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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE 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.

BRIEF OF PETITIONER

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I. 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?

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

STATEMENT OF THE CASE

Kieren M. Dennis ("Dennis") was indicted for murder and possession of a weapon during the commission of a violent crime in 2014 by the Lexington County Grand Jury. The case was prosecuted by Solicitor Samuel "Rick" Hubbard, III, Deputy Solicitor Shawn Graham, and Assistant Solicitor Rhonda Patterson. Dennis was represented by Todd Rutherford, Simone Martin, and Nicole Simpson, Esquires. (Nov. 2014 R. 1; Oct. 2016 R. 619; Aug. 2017 R. 1657; Sept. 2017 R. 2041; Aug. 2019 R. 2095).

The 1st Immunity Hearing

Prior to trial, Dennis made a motion for immunity from prosecution pursuant to the Protection of Persons and Property Act, S.C. Code Ann. §§ 16-11-410 to 450 (2006), and a hearing took place pursuant to the procedure set forth in *State v. Duncan*, 392 S.C. 404, 709 S.E.2d 662 (2011), from **November 17 to 19, 2014** before **Circuit Court Judge Thomas Russo** ("the 1st immunity hearing"). (Nov. 2014 R. 1-618). Fourteen (14) witnesses were called at the hearing. On February 4, 2015, Judge Russo denied Dennis immunity by Order. (R. 2905-14).

The 1st trial

The case proceeded to trial by jury on October 3, 2016, which concluded in a mistrial due to an 11-1 hung jury on October 11, 2016. It was reported by the jury that the alignment was 11-1 to convict. (Oct. 2016 R. 1656).

The 2nd Immunity Hearing

Dennis moved for a new or second immunity hearing in June of 2017, alleging new evidence. The State objected that Dennis was not entitled to a new or second immunity hearing. A second immunity hearing ("the 2nd immunity hearing") was held before Circuit Court Judge Robert E. Hood on August 22 and 24, 2017 and September 18, 2017. (June 2017 Motion, R. 1665; Aug. 2017 R. 1657; Sept. 2017 R. 2041). Seven (7) more witnesses were called at this hearing.

Dennis was allowed to present his *so-called* new evidence. On October 11, 2017, Judge Hood issued a 2nd Order denying immunity. (Oct. 2017 Order, p. 2915; Aug. 2019 R. 2901-2902).

The 2nd trial

The case proceeded to a jury trial from August 19 to 27, 2019, after which the jury unanimously found Dennis guilty of murder. He was sentenced by the trial judge, the Honorable Eugene C. Griffith, to 30 years' imprisonment. (Aug. 2019 R. 2904)

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

Dennis appealed his conviction and sentence and subsequently submitted a brief in support of his appeal. Respondent filed a responsive brief. After oral argument, a three (3) judge panel of the Court of Appeals issued a published opinion granting Dennis a new immunity hearing [a 3rd immunity hearing] in the Circuit Court below. State v. Kieren Marcellus Dennis, Opinion No. 6082 (Ct. App. Filed August 14, 2024). The Court did not reach Dennis's 2 trial issues raised in his brief nor did it reverse Dennis's conviction of murder. In its Opinion, the Court of Appeals held that "after a mistrial," without any determination of an error occurring within the 1st immunity hearing, a criminal defendant is entitled to a new immunity hearing before his re-trial.

The Petition for Rehearing

The State filed a timely Petitition for Rehearing and Rehearing En Banc. In the Petition, the State argued the Court of Appeals' Opinion contained factual errors, wrong legal conclusions, misapprehended certain facts and law, and overlooked certain facts and law. On October 30, 2024, the Court of Appeals denied the Petition for Rehearing stating it had not overlooked any matter or misapprehended any fact, but the Court withdrew its original opinion and re-filed the Opinion.

State v. Kieren Marcellus Dennis, Opinion No. 6082 (Ct. App. Re-Filed October 30, 2024).[1] In the Opinion, the Court clarified that it did not reverse Dennis's conviction for murder, it only granted him a 3rd immunity hearing before another Circuit Judge. Id.

The Appeal to this Court

The State filed a Petition for Writ of Certiorari in this Court respectfully requesting that this Court grant a writ of certiorari to the Court of Appeals, review the Court of Appeals published opinion in this case, and reverse the Court of Appeals Opinion on two (2) basis:

> The Court of Appeals erred 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.
>
> The Court of Appeals further erred in misapprehending the facts of record, not reviewing Judge Russo's denial of immunity after the 1st immunity hearing, and in directing the lower court to make certain findings and conclusions upon remand.

