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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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

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Withdrawn, Substituted, and Refiled October 30, 2024)

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

THE STATE,

PETITIONER,

V.

KIERIN MARCELLUS DENNIS,

RESPONDENT.

APPELLATE CASE NO. 2024-002019

BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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1.

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

2.

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

RESPONDENT'S COUNTER ISSUES PRESENTED

1.

Did the Court of Appeals correctly hold Respondent was entitled to a new, full immunity hearing pursuant to the Protection of Persons and Property Act since the prior mistrial and pretrial immunity hearing held before the mistrial were both nullities, and Respondent was also entitled to a second full immunity hearing based on after discovered evidence and/or nondisclosed Brady v. Maryland, 373 U.S. 83 (1963) evidence?

2.

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

STATEMENT OF THE CASE

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

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

When the state chose to call the case to trial again, a limited pretrial immunity hearing pursuant to the Protection of Persons and Property Act, S.C. Code Ann. § 16-11-440(A) and (C), was held before the Honorable Robert E. Hood from August 22-24, 2017. Todd Rutherford represented respondent. Shawn Graham and Rhonda Patterson were the assistant solicitors.

Arguments on respondent's entitlement to immunity were held before Judge Hood on September 18, 2017. Respondent filed a Brief in Support of Defendant's Renewed Motion for Hearing Pursuant to S.C. Code § 16-11-440 (A)&(C) dated September 21, 2017. R. 2926-2935. By order filed October 16, 2017, Judge Hood denied respondent immunity. R. 2915-2921.

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

On August 14, 2024, after briefing and oral argument, the Court of Appeals held the circuit court erred by denying respondent a new, full immunity hearing after the mistrial since "when a case ends in a mistrial, it is considered a nullity and begins 'anew when called again for trial.'" State v. Dennis, 444 S.C. 353, 363, 907 S.E.2d 142, 148 (2024) (quoting State v. Woods, 382 S.C. 153, 158, 676 S.E.2d 128, 131 (2009)); App. 381. Accordingly, the court remanded the case for a new immunity hearing. Id. at 372, 907 S.E.2d at 152; App. 390.

On September 13, 2024, the state, with new appellate counsel, filed an eighteen page petition for rehearing and rehearing *en banc* accompanied by a forty-one page memorandum. On September 16, 2024, respondent filed a motion to strike the petition for rehearing and the memorandum because the state failed to comply with the fifteen page limit set forth in Rule 221(a), SCACR. App. 304-307. That same day, the state filed an amended petition for rehearing and rehearing *en banc* that complied with the fifteen page limit. App. 314-330. However, the amended petition was still accompanied by a forty-one page memorandum not contemplated by the appellate court rules. App. 331-373. By order filed October 30, 2024, the Court of Appeals stated it declined to "act on the motion to strike because it is now moot" given the state's amended petition for rehearing. App. 374. The court also withdrew its previously filed opinion and substituted a new opinion, which clarified the court did not reverse respondent's conviction, it only granted him a new immunity hearing. App. 374-390.

On December 9, 2024, the state filed a petition for writ of certiorari with this Court. Respondent filed a return to the petition for writ of certiorari on January 17, 2025. The state filed a reply on January 27, 2025. By order filed April 22, 2025, this Court granted certiorari. The state filed its brief of petitioner on May 22, 2025. This brief of respondent follows.

STATEMENT OF FACTS

First Immunity Hearing Before Judge Russo

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

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

After the game, respondent and his friends went to the Cook Out. The Cook Out was a "hangout spot" for Lexington students after sporting events. It was only two to three miles from Lexington High School, and it was not a Dutch Fork "hangout." R. 14, l. 21 – 15, l. 3; R. 222, l. 24 – 223, l. 1. Respondent, who was driving a gold Ford Explorer, parked at the carwash behind the Cook Out since the Cook Out parking lot was full. Will Zander, who was driving Morgan

Zander and Lucky Cook, also parked at the carwash while Keith Adams parked at the PetSmart adjacent to the Cook Out. R. 14, ll. 9-20; R. 250, ll. 7-10.

As respondent and his friends were walking toward the Cook Out, they ran into Austin Sanders, a fellow Lexington student, in the parking lot. R. 250, ll. 7-13. Sanders told respondent that while he was in the drive thru line, several Dutch Fork students approached and began shaking his car. The students were "rowdy" and harassed other people in the drive thru as well. R. 250, l. 13 – 251, l. 9.

After speaking with Sanders, respondent and his friends entered the front door of the Cook Out. Despite the Cook Out being a Lexington High "hangout," there were at least thirty to forty students from Dutch Fork inside. R. 17, ll. 8-16. As soon as respondent and his friends entered, Michael James, who attended Dutch Fork, approached respondent, threw his hands into the air, and asked, "That's all y'all brought?" *Respondent calmly responded, "We just came here to eat."* Respondent and his friends then waited in line to order food. R. 251, l. 10 – 252, l. 12 (emphasis added).

While they were waiting in line, respondent overheard Dutch Fork students "picking on Lucky [Cook] about his sweater." R. 252, l. 13 – 253, l. 3. Michael James, the same student who confronted respondent when he entered, stood up on a chair behind Keith Adams, put his fist over Keith's head, and motioned as if he was going to punch Keith. Respondent and his friends continued to ignore the Dutch Fork students and waited for their food. R. 253, ll. 3-13.

Given the uncomfortable atmosphere, respondent told his friends, *"Let's leave," and "we just need to go,"* but his friends wanted to wait for their food since they had already ordered. Respondent received a phone call and stepped outside. R. 253, l. 19 – 254, l. 11. Keith Adams followed respondent outside because he did not want respondent "outside by himself." R. 16, ll.

12-25. Shortly thereafter, Lucky Cook, Will Zander, and Morgan Zander also walked outside without their food. As the group of friends were standing by a trashcan outside, Michael James walked past them. R. 17, ll. 18-25. When James reached the middle of the parking lot, he turned around, threw his hands in the air, and asked, "Are you still salty?" Respondent *calmy* responded, *"The game was thirty, thirty-five minutes ago. Y'all won. Congratulations." To avoid any confrontation, respondent then told his friends, "Guys come on, let's go" and the group began walking toward their cars.* R. 254, l. 13 – 255, l. 8 (emphasis added).

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

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

Keith Adams eventually drove away first. R. 23, ll. 13-17; R. 87, ll. 5-9. He pulled forward and drove through the driveway between the Cook Out and the PetSmart. R. 22, l. 19 – 23, l. 17. There were numerous students from Dutch Fork standing on the curb and in the roadway near this exit. Keith explained that he took this exit because it was closest to the interstate where he was headed and because the other exit had a traffic light that "takes forever." Keith eventually turned right out of the parking lot onto the main road. R. 22, l. 21 – 23, l. 19.

Will Zander, who was directly behind Keith, followed the same path past the group of Dutch Fork students who were standing on the curb and in the roadway. Will explained that he did not take the other exit near the Cook Out drive thru because it was "too congested" and he "always" took the exit between the Cook Out and the PetSmart.

As Will was driving to the exit, he heard the Dutch Fork students in the roadway yelling. Will's driver's side window was already down. Will stopped his car, dug in his pocket, grabbed four dollars in cash and coins, and threw it out the window. R. 87, l. 5 – 88, l. 23. There was testimony Will said: "Hey, this is what y'all are worth." R. 543, l. 2 – 546, l. 15. Several students from Dutch Fork, including Devon Chatman and Tyreke Farrow, ran into the road to pick up the money. R. 89, ll. 7-20; R. 451, ll. 19-25.

After Keith Adams and Will Zander pulled away, respondent backed his car up so he could likewise leave through the main exit between the PetSmart and the Cook Out. After he reversed, respondent put his car back in drive and looked forward. When he looked up, he saw Will's car stopped in the roadway. It was surrounded by Dutch Fork students. R. 258, l. 7 – 259, l. 2. Respondent did not know at the time that Will had thrown money into the road. He feared the Dutch Fork students were going to attack Will. Respondent quickly drove forward to make sure Will was alright. R. 258, l. 12 – 259, l. 24.

Respondent stopped behind Will's car. As soon as respondent stopped, Dutch Fork students surrounded his vehicle and approached his window, which was still about halfway down from when he was talking to Keith. R. 281, ll. 3-7. The students were yelling at respondent, ordering him to get out of the car, and calling him names – "pussy" and "bitch." R. 260, ll. 8-13; R. 262, ll. 10-15. Hands started reaching into respondent's window. He thought they were trying to attack him and "forcefully" pull him out of the car. With his foot still on the brake, respondent leaned as far into his car as possible to get away from the Dutch Fork students. R. 260, ll. 13-19.

