THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

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

Appellate Case No. 2024-002019

THE STATE,

Petitioner,

vs.

KIERIN MARCELLUS DENNIS,

Respondent.

REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT IN REPLY

Contrary to Respondent Dennis' argument in his Return to the Petition for Certiorari ("Return"), the Court of Appeals erred in its' published opinion in State v. Dennis, 444 S.C. 353, 363, 907 S.E.2d 142 (2024), in determining a mistrial entitles a criminal defendant to a new immunity hearing and determination under the Protection of Persons and Property Act ("the Act"). It does not. An immunity hearing is a statutory right to seek immunity **from prosecution**. S.C. Code §§ 16-11-410 to 450 (2006). It goes neither to evidence nor defense. *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."); *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 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."). Dennis misapprehends the nature of the pre-trial immunity determination when he suggests the law on pre-trial rulings as affected by a mistrial must be changed. (Rtn. at 18). Immunity is not a question for the jury and logically so.

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 Legislature could not have intended for a defendant to be granted a 2nd immunity hearing otherwise if the defendant received multiple mistrials, *for whatever reasons*, he would be entitled to multiple immunity hearings which would make no sense, not serve judicial economy, and be redundant. It could also result in the defendant being granted immunity after multiple mistrials, when multiple previous judges had denied immunity considering the same or similar evidence. It could also result in the same judge having to conduct another unnecessary immunity hearing if he is the trial judge upon retrial. 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. The Court of Appeals erred in ruling Dennis was entitled to a 2nd immunity hearing, and now a 3rd hearing. Dennis, *supra*. Dennis was only entitled to 1 immunity hearing, the one he had before Judge Russo and was appropriately denied immunity. Certiorari must be granted to correct this error.

Certiorari must also be granted because this appeal involves a question of exceptional importance to this State's criminal justice system. The 3-judge panel below issued a published Opinion, which is precedent if it remains unaltered. The panel held a criminal defendant upon mistrial or new trial is entitled to a new immunity hearing regardless of the reason for reversal, mistrial, or grant of new trial; and, regardless of whether the defendant had a full immunity hearing and denial with no legal or factual error. The holding has severe implications for our criminal justice system, the administration of justice, and an already overly crowded criminal docket, and does not serve judicial economy. Dennis does not address any of these concerns in his Return.

One can easily foresee circuit courts being required to conduct a new immunity hearing when there has been no showing of newly or after-discovered evidence under our case law, or when the same evidence is to be presented again. This would result in one circuit judge overruling

another circuit judge. A trial judge would be required to conduct a new immunity hearing when the grant of a mistrial or reversal had nothing to do with the pre-trial immunity hearing or denial. Under this published Opinion, one can easily foresee, a mistrial being granted due to something occurring during opening statement or the presentation of witnesses, and the court could not re-try the case until it granted another unnecessary immunity hearing.[1] A defendant could also provoke a mistrial during opening statement, presentation of witnesses, or closing argument, if he does not like the court's pre-trial immunity hearing ruling, in order to obtain a new immunity hearing under the published Opinion in this case. Further, one can foresee the State and the trial court being overly cautious in making a motion for a mistrial during trial or in granting the same, because the result will be the trial court will have to conduct an entirely new immunity hearing when it had previously heard and denied immunity under the Act. Certiorari must be granted, and the Opinion below must be reviewed to address these important concerns.

In his Return, Dennis still claims "new" evidence, the testimony of Bettini and Lynch, justified the grant of a 2nd immunity hearing. Dennis is wrong. This was not newly discovered evidence at all, but evidence provided by the State to Dennis which his counsel [of which he had 3] could have known by simply reviewing the discovery or by interviewing the witnesses disclosed **before the 1st immunity hearing** and could have presented **there,** but **Dennis failed to do so**. (R. 1668, ll. 7-25). Dennis admits as much when he asserts in his Return that Bettini and Lynch were interviewed at the scene and Bettini and Lynch were on both Officer Caitlin Voravudhi's and Officer Holliday's video cam footage at the crime scene. (Rtn. 12). Their written *and* recorded statements to police were disclosed to Dennis before the 1st immunity hearing which the State

[1] In fact, the mistrial could occur so early in the case, a new jury could be drawn [excluding the first jurors] and the case completed; yet, under the Court of Appeals' Opinion a trial judge would not be able to because he must conduct a new immunity hearing after mistrial.

