch respondent’s car or reach in his window. Respondent had his hand down by his thigh and Brunson maintained respondent said, “You don’t want this. You don’t want what I got.” Brunson saw respondent punch Da’Von Capers with his right hand. She claimed respondent’s hand came out of the window when he punched. R. 515, l. 16 – 517, l. 11. She did not see a knife. R. 529, ll. 1-5. After Capers was struck, Brunson said Capers tried to punch back, but respondent drove away. Brunson said there was nothing stopping respondent from leaving. She claimed he was not blocked in. R. 517, l. 16 – 518, l. 6. Brunson admitted she did not know if Capers threatened respondent before respondent struck him. R. 537, ll. 4-24; R. 539, ll. 1-5.

Tyreke Farrow, another Dutch Fork student, was crossing the street to the PetSmart when he saw Will Zander throw money into the road. When Farrow was in the road, he said he saw “a car coming full speed” toward him. Farrow jumped and his cousin, Xavier Holiday, pulled him out of the way. Farrow identified respondent as the driver of this car. R. 543, l. 2 – 547, l. 15. Farrow walked up to respondent’s car and said, “What the fuck are you doing? Are you trying to hit me with your car?” At least seven other Dutch Fork students approached the car, including Xavier Holiday, Lamar Butler, and Da’Von Capers. Capers confronted respondent. He yelled, “What are you doing? You’re trying to hit people in the road. Get out of your car if you want to hit people.” Farrow claimed respondent said, “I got something for y’all. Hey, yo, come here, come here.” Farrow said respondent then struck Capers with his right hand and drove away. R. 547, l. 16 – 548, l. 14. Farrow saw respondent’s hand come out the window, but he did not see a knife. R. 553, l. 6 – 554, l. 11. According to Farrow, no one touched respondent’s car or reached into the window. R. 550, ll. 20-24.

Lamar Butler, who also attended Dutch Fork, saw Will Zander throw money into the road. He also testified that Will said, “This is what y’all are worth.” R. 568, l. 17 – 569, l. 24. At least three Dutch Fork students went into the road to pick up the money, including Tyreke Farrow. R. 570, ll. 6-23. Respondent sped forward and Butler maintained he almost struck them with his car. Xavier Holiday pulled Farrow out of the roadway. R. 371, ll. 1-25. When respondent stopped in the roadway, Farrow, Holiday, Butler, and Da’Von Capers all approached respondent’s car. Capers was the closest to the window. R. 574, l. 4 – 575, l. 24. Butler claimed respondent motioned for Capers to come closer. R. 577, ll. 5-20. However, he admitted he could not really see what was going on because his view was blocked by other students. Butler thought respondent pushed Capers because Capers stumbled back into Farrow, but Butler never saw respondent strike Capers or saw respondent’s hand come out the window. After Capers

stumbled, respondent drove away. Butler claimed he never heard Capers say anything to respondent and that Capers never reached into respondent's window. However, again, Butler admitted his view was blocked by other students in front of him. R. 575, l. 25 – 578, l. 15.

Judge Russo denied respondent immunity by order dated February 4, 2015. R. 2905-2914. He found respondent was not entitled to immunity under both subsection (A) and (C) of § 16-11-440. Regarding § 16-11-440(A), the judge determined respondent failed to meet his burden of proving the decedent was in the process of unlawfully and forcefully entering an occupied vehicle. R. 2912. The judge further found respondent failed to prove he had reason to believe the decedent was in the process of unlawfully entering his occupied vehicle. The judge noted that while respondent testified the decedent was forcefully entering his car, he found it not credible. R. 2912.

Judge Russo also found respondent failed to establish the elements of self-defense. R. 2913. He concluded respondent did not show he was without fault in bringing on the difficulty because respondent “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.” R. 2913. He further found respondent's testimony that he was unable to leave after he stopped in the roadway was not credible. R. 2913. Assuming respondent established the second element of self-defense, that he actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, Judge Russo found respondent failed to show that a reasonably prudent man of ordinary firmness and courage would have entertained the same belief. R. 2913. Lastly, he found respondent “could have left” but “kept his vehicle stationary.” R. 2913. Accordingly, Judge Russo concluded respondent could and should have retreated.