Joshua Brooks, who attended Lexington High, was at the Cook Out, and he watched as a "whole bunch" of Dutch Fork students crowded around respondent's car in the roadway. R. 222, l. 11 – 224, l. 25. The students were "banging" on respondent's car "trying to scare him." Others were reaching in respondent's window. R. 225, ll. 1-3. Respondent could not leave because Will Zander's car was parked directly in front of him. R. 226, ll. 14-21. Brooks knew Will and respondent were greatly outnumbered and they "were being threatened" by the Dutch Fork students. R. 224, l. 13 – 225, l. 15.

Respondent was scared and he feared for his life at this time. R. 260, ll. 19-20. He could not leave because Will's car was parked in front of him and there were Dutch Fork students in front and around his car. R. 265, l. 22 – 266, l. 17. Respondent had a knife in his center console. He grabbed it, reached across his body with his right hand, struck, and then drove away. R. 262, l. 22 – 263, l. 2. He did not realize he had stabbed anyone. R. 268, ll. 15-20. Brooks remembered watching respondent drive off followed by Will. R. 224, l. 13 – 225, l. 15.

Kenneth Williams, who attended Dutch Fork, was standing on the curb by the roadway at the Cook Out. He saw Will Zander stop in the middle of the road and throw money out his

window. Several Dutch Fork students, including Tyreke Farrow and Devon Chatman, ran into the road to pick up the money. Williams said respondent pulled up "pretty fast" behind Will and claimed that he almost hit Farrow and Chatman. This upset the Dutch Fork students. They all "lined up" outside respondent's window. Although Williams never approached respondent's window, he maintained that he saw respondent's hand come out of his window and strike Da'Von Capers, the decedent. He thought respondent just pushed Capers until Capers said, "they got me" and ran to a vehicle. R. 449, l. 20– 453, l. 24. *Williams later admitted that he saw Capers reach into respondent's window*, but he strangely maintained it was after respondent had stabbed Capers. R. 469, l. 4 – 470, l. 5 (emphasis added).

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

Alexis Brunson, who also attended Dutch Fork, did approach respondent's car after she contended he almost hit several students in the roadway. She confronted respondent and yelled, "What are you doing? Are you crazy? You almost ran over some of our students." R. 512, l. 5 – 513, l. 21. Brunson was livid. She claimed she did not see anyone touch respondent's car or reach in his window. Respondent had his hand down by his thigh and Brunson maintained respondent said, "You don't want this. You don't want what I got." Brunson saw respondent

punch Da'Von Capers with his right hand. She claimed respondent's hand came out of the window when he punched. R. 515, l. 16 – 517, l. 11. She did not see a knife. R. 529, ll. 1-5. After Capers was struck, Brunson said Capers tried to punch back, but respondent drove away. Brunson maintained there was nothing stopping respondent from leaving. She claimed he was not blocked in. R. 517, l. 16 – 518, l. 6. Brunson admitted she did not know if Capers threatened respondent before respondent struck him. R. 537, ll. 4-24; R. 539, ll. 1-5.

Tyreke Farrow, another Dutch Fork student, was crossing the street to the PetSmart when he saw Will Zander throw money into the road. When Farrow was in the road, he said he saw "a car coming full speed" toward him. Farrow jumped and his cousin, Xavier Holiday, pulled him out of the way. Farrow identified respondent as the driver of this car. He claimed he would have been hit if he had not jumped out of the way. R. 543, l. 2 – 547, l. 15.

Farrow walked up to respondent's car and said, "What the fuck are you doing? Are you trying to hit me with your car?" At least seven other Dutch Fork students approached the car, including Xavier Holiday, Lamar Butler, and Da'Von Capers. Capers confronted respondent. He yelled, "What are you doing? You're trying to hit people in the road. Get out of your car if you want to hit people." Farrow claimed respondent said, "I got something for y'all. Hey, yo, come here, come here." Farrow said respondent then struck Capers with his right hand and drove away. R. 547, l. 16 – 548, l. 14. Farrow saw respondent's hand come out the window, but he did not see a knife. R. 553, l. 6 – 554, l. 11. According to Farrow, no one touched respondent's car or reached into the window. R. 550, ll. 20-24.

Lamar Butler, who also attended Dutch Fork, saw Will Zander throw money into the road. He also testified that Will said, "This is what y'all are worth." R. 568, l. 17 – 569, l. 24. At least three Dutch Fork students went into the road to pick up the money, including Tyreke

Farrow. R. 570, ll. 6-23. Respondent sped forward and Butler maintained he almost struck them with his car. Xavier Holiday pulled Farrow out of the roadway. R. 371, ll. 1-25.

When respondent stopped in the roadway, Farrow, Holiday, Butler, and Da'Von Capers all approached respondent's car. Capers was the closest to the window. R. 574, l. 4 – 575, l. 24. Butler claimed respondent motioned for Capers to come closer. R. 577, ll. 5-20. However, he admitted he could not really see what was going on because his view was blocked by other students. Butler thought respondent pushed Capers because Capers stumbled back into Farrow, but Butler never saw respondent strike Capers or saw respondent's hand come out the window. After Capers stumbled, respondent drove away. Butler claimed he never heard Capers say anything to respondent and that Capers never reached into respondent's window. However, again, Butler admitted his view was blocked by other students in front of him. R. 575, l. 25 – 578, l. 15.

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

Judge Russo also found respondent failed to establish the elements of self-defense. R. 2913. He concluded respondent did not show he was without fault in bringing on the difficulty because respondent "approached a crowd of Dutch Fork students near the curb at an accelerated

rate of speed in the oncoming lane of traffic, nearly hitting at least two Dutch Fork students, and with a weapon at his side." R. 2913. He further found respondent's testimony that he was unable to leave after he stopped in the roadway was not credible. R. 2913. Assuming respondent established the second element of self-defense, that he actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, Judge Russo found respondent failed to show that a reasonably prudent man of ordinary firmness and courage would have entertained the same belief. R. 2913. Lastly, he found respondent "could have left" but "kept his vehicle stationary." R. 2913. Accordingly, Judge Russo concluded respondent could and should have retreated.

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

Second Immunity Hearing Before Judge Hood

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

In fact, the defense had three newly discovered or not disclosed by the state key witnesses. The first was Beth Bettini, who went to see the Solicitor on her own volition. The

solicitor's office belatedly admitted Bettini called 911 during the Cook Out incident despite initially claiming they had no record of her call. Defense counsel emphasized that Bettini's testimony rebutted any contention that respondent "could have left at any time. *She said he couldn't have left. He would have run over them [the Dutch Fork students]. He couldn't leave. I saw the fear in his face, an independent witness, not a Lexington kid, not a Dutch Fork kid.*" R. 1680, l. 15 – 1681, l. 23 (emphasis added).

The second newly discovered witness was Ervin Chauncy Meggett, who gave a statement to the solicitor's office on August 26, 2016, after Judge Russo denied respondent immunity. Meggett told the solicitor's office, even as a "Dutch Fork kid," *that respondent was trying to leave and "Cape [the decedent] went up and banged on his car. Cape was wrong.* This is a statement that the Solicitor's Office got in August of 2016 that they turned over to us." R. 1677, l. 20 – 1678, l. 18 (emphasis added). Defense counsel emphasized that the state very early on decided to charge respondent, and counsel's status as a legislator worked against respondent because the solicitor's office maintained, "We need to get it scheduled before you go back in session." R. 1678, l. 5 – 1680, l. 1.

Third, defense counsel cited the newly discovered witness Zachary Lynch, an employee of the Cook Out, who was outside at the time respondent was attacked in the parking lot. "Apparently now literally today we believe that that [Lynch] statement was written with Officer Holiday. Didn't testify in the stand your ground [immunity hearing]. Didn't testify in the trial and it comes out because we now, *the Solicitor's Office called us yesterday at 6:00 and said, hey, or emailed us at 6:00 and say, hey, Zach Lynch also appears and Beth Bettini also appeared seven minutes into Officer Holiday's tape...*" R. 1681, l. 24 – 1689, l. 2. Lynch had critical

testimony that he saw the decedent and apparently others reaching into respondent's car at the time respondent stabbed the decedent. R. 1681, l. 24 – 1689, l. 2.

Caitlin Voravudhi, a patrol officer with Lexington Police Department, was the first witness during the limited hearing. She was one of the first officers who responded to the scene. R. 1702, l. 24 – 1703, l. 4. She received a call from dispatch indicating there was a fight in progress at the Cook Out. R. 1705, ll. 4-14. When she arrived, there were about forty younger people in the parking lot and some adults. Voravudhi attempted to control the scene and speak with witnesses. R. 1703, ll. 8-21.