asserted **and** Dennis repeatedly admitted below. **(R. 1668. ll. 7-25; 1669-70; 1679, ln. 23-1680, ln. 6; 1680, ln. 15-1681, ln. 5; 1681, ln. 24 – 1682, ln. 25; 1683, ln. 13-1684, ln. 9).** Bettini and Lynch's testimony cannot be newly or after discovered evidence. *State v. Spann*, 334 S.C. 618, 619-620, 513 S.E.2d 98, 99 (1999).[2]

Further, Bettini's *testimony* about her 911 call recited in the Opinion below was available to Dennis before the 1st immunity hearing as **her previous written and recorded statements to police were provided to Dennis before the 1st hearing. (R. citations above including R. 1680, ln. 15- 1681, ln. 5).**[3] Dennis admitted below that the portions of Bettini testimony that were so critical are on the video tape provided to him before the 1st immunity hearing. (**R. 1680, ln. 15-1681, ln. 5**). Dennis either made a strategic decision not to call her as a witness at the 1st immunity hearing or as Dennis asserted below, failed to review the discovery completely or interview Bettini before the 1st hearing. **(R. 1677, ln. 20-1684, ln. 9).** Her testimony cannot be newly or after discovered evidence. *Spann*.

Officer Caitlin Voravudhi, mentioned in the Opinion below, was also available at the 1st immunity hearing. Dennis simply failed to call her even though he had been provided with the

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[2] In order to establish after or newly discovered evidence, the party must show the evidence: (1) would probably change the result if a new trial is had: (2) has been discovered since the trial; (3) could not have been discovered before trial; (4) is material to the issue of guilt or innocence; and (5) is not merely cumulative or impeaching. Spann, 334 S.C. at 619-20, 513 S.E.2d at 99.

[3] Relying on the Court of Appeals' Opinion, Dennis, 444 S.C. at 361-62, 907 S.E.2d at 147, the Petition is incorrect in stating Bettini's 911 call was not recorded. It was recorded and inadvertently recorded over by the 911 agency 90 days after the crime. (R. 1876-90). The police timely requested all 911 calls for this crime before the 90 days, but through a clerical error the 911 agency did not provide Bettini's 911 call to the police because it was made from a different address than the crime, was the 2nd call and considered a duplicate, and was not logged on a CAD report. (R. 1876-90). The call was subsequently recorded over by the 911 agency. Before the 1st immunity hearing, the State requested any CAD reports of 911 calls, and they were told there was not one of Bettini. (R. 1876-90). It was only later, upon further request, the State received confirmation that Bettini did call 911 and this was turned over to the defense. (1876-90; 1681).

police and investigative file; her name is listed on the police report; and her camera footage of Bettini and Lynch was turned over to Dennis before the 1st hearing. The State did not hide her existence or the substance of her testimony from Dennis. Both the State and Dennis called her at the 1st trial before the jury. (R. 630-31; 1439-44). Dennis made a strategic decision not to call Voravudhi at the 1st immunity hearing or as Dennis argued below, Dennis failed to review the discovery completely and/or interview her before the 1st hearing. (R. 1677, ln. 20-1684, ln. 9). Her testimony cannot be newly or after discovered evidence. *Spann*.[4]

In his Return, Dennis argues Ervin Meggett as newly discovered evidence. The Court of Appeals mentions in its Opinion that one of Dennis' arguments for a 2nd immunity hearing was information Meggett told the Solicitor in *August of 2016*.[5] The Court mentions nowhere in its Opinion what Meggett actually testified to at the 2nd immunity hearing. Meggett could not remember stating what was contained in a Solicitor's Officer's summary of speaking with him in August of 2016, that *allegedly* the victim was in the wrong when he approached Dennis' vehicle as Dennis was leaving the *Cook Out*. (R. 2020-32). Regardless, it would not change the outcome. *Spann*. Meggett testified at the 2nd immunity hearing that **the victim was not leaning or reaching into Dennis' car** when stabbed. **The victim was standing straight up or erect** and **outside of**

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[4] Dr. Ross, mentioned in the Opinion below, was available before the 1st immunity hearing. She performed the autopsy. She issued an autopsy report. She was called as a witness in the 1st trial. (R. 1270-81). Ross' testimony cannot be newly or after-discovered evidence either. *Spann.*

[5] Meggett was captured in surveillance video from the time of the crime. He was with the victim when the victim was stabbed by Dennis. (R. 2023-25). The information Dennis complains about, Dennis admits, was relayed to the Solicitor after the 1st immunity hearing and denial of immunity by Judge Russo. (See Return, pp. 14-15). Dennis also admits the State turned this information over to him. (Id.). The State learned of Meggett after the 1st immunity hearing while preparing for trial and turned over its' interview notes immediately. (R. 1690-91). The State discovered Meggett by showing photos of Meggett at the crime scene to other witnesses in the case who identified him. (R. 1690-91). Dennis could have done the same before the 1st immunity hearing.