(Pet. for Writ of Cert.). Dennis filed a Return to the Petition for Writ of Certiorari. The State filed a Reply to the Return. On April 22, 2025, this Court issued an Order granting the Petition for Writ of Certiorari and ordered briefing by both parties. This is the Brief of Petitioner, the State of South Carolina.

[1] The Court of Appeals' revised and re-filed opinion is now reported at *State v. Dennis*, 444 S.C. 353, 907 S.E.2d 142 (Ct. App. 2024).

PETITIONER'S STATEMENT OF FACTS

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

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

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

2218-28). One of Dennis's long-time friends, Austin Sanders, was leaving the *Cook-Out* when Dennis and his friends arrived, and he told the group, "Yeah, I was in the drive-thru and a whole bunch of Dutch Fork kids were just – started getting rowdy in the drive-thru, shaking people's cars, and stuff like that." (Nov. 2014 R. 250). Dennis and his friends chose to go into *Cook-Out* anyway. (Nov. 2014 R. 250). Inside were between 30 to 40 current and former DFHS students, including Devon Chatman, Alexis Brunson, Michael James, Lamar Butler, Kenneth Williams, and the 18-year-old victim, Da'Von Capers.[3] (Nov. 2014 R. 213, 592; Aug. 2019 R. 2100).

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

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

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

448, 463). Once they were in their 3 cars, Dennis drove from his parking spot near the car wash to another area of the parking lot, and Dennis and his friends pulled up next to each other in their cars and discussed for about 5 minutes how they would exit the parking lot. (Nov. 2014 R. 126-127, 257-258). Keith left the parking lot first and turned right toward Main Street. (Nov. 2014 R. 44-46). Will Zander drove next to the DFHS crowd and stopped his car, rolled down the window, and threw money out of the car, saying, "Hey, this what y'all are worth." (Nov. 2014 R. 544, 569). Dennis, in the *PetSmart* parking lot, maneuvered his vehicle to face the DFHS students while Will Zander was doing this, i.e. taunting the DFHS crowd. (Nov. 2014 R. 51, 327-328). Dennis then pointed his car at the crowd of DFHS students and rapidly accelerated his vehicle into the wrong lane of traffic and almost hit 2 Dutch Fork students, Tyreke Farrow and Devon Chatman, before finally stopping his car by the opposite curb. (Nov. 2014 R. 451-452, 543-547). Xavier Holliday had to push Tyreke out of the way to prevent Dennis's car from hitting him. (Nov. 2014 R. 547).

DFHS students then gathered around Dennis's vehicle and heated words were exchanged because Dennis had almost hit 2 DFHS students. (Nov. 2014 R. 412-413, 506, 547). Will Zander did not leave the parking lot after taunting the crowd but parked his car diagonally in front of Dennis's car, exited his vehicle, and got a metal pipe out of his trunk. (Nov. 2014 R. 50, 62, 135, 151). After approximately a minute of this heated exchange, Dennis motioned in a "come here" fashion to 2 of the DFHS students, rolled his window down further, and told them, "You don't want what I got. You don't want what I got."[4] (Nov. 2014 R. 436-438, 516, 548). Dennis was leaning over in his seat, slumped toward the center console with his right hand down and out of view when he rolled the window down further, grabbed a knife from the center console, and

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

abruptly stabbed Da'Von Capers, who was outside his driver's side window, in the chest. (Nov. 2014 R. 262-263, 285, 375-377, 453; 547-48; 553; Aug. 2019 R. 2230-34). Some witnesses testified that Da'Von Capers did not reach inside Dennis's vehicle and others testified that he did, some saying it was only after Dennis stabbed Capers in the chest. (Nov. 2014; 547-51; 553; R. Aug. 2017 R. 1729-31, 1893-94). Dennis then sped out of the parking lot and the victim was pronounced dead at Lexington Medical Center shortly after. (Nov. 2014 R. 372; Aug. 2017 R. 1907-08; Aug. 2019 R. 2230-35).

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

I. The Court of Appeals erred 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.

The Court of Appeals erred in its' published opinion in *State v. Dennis*, 444 S.C. 353, 363, 907 S.E.2d 142 (Ct. App. 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. A mistrial does not entitle a criminal defendant to another, 2nd, or 3rd immunity hearing. An immunity hearing is a statutory right to seek immunity **from prosecution**. *S.C. Code Ann.* §§ 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)(In the context of an intellectual disability exemption from capital proceedings, this Court held, like other pre-trial determinations, such as the denial of a defendant's claim of immunity under the South Carolina Protection of Persons and Property Act, we find the issue is proper for our review). *Cf. Curry*, 406 S.C. at 370, 752 S.E.2d at 266 ("A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard, which this court reviews under an abuse of discretion standard of review.").