While Voravudhi was not wearing a body camera that night, the dash camera from her patrol car was recording both audio and video. Her dash camera was pointed toward the carwash and not the Cook Out. R. 1704, l. 12 – 1706, l. 24. Voravudhi spoke to Beth Bettini, the original complainant who called 911, and Zachary Lynch, a Cook Out employee. Voravudhi also took a written statement from Bettini and Lynch. R. 1710, ll. 22-24; R. 1716, l. 10 – 1717, l. 4; R. 2936-2937. Voravudhi turned over both written statements and her dash camera footage, which included her interview of Bettini and Lynch, to investigators. R. 1722, ll. 3-12; R. 1727, l. 12 – 1730, l. 5.

Beth Bettini testified that she entered the Cook Out parking lot through the rear entrance. When she turned the corner, she saw thirty to forty teenagers in the Cook Out parking lot. They were "screaming, hollering, cussing, acting crazy." Bettini had her windows down. She saw a light colored SUV come to a complete stop in the driveway because there were students blocking the road. The students surrounded the SUV and started yelling at the driver. They were calling him names and threatening him. They were yelling, "Fuck you. We'll kick your ass." She saw a

student throw a drink at the car. The driver said, "Y'all leave me the fuck alone or get the fuck away from me." R. 1773, ll. 3-6.

Bettini called 911 and described what she was witnessing. She thought there was about "to be a fight." She told the dispatcher that the driver of the light colored SUV – whom she identified as respondent – "looked scared to death" and she thought the other students were going to hurt him. R. 1771, l. 1 – 1774, l. 15. She explained that respondent could not leave because there were students in front of his car. He would have had to have hit them to leave. R. 1776, ll. 5-7.

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

Zachary Lynch was working at the Cook Out that night. R. 1817, ll. 3-11. He was outside taking a break when the stabbing occurred. R. 1818, ll. 9-15. Lynch was standing near the dumpsters smoking. R. 1824, ll. 1-3. He had a clear view of the parking lot and the driveway between the Cook Out and PetSmart. R. 1824, ll. 14-22. Lynch saw respondent attempt to pull out and leave. There were students in the roadway blocking respondent from leaving. There were also students standing along the sidewalk next to the roadway. The students were "taunting" respondent, calling him names, and acting "malicious." They all gathered outside respondent's window. R. 1826, ll. 2-8. One student threw a drink at respondent's car. Lynch saw a student reach inside respondent's window with his hand "forward." Lynch thought this person was trying to grab respondent. When he later learned there had been a stabbing,

Lynch thought it was the person who leaned into respondent's window who "did the stabbing." After the person who leaned into respondent's car came back out, respondent drove away. R. 1825, l. 7 – 1828, l. 5.

Dr. Janice Ross, the pathologist who conducted the autopsy, testified the decedent's injury could have occurred while he was leaning over consistent with respondent's account. The decedent had a single stab wound to the left chest just underneath the nipple. The trajectory of the wound was "downward slightly toward the middle of the body and slightly backward." R. 1741, l. 16 – 1742, l. 2. Dr. Ross explained that based on the trajectory of the wound, "if the knife was going straight," the decedent had to have been *leaning over* with his head, neck, and chest parallel with the ground. R. 1743, ll. 14-24; R. 1747, ll. 2-19 (emphasis added). "Every percentage that [the decedent] stands up" from a position parallel with the ground, "the knife . . . has to raise up that same percentage in order to get the same trajectory." If the decedent was standing erect, respondent's hand would have had to have come up and struck downward, not straight across, in order to match the trajectory of the wound. R. 1747, l. 25 – 1748, l. 20. Dr. Ross acknowledged, "If the defendant were leaning back in the vehicle against the arm rest . . . that would impact how far the victim had to lean in or had to lean over in order to receive that stab wound if the defendant stabbed him with his right hand." R. 1750, ll. 4-9. She concluded, "If the victim was standing up, then the knife would have had to come up and down. If the victim was stooped over, then it [the knife] would have [had] to go kind of straight parallel to the ground." R. 1753, ll. 9-19.

Ervin Chauncy Meggett, who attended Dutch Fork, was interviewed by the solicitor's office on August 26, 2016, shortly before the mistrial due to the hung jury. R. 2020, ll. 18-22. Why Meggett was not interviewed earlier is not revealed from this record. Meggett was standing

outside respondent's window when the decedent was stabbed. R. 2023, l. 19 – 2024, l. 3. He told the state during his August 2016 interview that the decedent "was in the wrong" and that respondent was trying to leave when the stabbing occurred. R. 2022, ll. 10-16. He said the decedent was "banging" on respondent's car when respondent stabbed him. R. 2025, l. 14 – 2026, l. 3. Meggett said at the limited immunity hearing that he did not remember telling the state the decedent was in the wrong and that respondent was trying to leave. R. 2024, ll. 19-23; R. 2026, l. 22 – 2027, l. 1. All he remembered was some students were banging on respondent's car, but he did not know if the decedent was one of the individuals who was banging. R. 2022, ll. 10-24.

Meggett admitted he was subpoenaed to testify during respondent's first trial that ended in a mistrial. He was placed in a room with other potential witnesses. However, Meggett denied that those witnesses confronted him for previously saying "things that were unfriendly to Cape [the decedent]." The decedent was Meggett's friend. R. 2024, l. 24 – 2025, l. 13.

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

The order concluded, "Based upon the denial of immunity, the Court does not need to reach a ruling on the merits of whether or not the Defendant was entitled to a second hearing.

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

Appeal

In a published opinion, the Court of Appeals held the circuit court erred by denying respondent a new, full immunity hearing after the mistrial since "when a case ends in a mistrial, it is considered a nullity and begins 'anew when called again for trial.'" State v. Dennis, 444 S.C. 353, 363, 907 S.E.2d 142, 148 (2024) (quoting State v. Woods, 382 S.C. 153, 158, 676 S.E.2d 128, 131 (2009)); App. 381. Accordingly, the court remanded the case for a new immunity hearing. Id. at 372, 907 S.E.2d at 152; App. 390. The Court of Appeals further held the circuit court erred by finding that because there was conflicting evidence as to respondent's entitlement to immunity, self-defense was a jury issue, citing State v. Cervntes-Pavon, 426 S.C. 442, 451, 827 S.E.2d 564, 569 (2019). Id. at 368-69, 907 S.E.2d at 151-52. Lastly, the Court of Appeals emphasized S.C. Code Ann. § 16-11-440(A) and (C) of the Act "for the trial court's edification on remand." Id. at 369, 907 S.E.2d at 151; App. 385-390.

However, the Court of Appeals did not rule on whether Judge Russo, and subsequently Judge Hood, erred by denying respondent immunity from prosecution, which were separate issues respondent raised and fully briefed on appeal. The Court of Appeals also did not rule on the two evidentiary issues respondent raised, citing to Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not address remaining issues on appeal when its determination of a prior issue is dispositive). Id. at 372, 907 S.E.2d at 152; App. 390.

STANDARD OF REVIEW

"A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard, which [the appellate court] reviews under an abuse of discretion standard of review." State v. Curry, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." State v. Jones, 416 S.C. 283, 289, 786 S.E.2d 132, 136 (2016).

ARGUMENT

1.

The Court of Appeals correctly held Respondent was entitled to a new, full immunity hearing pursuant to the Protection of Persons and Property Act since the prior mistrial and pretrial immunity hearing held before the mistrial were both nullities, and Respondent was also entitled to a second full immunity hearing based on after discovered evidence and/or nondisclosed *Brady v. Maryland*, 373 U.S. 83 (1963), evidence.

Relevant Facts

On June 15, 2017, respondent filed a Renewed Motion for Hearing Pursuant to S.C. Code § 16-11-440(A) and (C). In his motion, respondent argued he was entitled to a new immunity hearing after his trial ended in a mistrial and because of newly discovered evidence. R. 2922.

On August 22, 2017, a hearing was held on respondent's motion before Judge Hood. The judge asked for a procedural history of the case. R. 1662, ll. 4-20. The attorneys confirmed there had been a prior immunity hearing held before Judge Russo. R. 1663, ll. 3-17. Deputy Solicitor Graham told the judge that Judge Russo denied immunity in an order dated February 4,

2015. R. 1663, l. 20 – 1664, l. 10. A subsequent jury trial ended in a hung jury and a mistrial. R. 1664, l. 11 – 1665, l. 2.