As far as § 16-11-440(C), the judge, without any explanation, determined that even if this subsection applied, respondent would not be entitled to immunity because he failed to establish the elements of self-defense. R. 2914.

### **Facts from Second Immunity Hearing Before Judge Hood**

The state argued that Respondent was not entitled to a second immunity hearing. Judge Hood largely agreed, but ruled he would give respondent a partial immunity hearing disregarding defense counsel Rutherford's assertion that after a mistrial, everything starts over. Respondent had not been convicted and there was no guarantee his case would ever be called to trial again. Further, this was a highly unusual, if indeed not unique case, where the defense came upon evidence that was newly discovered, most of which would have been known before the first hearing before Judge Russo, but for the bungling of law enforcement and the solicitor's office. R. 1684, l. 23 – 1688, l. 13.

In fact, the defense had three newly discovered key witnesses. The first was Beth Bettini, who went to see the Solicitor on her own volition. The solicitor's office belatedly admitted Bettini called 911 during the Cook Out incident despite initially claiming they had no record of her call. Defense counsel emphasized that Bettini's testimony rebutted any contention that respondent "could have left at any time. *She said he couldn't have left. He would have run over them [the Dutch Fork students]. He couldn't leave. I saw the fear in his face, an independent witness, not a Lexington kid, not a Dutch Fork kid.*" R. 1680, l. 15 – 1681, l. 23 (emphasis added). The second newly discovered witness was Ervin Chauncy Meggett, who gave a statement to the solicitor's office on August 26, 2016, after Judge Russo denied respondent immunity. Meggett told the solicitor's office, even as a "Dutch Fork kid," *that respondent was trying to leave and "Cape [the decedent] went up and banged on his car. Cape was wrong.* This is a statement that the Solicitor's Office got in August of 2016 that they turned over to us."

R. 1677, l. 20 – 1678, l. 18 (emphasis added). Defense counsel emphasized that the state very early on decided to charge respondent, and counsel’s status as a legislator worked against respondent because the solicitor’s office maintained, “We need to get it scheduled before you go back in session.” R. 1678, l. 5 – 1680, l. 1. Third, defense counsel cited the newly discovered witness Zachary Lynch, an employee of the Cook Out, who was outside at the time respondent was attacked in the parking lot. “Apparently now literally today we believe that that [Lynch] statement was written with Officer Holiday. Didn’t testify in the stand your ground [hearing]. Didn’t testify in the trial and it comes out because we now, *the Solicitor’s Office called us yesterday at 6:00 and said, hey, or emailed us at 6:00 and say, hey, Zach Lynch also appears and Beth Bettini also appeared seven minutes into Officer Holiday’s tape...*” R. 1681, l. 24 – 1689, l. 2. Lynch had critical testimony that he saw the decedent and apparently others reaching into respondent’s car at the time respondent stabbed the decedent. R. 1681, l. 24 – 1689, l. 2.

Caitlin Voravudhi, a patrol officer with Lexington Police Department, was the first witness during the limited hearing. She was one of the first officers who responded to the scene. R. 1702, l. 24 – 1703, l. 4. When she arrived, there were about forty younger people in the parking lot and some adults. Voravudhi attempted to control the scene and speak with witnesses. R. 1703, ll. 8-21. While Voravudhi was not wearing a body camera that night, the dash camera from her patrol car was recording both audio and video. Her dash camera was pointed toward the carwash and not the Cook Out. R. 1704, l. 12 – 1706, l. 24. Voravudhi spoke to Beth Bettini, the original complainant who called 911, and Zachary Lynch, a Cook Out employee. Voravudhi also took a written statement from Bettini and Lynch. R. 1710, ll. 22-24; R. 1716, l. 10 – 1717, l. 4; R. 2936-2937. Voravudhi turned over both written statements and her dash camera footage, which included her interview of Bettini and Lynch, to investigators. R. 1722, ll. 3-12; R. 1727, l. 12 – 1730, l. 5.