The denial of immunity under the Act by Judge Russo, by Order (R. 2905-2914), after the 1st immunity hearing, was appealable after Dennis was convicted of murder, by the second jury as he was in this case.[5] The Protection of Persons and Property statute does not provide for an interlocutory appeal because the defense is not precluded from arguing self-defense at trial, i.e., the matter has not yet been concluded for purposes of Rule 201, SCACR, requiring "final judgment" for appeal). *S.C. Code Ann.* §§ 16-11-410 to 450 (2006). *See Brown v. County of Berkeley*, 366 S.C. 354, 362, 622 S.E.2d 533 (2005) (The trial court's interlocutory order denying the Appellant's Motion to Dismiss based on a qualified immunity claim was not an order involving the merits of the case or an order that affected a substantial right and as such could not be immediately appealed.); *Isaac*, 405 S.C. at 187, 747 S.E.2d at 682 (Order denying the defendant's request for an immunity hearing on charges of murder under the Protection of Persons and Property Act was not a final determination and thus was not an immediately appealable interlocutory order.).

As an immunity hearing ruling cannot be immediately appealed, Dennis certainly was not entitled to a new 2nd immunity hearing and ruling below before a final judgment had been rendered at all. Instead of waiting to exercise his legal remedy of a direct appeal after trial (if he had been found guilty at the 2nd trial), Dennis instead attempted to and halfway successfully convinced Judge Hood to redo the immunity hearing altogether, making superfluous Judge Russo's expenditure of time and effort and bypassing the direct appeal process.

This confusion further led directly to the Court of Appeals' Opinion in this case reviewing the 2nd immunity hearing and what Judge Hood did or did not do. There was no and is no legal purpose to conduct a 2nd hearing and Dennis was not entitled to a 2nd ruling on whether he was

[5] The Court of Appeals wrongly understood the State to argue a procedural bar because the denial of immunity was not appealed sooner. (See discussion infra at 17).

entitled to immunity. Judge Hood improperly, yet harmlessly, held a 2nd immunity hearing and issued a 2nd judgment regarding Dennis's non-entitlement to immunity. Dennis was simply not entitled to a 2nd immunity hearing, a second bite at the apple, on the question of immunity because of a mistrial. The 2nd immunity hearing was gratuitous.

Dennis misapprehends the nature of the pre-trial immunity determination when he suggests the law on pre-trial evidentiary rulings as affected by a mistrial must be changed if Respondent's argument is correct. 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 effect of the mistrial was to leave the parties in status quo ante, with the cause still *pending for trial* in the circuit court. The overruling of the motion for a directed verdict and the rulings made with reference to the admissibility and competency of the testimony resulted in no binding adjudication of the rights of the parties. Therefore, the appeal is prematurely brought, and jurisdiction thereof cannot be retained.").

The Legislature could not have intended for the defendant to be granted a 2nd immunity hearing otherwise if the defendant received multiple mistrials, *for whatever reasons*, he would be entitled to two, three, four, five .... [innumerable] immunity hearings which would make no sense, would not serve judicial economy, and would be redundant. It could also result in the defendant being granted immunity after multiple mistrials, when multiple previous trial 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 after a mistrial.

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 actually a 3rd hearing. Dennis was only entitled to 1 immunity hearing, the one he had before Judge Russo and was appropriately denied immunity.[6] This Court must correct the Court of Appeals' error.

The Court of Appeals also erred in relying on 2 Georgia cases which it cited in its Opinion for the proposition that Dennis was entitled to a new immunity hearing after a mistrial. Those cases are not controlling, instructive, or even persuasive, because in neither of those cases did the appellant receive an immunity hearing before trial and an order denying immunity as Dennis did in this case. See *State v. Hamilton*, 839 S.E.2d 560 (Ga. 2020); *State v. Remy*, 840 S.E.2d 385 (Ga. 2020). Here, Dennis received an immunity hearing before Judge Russo, an Order denying immunity from Judge Russo, a 2nd immunity hearing before Judge Hood, and another order denying immunity from Judge Hood. He remained in an *Issac* position. Further, the Court of Appeals cited *Hamilton* for one proposition but refused to follow *Hamilton* for another. *Dennis*, 444 S.C. 353, 365-67, 907 S.E.2d 142. The cases cited from Georgia are simply not persuasive in this setting. Dennis is not entitled to another, third, hearing and another, third, determination of immunity.