Defense counsel Rutherford told Judge Hood that the defense wanted the pathologist to testify at the new immunity hearing and that she could be in the courtroom around noon that day. R. 1665, l. 8 – 1666, l. 8. Solicitor Graham then stated:

> Your Honor, the motion that Mr. Rutherford filed *is asking for an entirely new hearing* and it looks like his number 4 is talking about new evidence consisting of testimony by Elizabeth Bettini stating she witnessed Da'Von Capers [the decedent] attack Kierin Dennis while in an occupied vehicle. Bettini then called 911 giving a detailed account of the incident based on her impressions of what she heard and we entered the dash cam into evidence. Then his fifth point talks about the 911 recordings never being produced at trial, no valid reason for giving further omission. He talks about a dash cam video during trial revealing Elizabeth Bettini's present sense impression on the attack unfolded as articulated during her testimony and that would be her testimony at trial that resulted in a mistrial.
>
> [Number] Seven talks about the manager of the Cook Out Restaurant on duty the night in question. His name is Zachary Lynch was standing outside while taking a break. He testified as to his vantage point during the attack on the defendant and recalled that Da'Von Capers was, in fact, the aggressor when Capers entered Kierin Dennis' occupied vehicle. Those are the only grounds that Mr. Rutherford is alleging in his motion as being new.

R. 1666, l. 11 – 1667, l. 8 (emphasis added).

Solicitor Graham argued there was no basis to give respondent what the state considered a "second stand your ground hearing. There is nothing that says you get two bites at that apple." R. 1666, l. 11 – 1669, l. 19. The state contended that to be allowed another hearing, the defense should have to file a motion pursuant to Rule 29, SCRCP, based on after discovered evidence. R. 1669, l. 3 – 1677, l. 18.

In his argument, defense counsel noted that in the event of a mistrial, there may never even be another trial. "It's up to the Solicitor's Office. It's not up to us." The defense correctly argued respondent was entitled to a new immunity hearing. R. 1688, l. 10 – 1689, l. 2.

The solicitor also incorrectly faulted the defense with not filing an appeal from the "stand your ground hearing that was denied." R. 1668, ll. 3-7. However, in State v. Isaac, 405 S.C. 177, 747 S.E.2d 677 (2013), this Court held that the denial of a defendant's request for immunity was no longer immediately appealable. It was an interlocutory order that was not appealable. Respondent, therefore, could not appeal the denial of immunity by Judge Russo because he had not been convicted. See State v. Rearick, 417 S.C. 391, 790 S.E.2d 192 (2016).

Moreover, as argued below, and as held by the Court of Appeals in its published opinion in this case, a mistrial is the equivalent of no trial, and it leaves the cause pending in the circuit court. See State v. Woods, 382 S.C. 153, 676 S.E.2d 128 (2009).

Further, defense counsel Rutherford noted the investigation continued after the first immunity hearing and the defense was now aware of the fact that Beth Bettini said respondent could not have left at the time of the stabbing because he would have had to run over two people. The solicitor's office had claimed there was no evidence of Bettini calling 911. However, the state later confirmed Bettini called 911. There was also a statement from Zachary Lynch, a Cook Out employee. The point of the defense was that, because of a deliberately sloppy investigation, where it was decided early on that respondent was guilty, Judge Russo had not considered relevant and compelling defense evidence at the prior immunity hearing. The solicitor's office had also been less than forthcoming with exculpatory evidence. R. 1677, l. 20 – 1689, l. 2.

After hearing arguments, Judge Hood said he would allow respondent to "proffer all of his testimony because let's play this out. Scenario number one is I say no, you're not entitled to

another hearing. There is no rule that permits it and I'm not gonna let you present anything. If we end up in an appellate situation at that point they could say return it for a hearing to determine whether or not the information mattered. So, I'm gonna skip that step all together. I'm gonna let Mr. Rutherford present this evidence, present whoever else he wants to in regards to the stand your ground issue and then if the State needs to reply to that, I will let them reply to that. If you don't need to reply to that, then I will review the entire testimony of the stand your ground hearing. Do we have that transcript?" The solicitor confirmed there was a copy of the prior immunity hearing transcript. The judge said he would review that prior transcript, as well as any "new evidence" the defense wanted to present at the limited hearing. The judge later said he would read and consider evidence from the jury trial, the mistrial. R. 1695, l. 6 – 1698, l. 1.

When the defense began telling the judge about Dr. Ross and the other witnesses it wanted to present, the court interrupted and said, "We're not gonna rehash the entire stand your ground [hearing]." The judge said he was only allowing the defense a limited hearing. R. 1698, l. 2 – 1701, l. 20.

At the limited immunity hearing held before Judge Hood on August 22 and August 24, 2017, he heard from Lexington police officer Caitlin Voravudhi, pathologist Dr. Janice Ross, Beth Bettini, Cook Out employee Zachary Lynch, and Ervin Meggett as defense witnesses. R. 1703-1875. The prosecution then presented 911 operator Nikki Rogers, Alexis Brunson, Devon Chatman, Investigator Marc Miramontes, and Investigator Brent Carter as witnesses. R. 1876-2032. Given the limited scope of the immunity hearing allowed, Judge Hood did not hear the testimony of Respondent Kierin Dennis, Keith Adams, William Zander, Morgan Zander, Joshua Brooks, or Bill Howard, who testified during the first immunity hearing before Judge Russo.

At the conclusion of the hearing, Deputy Solicitor Graham noted the judge had the transcript of the initial immunity hearing and of the trial (mistrial). R. 2032, l. 24 – 2033, l. 18. Graham asked: "If I could inquire what is your plan from here? I guess my question is, I don't know whether I need to renew all of my objections." The judge wondered if the attorneys thought he could get three weeks from court administration to review all of the evidence. R. 2033, l. 19 – 2034, l. 18. The judge said he would read "everything" and then he wanted to have a final hearing on "whatever legal arguments you want to [make]." R. 2034, l. 18 – 2035, l. 7.

An argument hearing was held on September 18, 2017, before Judge Hood. Defense counsel Rutherford argued the defense burden on immunity was only a preponderance of the evidence. R. 2044, l. 22 – 2046, l. 7. Counsel noted that Beth Bettini was an independent witness who tried to describe what happened to the solicitor's office before the trial. Bettini was told the prosecution had no record of her calling 911 on the night of the incident. "She is made to believe that they don't want to hear what she has to say, so much so that she calls my office two days into the trial to say, hey, I described what happened to the Solicitor's Office and they don't want to hear me." R. 2046, l. 8 – 2047, l. 22.

Defense counsel told the judge that he had practiced law for "a long time." He knew that 911 calls were recorded and documented. This called the integrity of the state's investigation into question. Counsel reminded the judge that he had now heard from Cook Out employee Zachary Lynch, who was an eyewitness. Lynch said, "He [the decedent] reached in the car and that's when he stabbed him." R. 2047, ll. 2-22. Defense counsel told the judge:

> *This proposition that the Solicitor is arguing that you don't get a second chance at a hearing, well, where in the law anywhere does a defendant not have a right to another hearing?* This is not a second trial wherein the burden would be much higher. This is simply a hearing. We believe that we would even meet the burden that they set forth that we would have to meet for a second trial

> much less simply another hearing. We're not bound by what happened in that trial. If we are, then the defendant should be set free because there was a mistrial. He was not found guilty. That's it. They want to rely on the count. The count doesn't matter. It's a mistrial pure and simple and if we're bound, then let's truly be bound. Your Honor knows we're not, the State knows we're not.
>
> *The fact that we are entitled to a new hearing should be clear.* The fact that other evidence exists that Judge Russo did not hear when he made his initial ruling is also clear. The fact that that evidence all points to more than a preponderance that my client was acting the way that the law allows under 16-11-440 we believe is clear and based on that we would ask Your Honor to not only allow this hearing or allow the culmination of this hearing, but find that he is immune to prosecution.

R. 2052, l. 16 – 2053, l. 15 (emphasis added).

The solicitor continued to insist respondent was not entitled to a "new hearing" and that the evidence presented at the hearing before Judge Hood was improper. R. 2054, l. 7 – 2058, l. 3. The judge then noted that it was clear that Beth Bettini had called 911 and that "no one in the Solicitor's Office nor the defense knew about it until just before the last hearing." The solicitor verified that was correct. R. 2058, ll. 4-15. The solicitor nonetheless argued the defense had failed to prove the evidence he presented before Judge Hood was new, entitling him to new hearing. The solicitor further contended that even if the judge considered the evidence presented before him, respondent had still failed to prove by a preponderance of the evidence that he was entitled to immunity. R. 2072, l. 5 – 2079, l. 8.

The solicitor cited to the testimony of Will Zander, Keith Adams, Morgan Zander, Tyreke Farrow, and Devon Chatman from the initial immunity hearing. R. 2074, l. 5 – 2081, l. 7. The solicitor also discussed the testimony of Michael James, who only testified during the mistrial. The solicitor incorrectly said he "thought" the testimony from James on his "duty to retreat theme" was from the initial immunity hearing. R. 2076, ll. 18-23; See 1066-1120.