Beth Bettini testified that she entered the Cook Out parking lot through the rear entrance. When she turned the corner, she saw thirty to forty teenagers in the Cook Out parking lot. They were “screaming, hollering, cussing, acting crazy.” Bettini had her windows down. She saw a light colored SUV come to a complete stop in the driveway because there were students blocking the road. They surrounded the SUV and started yelling at the driver. They were calling him names and threatening him. They were yelling, “Fuck you. We’ll kick your ass.” She saw a student throw a drink at the car. The driver said, “Y’all leave me the fuck alone or get the fuck away from me.” Bettini called 911 and described what she was witnessing. She thought there was about “to be a fight.” She told the dispatcher that the driver of the light colored SUV – whom she identified as respondent – “looked scared to death” and she thought the other students were going to hurt him. R, 1771, l. 1 – 1774, l. 15. She explained that respondent could not leave because there were students in front of his car. He would have had to have hit them to leave. R. 1776, ll. 5-7.

After everyone left, Bettini stayed and spoke to law enforcement. R. 1776, l. 22 – 1778, l. 21. First, she spoke to Deputy Voravudhi and then she talked to Investigator Brent Carter. She told Carter she had called 911. R. 1777, l. 1 – 1780, l. 2. Lexington County 911 destroyed the recording of Bettini’s call before it could be preserved because the call was not “properly linked” to the CAD report for the incident. R. 1876, l. 4 – 1880, l. 18; R. 1883, ll. 7-21.

Zachary Lynch was working at the Cook Out that night. R. 1817, ll. 3-11. He was outside taking a break when the stabbing occurred. R. 1818, ll. 9-15. Lynch was standing near the dumpsters smoking. R. 1824, ll. 1-3. He had a clear view of the parking lot and the driveway between the Cook Out and PetSmart. R. 1824, ll. 14-22. Lynch saw respondent attempt to pull out and leave. There were students in the roadway blocking respondent from leaving. There were also students standing along the sidewalk next to the roadway. The students

were “taunting” respondent, calling him names, and acting “malicious.” They all gathered outside respondent’s window. R. 1826, ll. 2-8. One student threw a drink at respondent’s car. Lynch saw a student reach inside respondent’s window with his hand “forward.” Lynch thought this person was trying to grab respondent. When he later learned there had been a stabbing, Lynch thought it was the person who leaned into respondent’s window who “did the stabbing.” After the person who leaned into respondent’s car came back out, respondent drove away. R. 1825, l. 7 – 1828, l. 5.

Dr. Janice Ross, the pathologist who conducted the autopsy, testified the decedent had a stab wound to the left chest just underneath the nipple. The trajectory was “downward slightly toward the middle of the body and slightly backward.” R. 1741, l. 16 – 1742, l. 2. Dr. Ross explained that based on the trajectory of the wound, “if the knife was going straight,” the decedent had to have been standing erect *or leaning over* with his head, neck, and chest parallel with the ground. R. 1743, ll. 10-24; R. 1747, ll. 2-19. (emphasis added). “Every percentage that [the decedent] stands up” from a position parallel with the ground, “the knife . . . has to raise up that same percentage in order to get the same trajectory.” If the decedent was standing erect, respondent’s hand would have had to have come up and struck downward, not straight across, in order to match the trajectory of the wound. R. 1747, l. 25 – 1748, l. 20. She acknowledged, “if the defendant were leaning back in the vehicle against the arm rest . . . that would impact how far the victim had to lean in or had to lean over in order to receive that stab wound if the defendant stabbed him with his right hand.” R. 1750, ll. 4-9. “If the victim was standing up, then the knife would have had to come up and down. If the victim was stooped over, then it [the knife] would have to go kind of straight parallel to the ground.” R. 1753, ll. 9-19.