This appeal involves a question of exceptional importance to this State's criminal justice system. The 3-judge panel of the Court of Appeals issued a published Opinion in this case, which is precedent if it remains unaltered. The panel held for the first time that a criminal defendant upon

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[6] This is not to say there could never be a circumstance that allows for another review. Error found in an immunity hearing below on appeal has resulted in a new hearing or a defendant may show a previous *Brady* violation relevant to immunity before the 1st immunity hearing or newly or after discovered evidence, as defined by the law, relevant to immunity. See Rule 29, S.C.R.Crim.P. (motion for a new trial based on after-discovered evidence; *S.C. Code Ann.* Section 17-27-45(c)(2nd PCR action based on after-discovered evidence); *McCoy v. State*, 401 S.C. 363, 737 S.E.2d 623 (2013). This brief addresses repetitive hearings when no error has been found and no final judgment entered and the erroneous grant of a 3rd immunity hearing by the Court of Appeals.

mistrial or new trial is entitled to an entirely 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 of immunity with no legal or factual error. The holding has severe implications for the South Carolina criminal justice system, the administration of justice, and an already overly crowded criminal docket and does not serve judicial economy. Dennis did not address any of these concerns below or in his Return to the Petition for Writ of Certiorari, yet they are powerful reasons for this Court to address the Court of Appeals' holding and reverse.

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, which was already presented once before and immunity denied. This would result in one circuit judge overruling another circuit judge which is against our case precedent and Rules of Criminal Procedure. See *Cook v. Taylor*, 272 S.C. 536, 252 S.E.2d 923 (1979); *Irick v. State*, 264 S.C. 632, 216 S.E.2d 545 (1975); *Ex parte State: In re Brittain*, 263 S.C. 363, 210 S.E.2d 600 (1974); *Dukes & Dukes, Inc. v. Hygrade Food Products Corp.*, 236 S.C. 69, 113 S.E.2d 254 (1960); *State v. Harrelson*, 211 S.C. 11, 43 S.E.2d 593 (1947); *State v. Price*, 35 S.C. 273, 14 S.E. 490 (1892); Rule 4(b), S.C.R.Crim.P. (*numerous other citations omitted*).

Also, a trial judge would be required to conduct a new immunity hearing when he heard the exact same evidence before and denied immunity and the grant of a mistrial or reversal had absolutely nothing to do with the pre-trial immunity hearing or the denial of immunity. 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.[7] 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. One can also foresee defense attorneys arguing by extension that whenever a defendant is granted a new trial after verdict or after direct appeal, the defendant should be entitled to a new immunity hearing when there was nothing wrong with the original immunity hearing or the determination of the immunity hearing was not even raised on appeal and should be the law of the case. Further, one can foresee the State being overly cautious in making a motion for a mistrial and the trial court being overly cautious in granting the same, even when justified, 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. The Court of Appeals' Opinion must be reversed.

II. The Court of Appeals further erred in misapprehending the facts of record, not reviewing Judge Russo's denial of immunity after the 1st immunity hearing, and in directing the lower court to make certain findings and conclusions upon remand.

The Court of Appeals erred in citing to so-called "new" evidence in its Opinion to justify the grant of a new immunity hearing, which was not newly discovered evidence at all, but evidence Dennis had or could have discovered and presented at the 1st immunity hearing but failed to do so. The evidence presented at the 2nd immunity hearing before Judge Hood, that Dennis claimed was "new" was not "newly discovered evidence" but evidence that was available through the discovery provided to Dennis **before the 1st immunity hearing before Judge Russo** and could have been

[7] 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.

presented **at the 1st immunity hearing,** but **defense counsel chose not to or failed to present.** (R. 1668, ll. 7-25). *State v. Spann*, 334 S.C. 618, 619-620, 513 S.E.2d 98, 99 (1999).[8] The *so-called* new evidence was evidence that could have been discovered by simple investigation by defense counsel [of which Dennis had 3] using the discovery provided by the State and interviewing witnesses.