Defense counsel Rutherford countered that the first immunity hearing before Judge Russo was held on the state's timeframe because they called the case to trial. Counsel argued:

> First of all, noting that this case occurred February 17th, 2014, *and nine months later we were having a hearing in a murder case in Lexington County. The Solicitor states that I chose to do so. That is a bold face untruth. We were told that the trial was going to be called and in doing so we needed to go ahead and file our motion so that we could get it heard.* Never in the history of Lexington County in my 20 years of practice have I seen a case go from, a murder case in particular, go from the date of incident to trial in nine months and to assert that I did that or that I'm the one that caused that to happen is just *absolutely untrue and the Solicitor knows that* because he and I talked about it. *They chose when to have the hearing, they chose when to schedule it* and all of that had to be completed before that date because they were worried that I would go back into session and it would be into the next year before it got tried. *It was certainly not on me as to when to call it.*

R. 2081, l. 10 – 2082, l. 3 (emphasis added).

Defense counsel specifically cited the testimony of Beth Bettini, who the solicitor continued to call "a liar" even though the state "lost her information. He continues to question what she would have told 911 based on nothing but his imagination" and Ms. Bettini was naturally angry about being called a liar simply because she was an eyewitness. R. 2084, ll. 8-15.

Graham responded, "As far as a timeline and I honestly don't remember, *if Mr. Rutherford says he was forced to have a trial and have a stand your ground hearing at the last minute, I'll concede to that.* I don't know—I honestly don't remember." R. 2087, ll. 17-21 (emphasis added).

At the end of the arguments, the judge said he would issue an order, which would address whether respondent was entitled to a new immunity hearing. R. 2090, l. 14 – 2092, l. 7. About a month later, Judge Hood issued a written order denying respondent immunity. R. 2915-2921. The order cited to "inconsistent testimony" and evidence being "in direct contradiction" and

ruled, "Under the facts before this Court, the Defendant's claim of self-defense presents a quintessential jury question." The order then concluded, "Based upon the denial of immunity, the Court does not need to reach a ruling on the merits of whether or not the Defendant was entitled to a second hearing. The Defendant was given the opportunity to present and proffer the evidence and the Court has considered the evidence. The state was allowed to respond. Further, *the Court read the testimony from the original immunity hearing and the jury trial.* The testimony has been heard and the record has been protected." R. 2920-2921 (emphasis added).

Discussion

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

"A mistrial is equivalent of no trial and leaves the cause pending in the circuit court. State v. Smith, 336 S.C. 39, 518 S.E.2d 294 (Ct. App. 1999). It leaves the parties 'as though no trial had taken place.' Grooms v. Zander, 246 S.C. 512, 514, 144 S.E.2d 909, 910 (1965) (ruling of trial judge in proceeding ending in mistrial represents no binding adjudication upon the parties as the mistrial leaves the parties in status quo ante). A court ruling as to the admissibility and competency of testimony during a trial, which was later declared a mistrial results 'in no binding

adjudication of the rights of the parties.' Keels v. Powell, 213 S.C. 570, 572, 50 S.E.2d 704, 705 (1948)." State v. Woods, 382 S.C. 153, 158, 676 S.E.2d 128, 131 (2009).

In State v. Woods, the state consented to a change of venue in a death penalty case, which resulted in a jury being selected from Marion County and transported to Clarendon County. That trial ended in a hung jury and a mistrial, as here. Woods argued on appeal that the trial court committed error because the jury was selected from Clarendon County for the second trial, where the court during the first trial had brought a jury from Marion County to Clarendon County for the trial. This Court found no error since the first trial resulted in a mistrial. The pretrial change of venue ruling was not binding, and the case began anew when the state again called the case for trial. The Court emphasized that when a mistrial occurs because of the inability of the jury to reach a verdict, it is the same as if no trial took place. Woods, 382 S.C. at 158, 676 S.E.2d at 131.

The same is true of the pretrial hearing in this case in which Judge Russo denied immunity. It was a nullity, and respondent was entitled to begin anew. Instead, respondent was forced to accept what limited hearing Judge Hood would allow him. The state's assertion in its brief that respondent "halfway successfully convinced Judge Hood to redo the [first] immunity hearing" is partially correct since the second hearing was gravely inadequate given that respondent was entitled to a new immunity hearing after the mistrial for the reasons continued to be explained below. See Brief of Petitioner at 10.

In State v. Smith, 336 S.C. 39, 518 S.E.2d 294 (Ct. App. 1999), the Court of Appeals found error where, during the first trial, the judge held an *in-camera* hearing at which time informant Hall identified defendant Smith as the person from whom he purchased crack cocaine on February 26, 1996. The judge allowed Hall to identify Smith in the jury's presence.

However, the first trial ended in a mistrial because of the admission of other evidence. A second trial was held before the same judge in September 1996. Smith requested a hearing on the in-court identification. He claimed Hall's identification was tainted on the first day of the retrial when Hall saw Smith in a holding cell. The judge ruled Smith was not entitled to another hearing on the same issue because Hall identified Smith during the prior trial where Smith had an *in-camera* hearing on the issue. On appeal, the Court of Appeals held that a mistrial was equivalent of no trial at all. Therefore, the prior court rulings on the admissibility and competency of testimony were not binding on the rights of the parties. Because the mistrial was equivalent of no trial, the trial judge could not rely on evidentiary rulings from the nugatory proceeding. The Court of Appeals remanded the case to the circuit court for an *in-camera* hearing to determine whether Hall's identification of Smith should be suppressed.

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

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

The pretrial hearing held before Judge Russo and the subsequent mistrial held before Judge Griffith were both nullities, and Judge Hood was obligated to proceed as if those nugatory proceedings did not exist. Again, when a mistrial occurs because of the inability of the jury to agree on a verdict, it is the same as if no trial took place. That is also true of the pretrial rulings

before that trial. See State v. Mills, 281 S.C. 60, 314 S.E.2d 324 (1984); State v. Smith, 336 S.C. 39, 518 S.E.2d 294 (Ct. App. 1999). Accordingly, the Court of Appeals correctly held Judge Hood erred by denying respondent's motion for a new, full immunity hearing.

Finally, as an additional sustaining ground, even if this Court were to agree with the state, and change the law on pretrial rulings before mistrials no longer being a nullity, respondent would still have been entitled to a new immunity hearing given the newly discovered evidence, and the state's bungling of the first immunity hearing, where it failed to disclose to the defense Brady[1] evidence in its possession that was favorable to respondent and critical to the immunity determination. See Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal."); See also I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000) ("Under the present rules, a respondent—the 'winner' in the lower court—may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court.").

The critical evidence from Beth Bettini, Zachary Lynch, and Ervin Chauncy Meggett was not known at the time of the first immunity hearing before Judge Russo, and it would have violated "the essential demands of fairness" to deny respondent a new immunity hearing under these circumstances. Cf. Knox v. Collins, 928 F.2d 657, 661 (5th Cir. 1991) (unkept promise to instruct on the law deprived defendant of a fair exercise of his peremptory challenges even though peremptory challenges are without a constitutional basis).

Additionally, at worst, since the circumstances that led to Judge Russo's order denying immunity had changed due to the newly discovered evidence or the nondisclosed Brady

[1] Brady v. Maryland, 373 U.S. 83 (1963).

evidence, Judge Hood was not bound by Judge Russo's order and should have granted respondent a new, full immunity hearing. See Rice v. Doe, 442 S.C. 160, 165-66, 898 S.E.2d 127, 129-30 (2024) ("When the circumstances that led to a prior ruling have changed, however, the trial judge should not be bound by an order that no longer serves the interests of justice." The "general principle" that "one circuit court judge does not have the authority to set aside the order of another" "was never intended to hamstring a subsequent judge when the circumstances legitimately have changed."); see also Steele v. Charlotte, Columbia, & Augusta R.R., 14 S.C. 324, 330 (1880) (recognizing that a "motion once heard and decided fully [may] be reviewed upon a new state of facts arising after the decision[,] . . . such as to make a new case, as . . . newly-discovered evidence, or that the ground of the order has been removed.").

Further, the evidence offered at the limited hearing was newly discovered evidence since it was discovered after the first immunity hearing, it could not have been discovered before then by the exercise of due diligence, it was material and not merely cumulative or impeaching and it probably would have changed the result of the initial immunity hearing if this evidence had been heard then. See State v. Spann, 334 S.C. 618, 513 S.E.2d 98 (1999).

The state's assertion that defense counsel Rutherford made a strategic decision not to call Bettini, Lynch, Officer Voravudhi, or Dr. Ross during the first immunity hearing is respectfully absurd given the obvious importance of their testimony. See Brief of Petitioner at 15-18.