Ervin Chauncy Meggett, who attended Dutch Fork, was interviewed by the solicitor’s office on August 26, 2016, shortly before the mistrial due to the hung jury. R. 2020, ll. 18-22.

Why Meggett was not interviewed earlier is not revealed from this record. Meggett was standing outside respondent's window when the decedent was stabbed. R. 2023, l. 19 – 2024, l. 3. He told the state during his August 2016 interview that the decedent “was in the wrong” and that respondent was trying to leave when the stabbing occurred. R. 2022, ll. 10-16. He said the decedent was “banging” on respondent's car when respondent stabbed him. R. 2025, l. 14 – 2026, l. 3. Meggett said at the limited immunity hearing that he did not remember telling the state the decedent was in the wrong and that respondent was trying to leave. R. 2024, ll. 19-23; R. 2026, l. 22 – 2027, l. 1. All he remembered was some students were banging on respondent's car, but he did not know if the decedent was one of the individuals who was banging. R. 2022, ll. 10-24. Meggett admitted he was subpoenaed to testify during respondent's first trial that ended in a mistrial. He was placed in a room with other potential witnesses. However, Meggett denied that those witnesses confronted him for previously saying “things that were unfriendly to Cape [the decedent].” The decedent was Megget's friend. R. 2024, l. 24 – 2025, l. 13.

Judge Hood denied immunity by order filed October 16, 2017. R. 2915-2921. The order cited to “inconsistent testimony” and evidence being “in direct contradiction” and ruled, “Under the facts before this Court, the Defendant's claim of self-defense presents a quintessential jury question. See *State v. Curry*, 406 S.C. 364, 752 S.E.2d 263 (2013).” R. 2920. “The direct contradiction between witnesses creates an issue for a jury to decide, not the trial court. Therefore, immunity does not apply because the Defendant has not proven beyond (sic) a preponderance of evidence standard of self-defense. The Court finds that the Defendant has not established the elements of self-defense by the greater weight of the evidence.” R. 2920-2921.

The order concluded, “Based upon the denial of immunity, the Court does not need to reach a ruling on the merits of whether or not the Defendant was entitled to a second hearing. The Defendant was given the opportunity to present and proffer the evidence and the Court has

considered the evidence. The state was allowed to respond. Further, *the Court read the testimony from the original immunity hearing and the jury trial*. The testimony has been heard and the record has been protected.” R. 2921 (emphasis added).

## **Appeal**

By published opinion filed August 14, 2024, the Court of Appeals held the circuit court erred by denying respondent a new, full immunity hearing after the mistrial since “when a case ends in a mistrial, it is considered a nullity and begins ‘anew when called again for trial.’” State v. Dennis, 444 S.C. 353, 363, 907 S.E.2d 142, 148 (2024) (quoting State v. Woods, 382 S.C. 153, 158, 676 S.E.2d 128, 131 (2009)); App. 381. Accordingly, the court remanded the case for a new immunity hearing. Id. at 372, 907 S.E.2d at 152; App. 390. The Court of Appeals further held the circuit court erred by finding that because there was conflicting evidence as to respondent’s entitlement to immunity, self-defense was a jury issue. Id. at 368-69, 907 S.E.2d at 151-52. Lastly, the Court of Appeals emphasized S.C. Code Ann. § 16-11-440(A) and (C) of the Act “for the trial court’s edification on remand.” Id. at 369, 907 S.E.2d at 151; App. 385-390.