Dennis' vehicle when Dennis **reached outside of his vehicle and stabbed the victim** and then drove off. (R. 2020-32). Meggett actually contradicted the 2 other witnesses mentioned by the Court of Appeals in its Opinion, Bettini and Lynch. (R. 2020). Meggett's testimony does not meet the definition of newly or after-discovered evidence, because it could have been discovered before the 1st immunity hearing and would not have changed the result. *Id*. It confirmed the State's case and contradicted Dennis' defense. Further, the 2nd immunity hearing court, after hearing Meggett's testimony, denied immunity. **Of note**, **Dennis did not call Meggett at the 2nd trial before the jury.** *Spann.* No court, not Judge Russo, Judge Hood, or the Court of Appeals has found any of this so-called "new" evidence is actually newly or after discovered evidence under *Spann* and its progeny. No court has found a Brady[6] violation either. Certiorari must be granted to correct the Court of Appeals' error in granting a 3rd immunity hearing under these circumstances.

In his Return, Dennis continues to argue the Court of Appeals correctly reversed Judge Hood, the 2nd immunity hearing judge. This argument is completely irrelevant, and the entire argument is a red herring as Judge Hood's determination was gratuitous and unnecessary. Dennis was not entitled to a 2nd immunity hearing or determination. The Court of Appeals erred in not reviewing on direct appeal the denial of immunity by the 1st immunity hearing judge, Judge Russo (R. 2905-14), which was correct, and all Dennis was entitled to, and instead erroneously granted Dennis a 3rd immunity hearing, after only 1 conviction. The Court of Appeals erroneously ruled the 1st immunity hearing was a nullity without any finding of error, much less reversible error.

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[6] Brady v. Maryland, 373 U.S. 83 (1963). In order to establish a Brady violation, the defendant must show the evidence was: (1) favorable to him, either exculpatory, or impeaching; (2) was in the possession of or known to the prosecution; (3) was suppressed by the State, "either willfully or inadvertently"; and (4) was material to guilt or punishment. Id. at 87. Evidence is material only if there is a reasonable probability, had the evidence been disclosed to the defense, the result of the proceeding would have been different. Kyles v. Whitley, 514 U.S. 419, 438 (1995).

Judge Russo held a complete immunity hearing from November 17-19, 2014, including 14 witnesses' testimony, and denied immunity by Order filed February 10, 2015. (R. 2905-14). That transcript and Order were contained in the record before the Court of Appeals. (*See* ROA 1-586 and 2905-14). But the Court of Appeals did not review Judge Russo's immunity determination as it should and instead erred in determining Dennis was entitled to "a new" immunity hearing simply because the first trial ended in a hung jury. Certiorari must be granted to reverse the error.

The Court of Appeals also erred in addressing an argument the State never made. (Opinion, p. 6). The State did not argue Dennis should have filed an interlocutory appeal of the 1st immunity hearing. The State argued the remedy for Dennis was **to appeal the 1st immunity hearing Order** *after conviction by the jury that found him guilty*, precisely what Isaac, 405 S.C. at 182, 747 S.E.2d at 679, provides. The State's argument below and on appeal was and still is Dennis was only entitled to 1 immunity hearing, the one he had before Judge Russo, who denied him immunity under the Act. Dennis was not entitled to the 2nd immunity hearing before Judge Hood.[7] The immunity hearing determination the Court of Appeals should have reviewed on appeal from Dennis' conviction was the 1st immunity hearing denial of immunity by Judge Russo in his Order (R. 2905-14), which was all Dennis was entitled to. Certiorari must be granted to correct the Court of Appeals' error in addressing an issue the State never raised or argued.