For example, Elizabeth Bettini, specifically discussed in the Court of Appeals' Opinion, **was called as a witness at the 1st trial by the defense.** (R. 1621-1649). Bettini was available to be called as a witness at the 1st immunity hearing. Bettini gave multiple statements to police shortly after the crime. These were **turned over to the defense before the 1st immunity hearing.** Her police body camera statements referenced by the Court of Appeals in its' Opinion were provided to defense counsel before the 1st immunity hearing as well. Yet, Dennis chose not to call Bettini at the 1st immunity hearing. Dennis either made a strategic decision not to call Bettini at the 1st immunity hearing or Dennis failed to interview Bettini before the 1st hearing. Regardless, the State did not prevent Dennis from interviewing Bettini and as noted in the Court of Appeals' Opinion, police only told Bettini shortly before trial not to talk *to the media.* (R. 1783, ll. 21-25). They did not tell Bettini at any time not to talk to defense counsel. (R. 1783, ll. 21-25). Bettini's testimony **was not newly or after-discovered evidence** as defined by the case law. *State v. Spann*, 334 S.C. at 619-620, 513 S.E.2d at 99 (evidence is newly or after-discovered evidence only if it could not have been discovered before trial).

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[8] 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.

The same is true of Zachary Lynch, the employee of *Cook-out* discussed in the Court of Appeals' Opinion. He was also **available as a witness at the 1st immunity hearing before Judge Russo**. In fact, Lynch was called as a witness at trial before Judge Griffith by Dennis. (Tr. 1448-1475). Police took a statement from Lynch shortly after the crime, and it was turned over to Dennis **before the 1st immunity hearing before Judge Russo**. Lynch can also be heard on Officer Caitlin Voravudhi's body camera footage the night of the crime which was also provided to defense counsel **prior to the 1st immunity hearing**. The State did not hide Lynch's purported testimony from Dennis. Despite having all this information available about Lynch prior to the 1st immunity hearing, Dennis chose not to call Lynch as a witness at the 1st immunity hearing. Dennis either strategically chose not to call Lynch at the 1st hearing or Dennis failed to interview Lynch before the 1st immunity hearing. Either way, this **is not** newly or after-discovered evidence as recognized by the law. *Spann*, 334 S.C. at 619-620, 513 S.E.2d at 99 (to constitute newly or after-discovered evidence, the evidence could not have been discovered before trial).

Dennis admitted as much in his Return to Certiorari 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. (Return, p. 12). Their written and recorded statements to police were disclosed to Dennis before the 1st immunity hearing, which the State 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. *Spann*, 334 S.C. at 619-620, 513 S.E.2d at 99.

Further, Bettini's *testimony* about her 911 call recited in the Court of Appeals' Opinion 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).[9] Dennis admitted below that the portions of Bettini's 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 also admitted below:

> And so did they turn over the evidence of Zachary Lynch and Beth Bettini that was listed in our motion? Absolutely.

(R. 1680, ll. 1-3). Dennis then goes on to admit the State turned over the videos and audios in a stack of disks before the 1st immunity hearing but argued there was so much discovery he could not review it all. (R. 1680, ll. 3-11). Dennis then admits again that the State turned over the discovery in the case but complains about statements that police did not take and how the police took the statements they did take, and compares this case to a General Motors [products liability] case and so he missed things in the discovery provided. (R. 1682, ln. 23-1683, ln. 12). Dennis either made a strategic decision not to call Bettini as a witness at the 1st immunity hearing or **as Dennis asserted below**, Dennis failed to review the discovery thoroughly or interview Bettini before the 1st hearing. **(R. 1677, ln. 20-1684, ln. 9).** Her testimony cannot be newly or after discovered evidence as defined by our law. *Spann*. This cannot be the basis for a new immunity hearing either. Otherwise, our lower courts would have to engage in numerous immunity hearings

[9] Bettini's 911 call 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 fact was turned over to the defense. (1876-90; 1681).

where counsel failed to recognize some fact in the discovery that he deems relevant or important to the case.

Officer Caitlin Varavudhi, also mentioned in the Court of Appeals' Opinion, was also available before and at the 1st immunity hearing. Dennis simply failed to call her as a witness even though he had been provided with the police and investigative file, her name is listed on the police report, and her body cam footage of Bettini and Lynch was turned over to Dennis before the 1st immunity hearing. The State did not hide her existence or the substance of her testimony from Dennis. Dennis simply chose not to call her at the 1st immunity hearing. Both the State and Dennis chose to call her at the 1st trial (R. 630-31; 1439-44). Dennis either made a strategic decision not to call Varavudhi at the 1st immunity hearing or as Dennis argued below, **Dennis failed to review the discovery thoroughly and/or interview her before the 1st hearing.** (R. 1677, ln. 20-1684, ln. 9). Either way, her testimony **was not** and **cannot be** newly discovered or after discovered evidence under our case law because it could have been discovered before trial. *Spann*, 334 S.C. at 619-620, 513 S.E.2d at 99.