On September 13, 2024, the state, with new appellate counsel, filed an eighteen-page petition for rehearing and rehearing *en banc* accompanied by a forty-one-page memorandum. On September 16, 2024, respondent filed a motion to strike the petition for rehearing and the memorandum in support because the state failed to comply with the fifteen-page limit set forth in Rule 221(a), SCACR. Respondent further argued the memorandum was essentially a new brief in support of the state’s position that respondent’s conviction should be affirmed. The state wanted a “do over” of its previous arguments with new appellate counsel before the Court of Appeals, to which it was not entitled. App. 304-307. That same day, the state filed an amended petition for rehearing and rehearing *en banc* that complied with the fifteen-page limit. App. 314-330. However, the amended petition was still accompanied by a forty-one-page memorandum

not contemplated by the appellate court rules. App. 331-373. By order filed October 30, 2024, the Court of Appeals stated it declined to “act on the motion to strike because it is now moot” given the state’s amended petition for rehearing. App. 374. The Court also withdrew its previously filed opinion and substituted a new opinion, which clarified the court did not reverse respondent’s conviction, it only granted him a new immunity hearing. App. 374-390. On December 9, 2024, the state filed a petition for writ of certiorari with this Court. This return to the petition for writ of certiorari follows.

### ARGUMENTS

1.

The Court of Appeals correctly held that Respondent was entitled to a new, full immunity hearing pursuant to the Protection of Persons and Property Act since the prior mistrial and pretrial immunity hearing held before the mistrial were both nullities.

The Court of Appeals correctly held the circuit court erred by denying respondent’s motion for a new, full immunity hearing after the mistrial. Defense counsel asked for a new immunity hearing to which respondent was entitled. The solicitor was successful in limiting the second immunity hearing as if respondent was being done a favor by having “newly discovered evidence considered” at all. The solicitor did not want the defense to have another immunity hearing – much less a full immunity hearing – before Judge Hood even though respondent’s first trial ended in a mistrial and the first immunity hearing and mistrial were both nullities that should not have been considered.

“A mistrial is equivalent of no trial and leaves the cause pending in the circuit court. State v. Smith, 336 S.C. 39, 518 S.E.2d 294 (Ct. App. 1999). It leaves the parties ‘as though no trial had taken place.’ Grooms v. Zander, 246 S.C. 512, 514, 144 S.E.2d 909, 910 (1965) (ruling of trial judge in proceeding ending in mistrial represents no binding adjudication upon the parties

as the mistrial leaves the parties in status quo ante). A court ruling as to the admissibility and competency of testimony during a trial, which was later declared a mistrial results ‘in no binding adjudication of the rights of the parties.’ Keels v. Powell, 213 S.C. 570, 572, 50 S.E.2d 704, 705 (1948).” State v. Woods, 382 S.C. 153, 158, 676 S.E.2d 128, 131 (2009).

In State v. Woods, the state consented to a change of venue in a death penalty case, which resulted in a jury being selected from Marion County and transported to Clarendon County. That trial ended in a hung jury and a mistrial, as here. Woods argued on appeal that the trial court committed error because the jury was selected from Clarendon County for the second trial, where the court during the first trial had brought a jury from Marion County to Clarendon County for the trial. This Court found no error since the first trial resulted in a mistrial. It was a nullity, and therefore began anew when the state again called the case for trial. The Court emphasized that when a mistrial occurs because of the inability of the jury to reach a verdict, it is the same as if no trial took place. Woods, 382 S.C. at 158, 676 S.E.2d at 131.

The same is true of the pretrial hearing in this case in which Judge Russo denied immunity. It was a nullity, and respondent was entitled to begin anew. Instead, he was forced to accept what limited hearing Judge Hood would allow him.

Further, in State v. Smith, 336 S.C. 39, 518 S.E.2d 294 (Ct. App. 1999), the Court of Appeals found error where during the first trial the judge held an *in-camera* hearing at which time informant Hall identified defendant Smith as the person from whom he purchased crack cocaine on February 26, 1996. The judge allowed Hall to identify Smith in the jury’s presence. However, the first trial ended in a mistrial because of the admission of other evidence. A second trial was held before the same judge in September 1996. Smith requested a hearing on the in-court identification. He claimed Hall’s identification was tainted on the first day of the retrial when Hall saw Smith in a holding cell. The judge ruled Smith was not entitled to another

hearing on the same issue because Hall identified Smith during the prior trial where Smith had an *in-camera* hearing on that same issue. On appeal, the Court of Appeals held that a mistrial was equivalent of no trial at all. Therefore, the prior court rulings on the admissibility and competency of testimony were not binding on the rights of the parties. Because the mistrial was equivalent of no trial, the trial judge could not rely on evidentiary rulings from the nugatory proceeding. The Court of Appeals remanded the case to the circuit court for an *in-camera* hearing to determine whether Hall's identification of Smith should be suppressed.