Finally, the Court of Appeals' Opinion is misleading as is Dennis' Return, because in their recitation of the facts and procedural history of the case, the Court and Dennis nowhere explain Dennis brought on the difficulty in this case by **first challenging** DFHS students to fight or settle

[7] Instead, the Court of Appeals erroneously reviewed the 2nd immunity hearing and Judge Hood's denial of immunity. In that review, it criticized Judge Hood's use of the language "a quintessential jury issue." However, as noted above, Dennis already had a full hearing before Judge Russo. The 2nd hearing was unnecessary. A statement by Judge Hood could not undermine the finding of Judge Russo. Dennis ignores this in his Return.

this at *the Cookout* restaurant **while still at the high school just outside the basketball arena**.[8] This critical fact, which drove the decision of Judge Russo [and Judge Hood] to deny immunity, after a full immunity hearing, is completely left out of the Court's Opinion and which Dennis Return. Dennis denies this fact in his Return based on his testimony which was found not to be credible by the circuit court. Dennis also completely ignores in his Return the evidence presented at trial that he instigated the conflict beginning at the high school. Certiorari must be granted to correct the error of the Court of Appeals.

The Court of Appeals also omitted from its Opinion and Dennis ignores that Dennis eventually intentionally drove his car to the *Cookout* looking for DFHS students or fans for the previously mentioned fight that he instigated while still at the high school while outside the basketball arena.[9] While the Court of Appeals mentioned Judges Russo [and Hood] found this fact, the Court nowhere sets forth that there was actual testimony that this occurred **supporting Judge Russo's [and Judge's Hood's] finding that Dennis brought on the difficulty**. This is further aggravated by there was no mention in the Court's Opinion or Dennis' Return that Dennis began the conflict at the High School after the game by challenging DFHS fans or students to fight or settle this at the *Cookout*.

The Court of Appeals also omitted that after arriving at the *Cookout*, Dennis parked his car near the car wash, entered the *Cook Out* where numerous DFHS students and alumni were eating, left the restaurant, re-entered his car, drove to the *PetSmart* parking lot, communicated with his associates in their cars about how to leave the parking lot, watched 1 friend leave the parking lot

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[8] (Nov. 2014 R. 161, 178, 247, 252, 359-62; Aug. 2017 R. 2007-08; Aug. 2019 R. 2139, 2168-69 2182, 2598-99).

[9] (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).

without incident, watched his other friend drive near the crowd and taunt the crowd by throwing money out the window, Dennis intentionally pointed his car directly toward a group of DFHS students, and then drove his car from the area of the *PetSmart* aggressively into a group of DFHS students or fans near the *Cook Out* almost striking 2 of them which further instigated and aggravated the conflict with the DFHS students ***started at the high school***. And, Dennis then called 2 DFHS students over to his car and further instigated the conflict by taunting the group of DFHS students that they did not want what Dennis had in his car.[10] These facts were also critical in Judge Russo's [and Judge Hood's] determination that Dennis 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 Dennis was guilty of murder and did not act in self-defense. Yet, even though these facts drove the circuit court's determination of immunity, these facts are not mentioned anywhere in the Court of Appeals' Opinion or Dennis Return. Again, certiorari must be granted to correct the Court of Appeals' Opinion.

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

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[10] (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; Aug. 2019 R. 2218-28; 2230-34; 2100; 2486-88).

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 uses deadly force while the victim was unlawfully entering a dwelling, residence, or occupied vehicle that belonged to the defendant, 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). This presumption does not apply if defendant is engaged in an unlawful activity or is using the dwelling, residence, or vehicle to further an unlawful activity. S.C. Code Ann. §16-11-440(B)(3). Further, 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 the court must apply and analyze Section (C) at his hearing and the defendant must 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 Dennis 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 properly and correctly found Dennis had not proven by a preponderance of the evidence the victim was unlawfully entering his vehicle at any time before or while Dennis stabbed him as no fingerprints or DNA from the victim or any DFHS student or former student was found on or in Dennis's vehicle. Further, the testimony of whether the victim had put his hand inside Dennis's window varied wildly. Some testified the victim did not reach into Dennis' window. Others testified the victim only reached in after he was stabbed. That credibility determination was for Judge Russo. Judge Russo found Dennis' 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 in bringing on the difficulty. He was not entitled to a presumption of fear.

Specifically, the credible evidence was Dennis 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, he moved his vehicle, 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 at the high school, by not going into the restaurant and antagonizing those he had challenged to fight earlier, and by not driving his car into a group of DFHS students but simply leaving 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), (B), and (C) of the Act and properly denied immunity where Dennis instigated the conflict, further aggravated the conflict, goaded DFHS students, sought out the conflict, was not without fault in bringing on the difficulty, did not act reasonably or as a reasonable man in the circumstances, had other means of avoiding the difficulty than employing deadly force, could have retreated, and failed to prove he was entitled to immunity under the Act by a preponderance of the evidence. Certiorari must be granted to correct the Court of Appeals' errors in its published Opinion.