Moreover, the second immunity judge did not view the witnesses from the first immunity hearing or the mistrial and his order denying relief was erroneous because he could not make credibility findings or weigh evidence from witnesses he did not view in person. See State v. Johnson, 413 S.C. 458, 468, 776 S.E.2d 367, 372 (2015) (noting "the determination of credibility must be left to the trial judge who saw and heard the witnesses and is therefore in a better

position to evaluate their veracity"); State v. Clasby, 385 S.C. 148, 155, 682 S.E.2d 892, 895 (2009) ("The determination of a witness's credibility is left to the trial judge who saw and heard the witness and is therefore in a better position to evaluate his or her veracity.").

The evidence at the second immunity hearing was compelling and more than proved by a preponderance of the evidence that respondent was entitled to immunity. Dr. Ross, the pathologist, testified that a likely scenario, given the trajectory of the decedent's wound, was that the decedent was leaning over and parallel to the ground. R. 1473, ll. 14-24; R. 1747, ll. 6-19. The only way the decedent could have been parallel to the ground was if he was leaning over into respondent's car, supporting respondent's account of events. Bettini and Lynch, both independent witnesses, testified that the decedent was the aggressor. Bettini witnessed numerous students surround respondent's car and threaten him. R. 1771, ll. 10-19. She explained that respondent could not leave because there were students in front of his car. He would have had to have hit them to leave. R. 1776, ll. 5-7. Lastly, she said respondent "looked scared to death" and she thought the other students were going to hurt him. R, 1771, l. 22 – 1774, l. 15. Lynch likewise confirmed there were students in the roadway blocking respondent from leaving. R. 1826, ll. 2-4. He said the students were "taunting" respondent, calling him names, and acting "malicious." They all gathered outside respondent's window. R. 1826, ll. 5-8. Lynch saw a student reach inside respondent's window with his hand "forward." Lynch thought this person was trying to grab respondent. R. 1826, ll. 13-24. Lastly, Meggett, who was friends with the decedent and was standing outside respondent's window when the decedent was stabbed, told the state during his interview before the first trial that the decedent "was in the wrong" and that respondent was trying to leave when the stabbing occurred. Meggett said the

decedent was "banging" on respondent's car when respondent stabbed him. R. 2022, l. 10 – 2026, l. 3.

Respectfully, this Court should affirm the decision of the Court of Appeals that the first immunity hearing and the mistrial were nullities and therefore respondent is entitled to a new immunity hearing. See State v. Woods, 382 S.C. 153, 676 S.E.2d 128 (2009); State v. Smith, 336 S.C. 39, 518 S.E.2d 294 (Ct. App. 1999). In the alternative, if this Court were to hold that, after a mistrial, pretrial immunity hearings are not nullities, that decision should be prospective only since respondent relied on the law on mistrials at the time his case was litigated. In the second alternative, this Court should affirm the decision of the Court of Appeals as modified since Respondent was entitled to a new immunity hearing on the basis of newly discovered evidence due the state's bungling of the first immunity hearing and the nondisclosure of available critical witnesses and evidence to the defense. Finally, if this Court reverses the decision of the Court of Appeals and holds respondent is not entitled to a new immunity hearing, this Court should remand the case to the Court of Appeals to rule on respondent's remaining issues on appeal, including, but not limited to, whether respondent is entitled to immunity.

2.

The Court of Appeals correctly understood the facts as presented and correctly held the circuit court erred by (1) finding that because there was conflicting evidence as to Respondent's entitlement to immunity, self-defense was a jury issue, and (2) denying Respondent immunity based upon the legally erroneous reason that Respondent had the duty to retreat. However, whether the circuit court correctly or erroneously denied Respondent immunity is not before this Court as the issues were never ruled upon by the Court of Appeals.

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

Moreover, whether Judge Russo and subsequently Judge Hood correctly or erroneously denied respondent immunity is not before this Court as the Court of Appeals never ruled on the issues, despite them being raised and fully briefed by respondent. The Court of Appeals merely held respondent is entitled to a new immunity hearing because when a case ends in a mistrial, it is considered a nullity and begins anew when called again for trial. If this Court reverses the decision of the Court of Appeals and holds respondent is not entitled to a new immunity hearing, respectfully, this Court must remand this case to the Court of Appeals to rule on respondent's remaining issues on appeal, including whether Judge Russo and subsequently Judge Hood erred by denying respondent immunity from prosecution. See Rule 220(c), SCACR ("The appellate

court may *affirm* any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.") (emphasis added).

Conflicting Evidence

The Court of Appeals correctly held the circuit court erred by finding that, because there was conflicting evidence as to respondent's entitlement to immunity, self-defense was a jury issue. Notably, the state conceded in its brief before the Court of Appeals that *both* circuit court "judges listed conflicting evidence as a reason for denying immunity." The state also acknowledged that *both* judges ruled respondent had "a duty to retreat under the law." App. 98 (emphasis added).

In State v. Cervantes-Pavon, 426 S.C. 442, 827 S.E.2d 564 (2019), this Court held the circuit court erred by finding the immunity issue presented a jury question. The Court emphasized, "Just because conflicting evidence as to an immunity issue exists does not automatically require the court to deny immunity; the court must sit as the fact-finder at this hearing, weigh the evidence presented, and reach a conclusion under the act." Id. at 451, 827 S.E.2d at 569. While the circuit court judge here did not have the benefit of this Court's opinion in Cervantes-Pavon at the time the state successfully urged the court that conflicting evidence made self-defense a jury issue under State v. Curry, the case nonetheless controls.

The "act requires the circuit court to determine whether a movant is entitled to immunity." Cervantes-Pavon, 626 S.C. at 451, 827 S.E.2d at 568 (citing State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011) (setting forth the procedure, burden of proof, and standard of review for an immunity determination)). The circuit "court, in announcing its ruling, should at least make specific findings on the elements on the record." State v. Gray, 438 S.C. 130, 141, 882 S.E.2d 469, 475 (Ct. App. 2022) (quoting State v. Glenn, 429 S.C. 108, 123, 838 S.E.2d 491,

499 (2019)). Respectfully, the circuit court's finding here that conflicting evidence made self-defense a jury issue resulted in an abdication of judicial responsibility under the Protection of Persons and Property Act. See Gray, 426 S.C. at 142, 882 S.E.2d at 475 (reversing the circuit court's denial of Gray's motion for immunity under the act because the court "impermissibly abdicated its role as the fact-finder at Gray's immunity hearing").

In Judge Hood's order denying respondent immunity, he repeatedly referred to inconsistent or contradictory evidence. The judge noted that "the Defendant could have left the Cook-Out without coming into contact with any Dutch Fork students, but he chose the route he left to assault and incite the Dutch Fork students. Additionally, the testimony as to the 'fear in his eyes,' given by Beth Bettini and the Defendant, *are in direct contradiction* with the testimony of the Dutch Fork students." R. 2920.

Judge Hood further found, "Third, if his defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary fitness and courage would have entertained the same belief. *Id.* This standard has not been established by the preponderance of evidence, *based upon the inconsistent testimony*." R. 2920 (emphasis added).

The judge concluded:

> Under the facts before this Court, the Defendant's claim of self-defense presents a *quintessential jury question.* See *State v. Curry*, 406 S.C. 364, 752 S.E.2d 263 (2013) (Murder defendant was not entitled to immunity from prosecution under Protection of Persons and Property Act where testimony of defendant and eyewitnesses was in direct conflict as to whether victim attacked defendant). *The direct contradiction between witnesses creates an issue for a jury to decide, not the trial court.* Therefore immunity does not apply *because the Defendant has not proven* ***beyond*** *a preponderance of evidence standard* of self-defense.[2]

[2] The "beyond a preponderance of evidence standard of self-defense" error is not insignificant since in State v. Cervantes-Pavon, 426 S.C. 442, 827 S.E.2d 564 (2019), this Court reversed in part because the circuit court cited to this incorrect standard in making its ruling.