Again, the same is true as to the pretrial immunity hearing and the mistrial in this case. Judge Hood refused to allow Respondent a full hearing and he relied on evidence offered during the mistrial and the prior pretrial immunity hearing, which were both nugatory because the proceeding ended in a mistrial. That was error on the part of the court.

Moreover, this Court held in State v. Cervantes-Pavon, 426 S.C. 442, 827 S.E.2d 564 (2019), that a court's ruling on immunity must be based solely on the evidence presented at the pretrial immunity hearing. On remand, this Court instructed the circuit court to rely only on the evidence presented at the new immunity hearing.

The pretrial hearing held before Judge Russo and the subsequent mistrial held before Judge Griffith were both nullities, and Judge Hood was obligated to proceed as if those nugatory proceedings did not exist. Again, when a mistrial occurs because of the inability of the jury to agree on a verdict, it is the same as if no trial took place. That is also true of the pretrial rulings before that trial. See State v. Mills, 281 S.C. 60, 314 S.E.2d 324 (1984); State v. Smith, 336 S.C. 39, 518 S.E.2d 294 (Ct. App. 1999). Accordingly, the Court of Appeals correctly held Judge Hood erred by denying respondent's motion for a new, full immunity hearing.

Finally, even if this Court were to agree with appellant, and change the law on evidence offered pretrial and during mistrials no longer being a nullity, respondent still would have been

entitled to another immunity hearing given the newly discovered evidence, and the state's bungling of the first immunity hearing where it failed to disclose to the defense evidence in its possession that was favorable to respondent and critical to the immunity determination. Respectfully, this Court should deny certiorari.

2.

The Court of Appeals correctly understood the facts as presented and correctly held the circuit court erred by (1) finding that because there was conflicting evidence as to Respondent's entitlement to immunity, self-defense was a jury issue, and (2) denying Respondent immunity based upon the legally erroneous reason that Respondent had the duty to retreat.

The Court of Appeals correctly understood the facts presented. Respondent was not at fault in bringing on the difficulty and had no duty to retreat. As seen, the evidence showed respondent never said a word to any of the Dutch Fork students in the high school parking lot after the game. Respondent went to the Cook Out, the "hangout" for Lexington High School students after sporting events. He acted calmly at the restaurant, purposefully ignoring taunting from the Dutch Fork students, including Michael James. Respondent and his friends ultimately left the Cook Out without their food because of the uncomfortable atmosphere. To avoid any confrontation after Michael James followed them outside the restaurant, respondent immediately walked to his car. Thirty to forty Dutch Fork students then "rushed" out of the Cook Out. While respondent was attempting to leave, Dutch Fork students surrounded his vehicle. Respondent could not leave because Will Zander's vehicle was in front of him, and students were in the roadway. The circuit court's reasoning that respondent had a duty to retreat was erroneous. Respectfully, no amount of creative writing by the state can change the evidence presented.

## **Conflicting Evidence**

The Court of Appeals correctly held the circuit court erred by finding that, because there was conflicting evidence as to respondent's entitlement to immunity, self-defense was a jury issue. Notably, the state conceded in its brief before the Court of Appeals that both circuit court "judges listed conflicting evidence as a reason for denying immunity." The state also acknowledged that both judges ruled respondent had "a duty to retreat under the law." App. 98. In State v. Cervantes-Pavon, 426 S.C. 442, 827 S.E.2d 564 (2019), this Court held the circuit court erred by finding the immunity issue presented a jury question. The Court emphasized, "Just because conflicting evidence as to an immunity issue exists does not automatically require the court to deny immunity; the court must sit as the fact-finder at this hearing, weigh the evidence presented, and reach a conclusion under the act." Id. at 451, 827 S.E.2d at 569. While the circuit court judge here did not have the benefit of this Court's opinion in Cervantes-Pavon at the time the state successfully urged the court that conflicting evidence made self-defense a jury issue under State v. Curry, the case nonetheless controls.