Further, Dr. Janice Ross, mentioned in the Court of Appeals' Opinion, was available before and at the 1st immunity hearing as well. She was the pathologist who performed the autopsy on the victim. She issued an autopsy report. The State provided Dennis with her report before the 1st immunity hearing. She was called as a witness in the 1st trial itself. (R. 1270-81). The State did not hide her testimony or findings from Dennis. Dennis simply chose not to call her as a witness at the 1st immunity hearing. Dennis made a strategic decision not to call Dr. Ross at the 1st immunity hearing or Dennis failed to interview Dr. Ross before the 1st immunity hearing. Either way, Dr. Ross's testimony **is not** and **cannot be** newly or after-discovered evidence as defined by our case law. *Spann*.

Dennis argues Ervin Meggett as newly discovered evidence. The Court of Appeals mentions in its' Opinion that one of Dennis's arguments for a new [2nd] immunity hearing was information Ervin Meggett told police [actually the Solicitor] in August of 2016.[10] The Court of Appeals mentions nowhere in its Opinion what Meggett actually testified to at the 2nd immunity hearing. 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's vehicle when Dennis was leaving the *Cook-Out*. (R. 2020-2032). 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's vehicle when stabbed. The victim was standing straight up or erect** and **outside of Dennis's vehicle** when **Dennis reached outside of his vehicle and stabbed the victim** and then drove off. (R. 2020-2032). 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 it would not have changed the result. *Spann.* It confirmed the State's case and contradicted Dennis's defense. Of note, **Dennis did not call Meggett at the 1st or 2nd trial before either jury.** *Id.* 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

[10] Meggett was captured in a surveillance video from the time of the actual crime. He was with the victim when the victim was stabbed by Dennis. (R. 2023-2025). 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 to Cert., 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. *Spann.*

its progeny. No court has found a *Brady*[11] violation either. This Court must correct the Court of Appeals' error in granting a 3rd immunity hearing under these circumstances.

In summary, the Court of Appeals' Opinion is factually incorrect and misleading because it implies Dennis did not receive a fair 1st immunity hearing before Judge Russo because evidence was either hidden, not disclosed, or newly discovered before the 2nd immunity hearing before Judge Hood. This is incorrect, as argued below. The information Dennis presented at the 2nd immunity hearing from Bettini and Lynch, Dennis could have discovered simply by interviewing Bettini or Lynch, who he knew about, before the 1st hearing or calling Bettini or Lynch at the 1st hearing, or interviewing Officer Voravudhi, who he knew about, or calling Officer Voravudhi at the 1st hearing. Dennis could have called Dr. Ross, who he knew about, at the 1st immunity hearing as well. Dennis chose not to. These were decisions Dennis and his defense counsel made before the 1st hearing. They were not the fault of the State, the police, some agency, or circumstance.

The omission of critical facts in the Opinion also leads to a misleading impression. Chauncey Meggett testified he did not remember telling the Solicitor's Office what was contained in a Solicitor's summary of an interview with him, but he did clearly remember the victim was outside Dennis's car and standing straight up when Dennis stabbed the victim by Dennis reaching out his car window and stabbing the victim. Victim did not reach in Dennis's vehicle before being stabbed.

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[11] *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). Dennis cannot show a *Brady* violation because the State turned over all of the discovery as Dennis has admitted.

Dennis was not denied a fair 1st immunity hearing, he simply chose not to review the discovery provided thoroughly, not to investigate certain witnesses as available to him as the State, and to call different witnesses or not present certain evidence. The Court of Appeals' Opinion fails to acknowledge or point this out. The Opinion implies Dennis was somehow deprived of this information and fails to acknowledge if this information was not presented at the 1st immunity hearing it was Dennis's own fault. In fact, no Court, not Judge Russo, Judge Hood, or the Court of Appeals have found any of this so-called "new" evidence is actually newly discovered evidence under *Spann* and its progeny. No court has found a *Brady* violation. The Court of Appeals' Opinion must be reversed.