R. 2920-2921 (emphasis added).

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

Duty to Retreat/Avoid the Danger

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

Section 16-11-440(A) provides a presumption of reasonable fear of imminent peril of death or greatly bodily injury to a person who uses deadly force. A person is entitled to the presumption of reasonable fear if (1) the person against whom the deadly force is used is in the process *of unlawfully and forcefully entering* or has unlawfully and forcefully entered . . . an occupied vehicle; and (2) the person who used deadly force knows or has reason to know *that an unlawful and forcible entry or unlawful and forcible act is occurring or has occurred.* S.C. Code Ann. § 16-11-440(A) (emphasis added). Further, Section 16-11-440(C) provides that a person who is not engaged in an unlawful activity and who is attacked in another place where he has a right to be, including, but not limited to, his place of business, *has no duty to retreat and has the*

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

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

It is apparent from Judge Hood's order denying immunity dated October 11, 2017, that he denied respondent immunity because he did not retreat, and because he went to the Cook Out in the first place. The judge noted, "While walking into the cookout, the defendant's friend, Austin Sanders, was leaving the Cook-Out and told the group, 'Yeah, I was in the drive-thru and a whole bunch of Dutch Fork kids were just—started getting rowdy in the drive-thru, shaking people's cars, and stuff like that.' *Despite this comment, Defendant and his group continued into the Cook-out.*" R. 2917 (emphasis added). The judge reasoned that respondent should not have gone into the Cook Out where he had a right to be and that he should have retreated when he saw the Dutch Fork students there. Further, in the analysis section of Judge Hood's order, he wrote, "The evidence, which consists of video surveillance and witness testimony, shows the Defendant seeking out the Cook-Out restaurant and the Dutch Fork students that night. The Defendant

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

Judge Hood also oddly wrote, "Second, the Defendant must have actually believed he was in imminent danger of losing life or sustaining serious bodily injury, or he actually was in such imminent danger. *Id.* The Defendant has failed to do so in this case. The Defendant and his friends went to the Cook-Out, *knowing that Dutch Fork Students would be present. The Defendant could have left the Cook-Out without coming into contact with any Dutch Fork students, but he chose the route he left to assault and incite the Dutch Fork students.*" R. 2920 (emphasis added). Judge Hood reasoned respondent was responsible for the situation because he went to the Cook Out and because he did not retreat.[3]

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

As the Court of Appeals recognized, Section 16-11-440(C) clearly states that the defendant has no duty to retreat when he is acting legally in a place he has a right to be. The Cook Out was the Lexington High School hangout after basketball games. Respondent was a recent graduate of Lexington High, who went to the basketball game. He had every right to go to the Lexington High hangout that night, and he was not obligated to avoid it simply because he

[3] It is strange the judge reasoned respondent failed to prove he believed he was imminent danger or actually was in imminent danger because he did not avoid the Cook Out, the Lexington High hangout that night.

saw Dutch Fork students at the Cook Out upon his arrival. Respondent was not at fault for bringing on the difficulty for purposes of self-defense where he went to a public restaurant where he had a right to be. Respondent also did not have to retreat or flee when the trouble began. The evidence showed his car was surrounded. Section 16-11-420(E) states that "the general assembly finds that no person or victim of crime should be required to surrender his personal safety to a criminal, nor should a person or victim be required to needlessly retreat in the face of intrusion or attack." As this Court stated in State v. Jones, 416 S.C. 283, 296-97, 786 S.E.2d 132, 139 (2016): "Section 16-11-440(C) is broadly worded" and it states a defendant has no duty to retreat and has a right to stand his ground.

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

Again, whether Judge Russo and subsequently Judge Hood correctly or erroneously denied respondent immunity is not before this Court as the Court of Appeals never ruled on the issues. If this Court reverses the decision of the Court of Appeals and holds respondent is not entitled to a new immunity hearing, respectfully, this Court must remand this case to the Court of Appeals to rule on respondent's remaining issues on appeal, including whether both judges erred

by denying respondent immunity from prosecution. See Rule 220(c), SCACR ("The appellate court may *affirm* any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.") (emphasis added). This Court, respectfully, may not *reverse* for any reason appearing in the record. However, if this Court decides to rule on these issues for the first time on certiorari, rather than remand to the Court of Appeals to address these unresolved, raised but not ruled upon issues, given the Court of Appeals' holding granting respondent's partial relief, respondent addresses the issues below out of an abundance of caution.

Judge Hood Erred by Denying Respondent Immunity

Section 16-11-440(A) provides: "A person is *presumed to have a reasonable fear of imminent peril of death or great bodily injury* to himself or another person when using deadly force that is intended or likely to cause death or great bodily injury to another person *if the person* against whom the deadly force is used is in the process of *unlawfully and forcefully entering*, or has unlawfully and forcibly entered a dwelling, residence, or occupied vehicle, or *if he removes or is attempting to remove another person* against his will from the dwelling, residence, or *occupied vehicle*; and the person using deadly force knows or has reason to believe that an unlawful and forcible entry or unlawful and forcible act *is occurring or has occurred.*" S.C. Code Ann. § 16-11-440(A) (emphasis added).

Section 16-11-440(C) of the Act, the stand your ground provision, provides "a person who is *not engaged in an unlawful activity* and who is attacked in another *place where he has a right to be*, including, but not limited to, his place of business, *has no duty to retreat* and has the right to stand his ground and meet force with force, including deadly force, *if he reasonably believes* it is necessary to *prevent death or great bodily injury to himself* or another person or to

prevent the commission of a violent crime as defined in Section 16-1-60." S.C. Code Ann. § 16-11-440(C) (emphasis added).

"A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard." State v. Curry, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013). During the pretrial hearing, a defendant must set out "a valid case of self-defense," excluding the duty to retreat, "and the trial court must necessarily consider the elements of self-defense in determining a defendant's entitlement to the Act's immunity." Id. at 371, 752 S.E.2d at 266. To establish self-defense, four elements must be present: (1) the defendant must be without fault in bringing on the difficulty; (2) the defendant must have been in actual imminent danger of losing his life or sustaining serious bodily injury, or he must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) if his defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief, or if the defendant was actually in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life; and (4) the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in the particular instance. State v. Hendrix, 270 S.C. 653, 657-658, 244 S.E.2d 503, 505-506 (1978); State v. Davis, 282 SC. 45, 46, 317 S.E.2d 452, 453 (1984).

In this case, respondent proved by a preponderance of the evidence that he was entitled to immunity pursuant to Section 16-11-440(A). Section 16-11-440(A) states that when an individual is occupying his car and someone is using force to enter the vehicle or to remove him from the vehicle that individual is presumed to have a reasonable fear of imminent peril of death or great

bodily injury such that deadly force is permitted. Respondent was in his car when he was attacked by an angry crowd of Dutch Fork students who were yelling threats and taunting him. They were banging on respondent's car and reaching into the window, grasping at whatever they could reach. Respondent feared for his life. Consequently, respondent had a right to use deadly force against the decedent who respondent reasonably believed was unlawfully and forcibly trying to enter his car or remove him from his car.

The language of the Act makes clear that the General Assembly intended for an individual to be protected from an attack while in his or her car. Pursuant to the Act, a person is not obligated to retreat from his attacker even if he could. Nevertheless, in this case, respondent could not retreat since his car was surrounded by an aggressive mob.

The state argued below that the presumption found in § 16-11-440(A) does not apply because respondent was engaged in an unlawful activity. See § 16-11-440(B)(3). That is fundamentally incorrect. The state argued that respondent pulling up behind Will Zander at a high rate of speed and almost hitting students standing in the roadway was an unlawful act of aggression or assault. Brief of Petitioner at 29-30. However, respondent was merely coming to the aid of his friend. When he looked up, respondent saw a crowd of Dutch Fork students around Will's vehicle. Given the events of that evening, in which respondent and his friends were taunted, forced to leave the restaurant without receiving their food, and followed to their cars, respondent reasonably believed the Dutch Fork students were threatening Will and his friends in the roadway. Respondent had the right to act on appearances. See State v. Starnes, 340 S.C. 312, 320, 531 S.E.2d 907, 912 (2000); State v. Dickey, 394 S.C. 491, 716 S.E.2d 97 (2011). Respondent's actions were as reasonable as the defendants in State v. Jones, 416 S.C. 283, 786 S.E.2d 132 (2016) and State v. Douglas, 411 S.C. 307, 768 S.E.2d 232 (Ct. App. 2014), especially where respondent repeatedly

avoided confrontations with the aggressive students from the other school. Moreover, under the common law defense of others, respondent had the right to protect Will. See State v. Long, 325 S.C. 59, 480 S.E.2d 62 (1997). Consequently, respondent's action of pulling up quickly behind Will to see if Will was in danger was not unlawful.

Respondent also proved by a preponderance of the evidence that he was entitled to immunity pursuant to Section 16-11-440(C). This subsection provides immunity when an individual uses deadly force against an attacker in places other than a vehicle or residence. An individual can only be granted immunity under this provision if he can demonstrate: (1) he was in a place where he has a right to be; (2) he was not engaged in unlawful activity; and (3) he reasonably believed it was necessary to use deadly force to prevent great bodily injury to himself.

Respondent was on public property on an open roadway at a public restaurant. He had every right to be in that location. Respondent was not engaged in any unlawful activity, as thoroughly discussed above. Moreover, the verbal threats and physical violence respondent experienced that evening was enough to put him in apprehension of being greatly injured. When respondent struck back toward the window, he reasonably believed his life was in danger and deadly force was necessary. Therefore, respondent also satisfied subsection (C).