The "act requires the circuit court to determine whether a movant is entitled to immunity." Cervantes-Pavon, 626 S.C. at 451, 827 S.E.2d at 568 (citing State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011) (setting forth the procedure, burden of proof, and standard of review for an immunity determination)). The circuit "court, in announcing its ruling, should at least make specific findings on the elements on the record." State v. Gray, 438 S.C. 130, 141, 882 S.E.2d 469, 475 (Ct. App. 2022) (quoting State v. Glenn, 429 S.C. 108, 123, 838 S.E.2d 491, 499 (2019)). Respectfully, the circuit court's finding here that conflicting evidence made self-defense a jury issue resulted in an abdication of judicial responsibility under the Protection of Persons and Property Act. See Gray, 426 S.C. at 142, 882 S.E.2d at 475 (reversing the circuit

court's denial of Gray's motion for immunity under the act because the court "impermissibly abdicated its role as the fact-finder at Gray's immunity hearing").

Because the circuit court's order was based upon an error of law as explained by this Court in State v. Cervantes-Pavon, the Court of Appeals correctly held the circuit court erred in deferring to the jury because there were conflicts in the evidence.

### **Duty to Retreat/Avoid the Danger**

The South Carolina General Assembly adopted the Protection of Persons and Property Act in 2006 in an effort to "codify the common law Castle Doctrine which recognizes that a person's home is his castle and to extend the doctrine to include an occupied vehicle and the person's place of business." S.C. Code Ann. § 16-11-420(A). The General Assembly recognized "that persons residing in or visiting this State have a right to expect to remain unmolested and safe within their homes, businesses, and vehicles." S.C. Code Ann. § 16-11-420(D). It explained "that no person . . . should be required to surrender his personal safety to a criminal, nor should a person or victim be required to needlessly retreat in the face of intrusion or attack." S.C. Code Ann. § 16-11-420(E).

Section 16-11-440(A) of the Act provides a presumption of reasonable fear of imminent peril of death or greatly bodily injury to a person who uses deadly force. A person is entitled to the reasonable fear presumption if (1) the person against whom the deadly force is used is in the process *of unlawfully and forcefully entering* or has unlawfully and 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. S.C. Code Ann. § 16-11-440(A) (emphasis added). Further, Section 16-11-440(C) of the Act provides that a person who is not engaged in an unlawful activity and who is attacked in another place where he has a right to be, including, but not limited to, his place of business, has no duty to retreat and

has the right to stand his ground and meet force with force, including deadly force, if he reasonably believes it is necessary to prevent death or great bodily injury to himself or another person or to prevent the commission of a violent crime as defined in Section 16-1-60. S.C. Code Ann. §16-11-440(C).

In its opinion, the Court of Appeals emphasized Sections 16-11-440(A) and (C) of the Act. It correctly held pursuant to Section 16-11-440(A), that “although the victim also had the right to be at Cook-Out, he did not have the right to be in Dennis’s [respondent’s] occupied vehicle, as Dennis did, during the confrontation. Therefore, the presumption that Dennis’s fear was reasonable applied to the extent he met his burden of showing the victim was unlawfully in or entering his vehicle.” Dennis, 444 S.C. at 371, 907 S.E.2d at 152; App. 389. The court also correctly emphasized that pursuant to Section 16-11-440(C), respondent did not have a duty to retreat. Id. at 371-72, 907 S.E.2d at 152; App. 389-390.