Dennis' also argues in his Return that the Court of Appeals did not err in making evidentiary findings on appeal as if it is a Circuit Court in an immunity hearing and in instructing the Circuit Court on whether it should find certain facts or presumptions favorable to Dennis on remand. (See "Duty to Retreat/Avoid the Danger" *Dennis*, 444 S.C. 369-72, 907 S.E.2d 151-52. Dennis is wrong. Not only is this portion of the opinion *dicta*, these evidentiary and legal findings in this section of the Opinion and directions to the Circuit Court to follow them would require the Circuit Court, which is the sole determiner of the facts and elements at an immunity hearing, to

follow the factual findings and legal conclusions of the Court of Appeals which would abdicate the Circuit Court's statutory role in immunity proceedings to the Court of Appeals. *S.C. Code Ann.* Sections 16-11-410 to 450 (2006); *State v. Manning*, 418 S.C. 38, 43, 791 S.E.2d 148, 150 (2016); *Isaac*, 405 S.C. at 187, 747 S.E.2d at 682; *Duncan*, 392 S.C. 404, 709 S.E.2d 662; *State v. McCarty*, 437 S.C. 355, 372, 878 S.E.2d 902, 911 (2022); *State v. Chhith-Berry*, 437 S.C. 527, 542-43, 878 S.E.2d 352, 360 (Ct. App. 2022)("[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.C. 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." 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."). The Court of Appeals duty was to conduct appellate review of the Circuit Court's immunity determination not to dictate what to find or what presumption to grant Dennis on remand. *Jones*, 416 S.C. at 290, 786 S.E.2d at 136 ("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 *Curry*, 406 S.C. at 370, 752 S.E.2d at 266. Respectfully, the Court of Appeals exceeded its appellate review and authority here, and it must be corrected by this Court otherwise Circuit Court Judges will feel obligated to follow this language of a published Opinion no matter what the facts are in a particular case. Certiorari must be granted.

Further, the Court of Appeals' factual determinations are incorrect. As Judge Russo [and Judge Hood] found, Dennis began and instigated the difficulty between himself and DFHS students **beginning at the high school** where he challenged them to fight or "settle this" later at the *Cook-Out*. Dennis drove to the *Cook-Out* and further instigated the conflict by going inside in the presence of DFHS students after challenging them **at the high school**. He then walked to his car, parked near the car wash, and again sought out DFHS students or fans by moving his car and driving to *PetSmart*, close to the *Cook-Out*, met with his associates discussing what they were going to do, maneuvered his car to where it pointed at DHFS students, and drove his car directly into several DFHS students almost striking 2 near the *Cook-Out.* This action escalated the conflict Dennis started even further. There was also evidence presented the victim did not lean or reach into Dennis' car. And Dennis signaled the DFHS students to come to his car and lured the victim to his car where Dennis was armed with a deadly weapon, a knife. Dennis provoked the stabbing. The stabbing also occurred where cars were visible passing Dennis' parked car indicating the conflict he started, he could have easily driven away from, i.e. he had other means of avoiding the difficulty. Dennis had already been inside the restaurant and returned to his car before he moved his car to a different area and then drove into the group of DFHS students or fans. He could have left long before the incident. Dennis 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 difficulty and murdered a human being. Certiorari must be granted to correct the Court of Appeals' factual errors.

The fact that Dennis was in his car does not mean he was in a place where he had a right to be.[11] Further, the credible evidence was the victim was stabbed outside the car. The Court of Appeals erred in giving the Circuit Court instructions on what it should find below and what presumptions it must apply in Dennis' favor on remand, as the credible record does not support Dennis was without fault in bringing on the difficulty, he acted reasonably after instigating the conflict, he had no other means of avoiding the difficulty, or he even was in a place he had a right to be. Further, the credible evidence below was that *the situs of the crime* was outside Dennis' car. Certiorari must be granted and this portion of the Court of Appeals' Opinion struck.

CONCLUSION

For the above stated reasons, this Court must grant the Petition for Writ of Certiorari and review and reverse the Court of Appeals' published Opinion in this case.

Respectfully submitted,

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[11] Otherwise, a defendant could drive a vehicle intentionally into a crowd on a public street, injuring or killing numerous victims, and claim because he was inside a car or truck, that he was in a place he had a right to be and was entitled to immunity under the Act or certain presumptions. Similarly, and defendant could be in his vehicle but trespassing, and when the lawful owner of the property sought to eject him, claim he was entitled to immunity under the Act or certain presumptions.