The Court of Appeals also erred in not reviewing on direct appeal the denial of immunity by the 1st immunity hearing judge, the Honorable Thomas Russo, which was correct, and instead erroneously granted Dennis a 3rd immunity hearing, after only 1 conviction. Dennis was only entitled to 1 immunity hearing and Order, which he received from Judge Russo, (R. 2905-2914), which should have been reviewed on appeal by the Court of Appeals but was not. This Court should review Judge Russo's determination on the issue of immunity, which was correct.

The Court of Appeals erred when it ruled the 1st immunity hearing was a nullity without any finding of error, much less reversible error. Judge Russo held a complete immunity hearing on November 17-19, 2014. The record shows that testimony was received from multiple witnesses [14 in all]. Judge Russo denied immunity in an Order filed on February 10, 2015. (R. 2905-2914). A jury trial was held in October 2016. The jury could not return a verdict (reporting that they were 11 to 1 in favor of conviction). The 1st immunity hearing transcript, and the February 2015 Order of Judge Russo denying immunity from that hearing, were contained in the record before the Court of Appeals. (*See* ROA 1-586 and 2905-2914). But the Court of Appeals erred in not reviewing

Judge Russo's immunity determination and erred in determining that Dennis was entitled to "a new, full immunity hearing" simply because the first trial ended in a hung jury.

The Court of Appeals also completely misunderstood the State's argument as to appealability. The Court of Appeals first stated that it rejected the State's argument that "...Dennis was precluded from receiving a new immunity hearing because he failed to appeal the denial of immunity after the first immunity hearing." (*Dennis*, 444 S.C. at 363, 407 S.E.2d 142). This statement is wrong. The Court of Appeals addressed an argument the State never made. The State submitted that the remedy was for Dennis **to appeal the 1st immunity hearing Order after judgment**, i.e. after conviction by the second jury that found him guilty, precisely what *State v. Isaac*, 405 S.C. 177, 182, 747 S.E.2d 677, 679 (2013), provides. The State's argument below and on appeal was and still is Dennis was only entitled to 1 immunity hearing, the hearing he had before Judge Russo, who denied him immunity under the Act by Order. Dennis was not entitled to the 2nd immunity hearing before Judge Hood, which was completely gratuitous.[12] The immunity hearing determination the Court of Appeals should have reviewed on appeal from Dennis's conviction was the 1st immunity hearing denial of immunity by Judge Russo in his Order (R. 2905-2914), which was all Dennis was entitled to.

Finally, the Court of Appeals' Opinion is misleading because in its recitation of the facts and procedural history of the case, the Court nowhere explains Dennis brought on the difficulty in this case by **first challenging** DFHS students **to fight at *the Cook-Out*** restaurant **while still at**

[12] 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 and gratuitous. A statement by Judge Hood could not undermine the finding of Judge Russo.

the high school just outside the basketball arena.[13] This critical fact, which drove both the decision of Judge Russo [and Judge Hood] to deny immunity, after a full immunity hearing, is completely left out of the Court of Appeals' Opinion and is nowhere mentioned. *Dennis*, supra. Dennis denies this fact in his Return to the Petition for Certiorari based on his testimony which was found not to be credible by the Circuit Court. Dennis also tellingly completely ignored in his Return to the Petition for Writ of Certiorari the evidence presented at trial that he instigated the conflict beginning at the high school. The Court of Appeals error omitting this critical fact must be corrected.

The Court of Appeals also omitted from its Opinion and Dennis ignores that Dennis eventually intentionally drove his car to the *Cook-Out* 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.[14] 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 of Appeals' Opinion 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 *Cook-Out*.

The Court of Appeals also omitted that after arriving at the *Cook-Out*, Dennis parked his car near the car wash, entered the *Cook-Out* restaurant where numerous DFHS students and alumni were eating, left the restaurant, re-entered his car, drove to the *PetSmart* parking lot, communicated

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

[14] (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).

with his associates in their cars about how to leave the parking lot, watched 1 friend leave the parking lot 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 intentionally 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.[15] 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 lower court's determination of immunity, these facts are not mentioned anywhere in the Court of Appeals' Opinion. The Court of Appeals' Opinion must be corrected.

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

[15] (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 Ann.* §§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 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 Ann.* § 16-11-440(C) (2006); *State v. Jones*, 416 S.C. 283, 294–97, 301, 786 S.E.2d 132, 138–39, 142 (2016). 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. *State v. 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 that 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's window. Others testified the victim only reached in after he was stabbed. That credibility determination was for Judge Russo. Judge Russo found Dennis's testimony **was not credible** regarding his belief that unlawful or deadly force was about to or was occurring and that he had not proven by a preponderance of the evidence **that he was not without fault in bringing on the difficulty**. He was not entitled to a presumption of fear.