It is apparent from Judge Hood’s order denying immunity dated October 11, 2017, that he denied respondent immunity because he did not retreat, and because he went to the Cook Out in the first place. The judge noted, “While walking into the cookout, the defendant’s friend, Austin Sanders, was leaving the Cook-Out and 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.’ *Despite this comment, Defendant and his group continued into the Cook-out.*” R. 2917 (emphasis added). The judge reasoned that respondent should not have gone into the Cook Out where he had a right to be and that he should have retreated when he saw the Dutch Fork students there. Further, in the analysis section of Judge Hood’s order, he wrote, “The evidence, which consists of video surveillance and witness testimony, shows the Defendant seeking out the Cook-Out restaurant and the Dutch Fork students that night. The Defendant **chose the situation** that led to the altercation with the Dutch Fork students. The

Defendant **also chose not to leave the other exits** that were available to him. He chose to drive into a crowd of Dutch Fork students.” R. 2919 (emphasis added).

Judge Hood also oddly wrote, “Second, the Defendant must have actually believed he was in imminent danger of losing life or sustaining serious bodily injury, or he actually was in such imminent danger. *Id.* **The Defendant has failed to do so in this case.** The Defendant and his friends went to the Cook-Out, **knowing that Dutch Fork Students would be present.** *The Defendant could have left the Cook-Out without coming into contact with any Dutch Fork students, but he chose the route he left to assault and incite the Dutch Fork students.*” R. 2920 (emphasis added). Judge Hood reasoned respondent was responsible for the situation because he went to the Cook Out and because he did not retreat.<sup>1</sup>

Judge Russo also found respondent “could have left,” and “rather than attempting to leave, the Defendant kept his vehicle stationary.” R. 2913. The judge impermissibly found respondent was not “without fault” for purposes of self-defense for this reason, and that respondent could have retreated. Judge Russo’s immunity order also could not be allowed to stand, and required reversal for this reason also.

As the Court of Appeals recognized, Section 16-11-440(C) clearly states that the defendant has no duty to retreat when he is acting legally in a place he has a right to be. The Cook Out was the Lexington High School hangout after basketball games. Respondent was a recent graduate of Lexington High, who went to the basketball game. He had every right to go to the Lexington High hangout that night, and he was not obligated to avoid it simply because he saw Dutch Fork students at the Cook Out upon his arrival. Respondent was not at fault for bringing on the difficulty for purposes of self-defense where he went to a public restaurant where

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<sup>1</sup> It is strange the judge reasoned respondent failed to prove he believed he was imminent danger or actually was in imminent danger because he did not avoid the Cook Out, the Lexington High hangout that night.

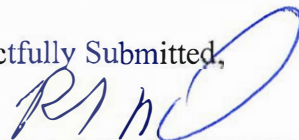
he had a right to be. Respondent also did not have to retreat or flee when the trouble began. The evidence showed his car was surrounded. Section 16-11-420(E) states that “the general assembly finds that no person or victim of crime should be required to surrender his personal safety to a criminal, nor should a person or victim be required to needlessly retreat in the face of intrusion or attack.” As this Court stated in State v. Jones, 416 S.C. 283, 296-97, 786 S.E.2d 132, 139 (2016): “Section 16-11-440(C) is broadly worded” and it states a defendant has no duty to retreat and has a right to stand his ground.

Pursuant to § 16-11-440(C), respondent was not engaged in an unlawful activity, and the Cook Out restaurant, the Lexington High hangout, was a place where respondent “had a right to be.” It was therefore erroneous to reason respondent was at fault for the ultimate harm because he went to the Cook Out that night. It was equally erroneous to reason that respondent had the duty to retreat from the Cook Out when trouble started that respondent did not cause. Both circuit court judges erred as a matter of law by reasoning respondent had a duty to retreat and that he had a duty to avoid the Cook Out restaurant where it was a place he had a right to be as long as he was acting lawfully, which he was. The Court of Appeals correctly emphasized this portion of the law in its opinion.

### CONCLUSION

Based on the foregoing argument, this Court should deny certiorari.

Respectfully Submitted,



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ATTORNEYS FOR RESPONDENT

This 17th day of January, 2025.