Specifically, as Judge Russo found, 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 to another location in the parking lot rather than leaving the *Cook-Out*, he pointed his vehicle and accelerated his vehicle directly at DFHS students almost striking 2, 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 at the high school 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. The Court of Appeals should have affirmed Judge Russo's determination and erred in not doing so.

Judge Russo appropriately denied immunity as 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. The Court of Appeals erred in not reviewing Judge Russo's immunity determination. This Court must cure the error. This Court should review Judge Russo's immunity determination, and based on the record evidence, affirm Judge Russo's denial of immunity because he did not abuse his discretion. This Court must correct the Court of Appeals' errors in its published Opinion.

The Court of Appeals also erred in making evidentiary findings on appeal as if it is a Circuit Court in an immunity hearing and instructing the Circuit Court on whether it should find certain facts and presumptions favorable to Dennis on remand. (See "Duty to Retreat/Avoid the Danger" section of the Opinion, pp. 11-15; *Dennis*, 444 S.C. 369-72, 907 S.E.2d 151-52.). First, this portion of the Opinion is entirely *dicta* as it was unnecessary to the decision made in this case. *See Nash v. Tindall Corp.*, 375 S.C. 36, 40-41, 650 S.E.2d 81, 83 (Ct. App. 2007) (explaining "dictum 'is a statement on a matter not necessarily involved in the case, ... is not binding as authority ..., [and] is not the court's decision.' " (quoting 21 C.J.S. *Courts* § 227 (2006)). Dictum is not the law. *Gordon v. Lancaster*, 425 S.C. 386, 395, 823 S.E.2d 173, 177 (2018)(Few, J. concurring). This Court must grant certiorari and correct this portion of the Court of Appeals' Opinion.

Second, and even more troubling, these evidentiary and legal findings of the Court of Appeals in this section of the Opinion and directions to the Circuit Court to follow them, *Id.*, 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, 878 S.E.2d 902 (2022). This Court has repeatedly held a Circuit Court may not abdicate its fact finding and legal conclusion determinations in an immunity hearing to another body. *State v. McCarty*, 437 S.C. 355, 372, 366, 878 S.E.2d 902, 911 (2022)("[T]he circuit court must weigh the evidence and make its own credibility and factual findings before reaching a decision as to immunity"); *State v. Chhith-Berry*, 437 S.C. 527, 542-43, 878 S.E.2d 352, 360 (Ct. App. 22)("[T]he [trial court's [immunity ruling must be based solely on the evidence

presented at the pretrial hearing[.]"); *State v. Cervantes-Pavon*, 426 S.C. 442, 452 827 S.E.2d 564, 569 (2019); *State v. Glenn*, 429 S.C. 108, 116, 838 S.E.2d 491, 495 (2019); *McCarty*, 437 S.Ct. at 375, 878 S.E.2d at 913 ("the circuit court is in the best position to assess witness credibility and make the necessary findings of fact"); *State v. Gray*, 488 S.C. 130, 141, 882 S.E.2d 469, 475 (Ct. App. 2022)("[T]he trial court must sit as the fact-finder at this hearing, weigh the evidence presented, and reach a conclusion under the Act." And, it must not abdicate its role); *State v. Ford*, 439 S.C. 261, 886 S.E.22d 710 (Ct. App. 2023) ("[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 to the Circuit Court what to find or what inference to grant to 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 in this section of the Opinion, and the Opinion 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.

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 / "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 into or touch Dennis's 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's parked car indicating the conflict that 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 conflict and murdered a human being. This Court must correct the factual errors of the Court of Appeals in its' Opinion.

The fact that Dennis was in his car does not mean he was in a place where he had a right to be. 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, a defendant could be in his vehicle but trespassing, and when the lawful owner, lessee, or invitee of the property properly sought to eject him, kill that person and claim he was entitled to immunity under the Act or certain presumptions. That was never the intent of the Legislature as set forth in the Act. Further, the credible evidence is 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's favor on remand, as Judge Russo found 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 *the situs of the crime* was outside Dennis's car. This portion of the Court of Appeals' Opinion must be struck.

CONCLUSION

For the above stated reasons, this Court must reverse the Court of Appeals Opinion, affirm Judge Russo's denial of immunity, and remand to the Court of Appeals for determination of the other 2 direct appeal issues raised by Dennis in his Initial Brief.

Respectfully submitted,

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