Lastly, respondent set out a valid case of self-defense, excluding the duty to retreat, by a preponderance of the evidence. Respondent was not at fault in bringing on the difficulty. He avoided conflict every step of the way as seen above. Again, when he entered the Cook Out and was confronted by Michael James, respondent stated, "We just came here to eat," ignored the Dutch Fork students, and waited in line to order food. Then when James followed respondent and his friends out of the restaurant and asked if they were "still salty," respondent merely congratulated James on Dutch Fork's win and began walking to his car. When thirty to forty

Dutch Fork students then rushed out of the Cook Out and began threatening and taunting respondent, respondent continued to walk backward to his car and not engage with the students.

Judge Hood found respondent failed to prove he was without fault in bringing on the difficulty because he "chose the situation that led to the altercation with the Dutch Fork students," he "chose not to leave [through] the other exits that were available to him," and he "chose to drive into a crowd of Dutch Fork students." R. 2919. The judge essentially reasoned that respondent was at fault because he went into the Cook Out, where he had a right to be, and should have retreated when he saw the Dutch Fork students there. However, § 16-11-440(C) clearly states that the defendant has no duty to retreat when he is acting legally in a place he has a right to be. The Cook Out was the "hangout spot" for Lexington High School students after basketball games. Respondent was a recent graduate of Lexington High School and went to the basketball game that night. He had every right to go to the Cook Out, and he was not obligated to avoid it simply because he saw Dutch Fork students there upon his arrival. Respondent also did not have to retreat or flee when the trouble began. He had no duty to retreat under the Act. This does not make him at fault in bringing on the difficulty.

Respondent further proved by a preponderance of the evidence that he actually was in imminent danger of losing his life or sustaining serious bodily injury, or he believed he was in such danger. Respondent's car was surrounded by a mob of angry Dutch Fork students who had been taunting and threatening respondent and his friends all night. The evidence established the students were banging on respondent's car, reaching into his window, and yelling threats and profanity. Respondent reasonably feared the students were "trying to attack" him and "forcefully pull [him] out of the car." R. 260, ll. 8-15. Respondent feared for his life. Josh Brooks, an independent witness, testified the Dutch Fork students were banging on respondent's car "trying to scare him"

while others were reaching into the window. R. 224, l. 22 – 225, l. 3. Brooks believed respondent was being threatened and he himself "felt a sense of threat." R. 225, ll. 14-18. Beth Bettini, another independent witness, testified respondent "looked scared to death" as the Dutch Fork students surrounded his car and screamed threats at him. R. 1771, l. 10 – 1774, l. 15. Zachery Lynch, also an independent witness, testified that he saw a student reach inside respondent's window with his hand "forward." Lynch thought this person was trying to grab respondent. R. 1826, ll. 13-24.

Oddly, Judge Hood found respondent failed to prove this second element, that he actually was in imminent danger of losing his life or sustaining serious bodily injury, or he believed he was in imminent danger, because respondent did not avoid the situation at the Cook Out. He stated, "The Defendant and his friends went to the Cook Out knowing that Dutch Fork students would be present. The Defendant could have left the Cook Out without coming into contact with any Dutch Fork students, but he chose the route he left to assault and incite the Dutch Fork students." R. 2920. This strange reasoning, respectfully, has no basis or support in the record, and, as argued above, respondent did not have a duty to retreat that night.

As to the third element of self-defense, it is clear from the evidence that a reasonably prudent person of ordinary firmness and courage would have likewise believed he was in imminent danger, and that respondent was in fact in such imminent danger. Respondent proved by a preponderance of the evidence that the circumstances were such as would warrant a person of ordinary prudence, firmness, and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life. Again, a mob of Dutch Fork students surrounded respondent's car, threatened respondent, banged on his car, and reached in his window. Respondent was blocked in and could not leave. Any reasonably prudent person under these circumstances would have likewise believed in was in imminent danger and struck the fatal blow.

In his order denying immunity, Judge Hood found respondent failed to establish this third element of self-defense because of "inconsistent testimony," but did not specify what the alleged inconsistent testimony was. R. 2920. Moreover, citing State v. Curry, 406 S.C. 364, 752 S.E.2d 263 (2013), the judge determined respondent's "claim of self-defense presents a quintessential jury question." R. 2920. He asserted, "The direct contradiction between witnesses creates an issue for a jury to decide, not the trial court." R. 2920. This finding was an error of law as argued above and as the Court of Appeals held. See State v. Cervantes-Pavon, 426 S.C. 442, 827 S.E.2d 564 (2019). While Judge Hood did not have the benefit of this Court's opinion in Cervantes-Pavon at the time the state successfully urged him that conflicting evidence made self-defense a jury issue, and that immunity therefore had to be denied, his ruling nonetheless resulted in an abdication of judicial responsibility under the Act.

Judge Russo Erred by Denying Respondent Immunity

During the hearing before Judge Russo, respondent proved by a preponderance of the evidence that he was entitled to immunity pursuant to the Act. Respondent was in his car when he was attacked by a crowd of Dutch Fork students who were yelling threats and taunting him. They were banging on respondent's car and reaching into the window, grasping at whatever they could reach. Respondent feared for his life. Consequently, respondent had a right to use deadly force against the decedent who respondent reasonably believed was unlawfully and forcibly trying to enter his car or remove him from his car.

As to § 16-11-440(A), Judge Russo found respondent failed to prove that the decedent was in the process of unlawfully and forcefully entering respondent's car. R. 2912. The judge emphasized that while one witness, without naming who, testified that he saw several students reach inside respondent's car from a distance, other witnesses, who were standing directly outside

respondent's car, testified that no one touched the vehicle or reached inside. Additionally, no fingerprints were found on or in the vehicle. R. 2912. While Judge Russo did not have the benefit of the testimony from Beth Bettini, Zachery Lynch, or Chauncy Meggett, respondent nonetheless proved by a preponderance of the evidence that the decedent was forcefully trying to enter his car.

Josh Brooks, the only independent witness to testify at the first immunity hearing, testified that a "whole bunch" of Dutch Fork students crowded around respondent's car in the roadway. R. 224, ll. 13-25. The students were "banging" on respondent's car "trying to scare him." Brooks asserted that other students were reaching in respondent's window. R. 225, ll. 1-3. Brooks' testimony along with respondent's vivid account of the attack was sufficient to satisfy his burden of proof.

The witnesses cited by Judge Russo to support his findings were all Dutch Fork students who remained loyal to their deceased friend. Additionally, the state argued below that the presumption found in § 16-11-440(A) does not apply because respondent was engaged in an unlawful activity. See § 16-11-440(B)(3). The state argued that respondent pulling up behind Will Zander at a high rate of speed and almost hitting students standing in the roadway was an unlawful act of aggression or assault. However, respondent was merely coming to the aid of his friend, he did not hurt anyone, and he did not intend to hurt anyone. Given the events of that evening, in which respondent and his friends were taunted, forced to leave the restaurant without receiving their food, and followed to their cars, respondent reasonably believed the students were threatening Will in the roadway. Respondent had the right to act on appearances. See State v. Starnes, 340 S.C. 312, 320, 531 S.E.2d 907, 912 (2000); State v. Dickey, 394 S.C. 491, 716 S.E.2d 97 (2011). Moreover, under the common law defense of others, respondent had the right to protect Will. See State v.

Long, 325 S.C. 59, 480 S.E.2d 62 (1997). Consequently, respondent's action of pulling up quickly behind Will to see if Will was in danger was not unlawful.

Respondent also proved by a preponderance of the evidence that he was entitled to immunity pursuant to Section 16-11-440(C). An individual can only be granted immunity under this provision if he can demonstrate: (1) he was in a place where he has a right to be; (2) he was not engaged in unlawful activity; and (3) he reasonably believed it was necessary to use deadly force to prevent great bodily injury to himself or another person. Respondent was on public property on an open roadway. He had every right to be in that location. Respondent was not engaged in any unlawful activity, as thoroughly discussed above. Moreover, the verbal threats and physical violence respondent experienced that evening was enough to put him in apprehension of being greatly injured. When respondent struck toward the window, he reasonably believed his life was in danger and deadly force was necessary. Therefore, respondent also satisfied subsection (C).

Lastly, respondent set out a valid case of self-defense, excluding the duty to retreat, by a preponderance of the evidence. Respondent was not at fault in bringing on the difficulty. He avoided conflict at every turn as seen above.

Judge Russo found respondent failed to prove he was without fault in bringing on the difficulty because he "approached a crowd of Dutch Fork students near the curb at an accelerated rate of speed in the oncoming lane of traffic, nearly hitting at least two Dutch Fork students, and with a weapon at his side." The judge further found respondent remained stationary in the roadway rather than attempt to leave. He concluded respondent's testimony that he was unable to leave not credible. R. 2913. However, § 16-11-440(C) clearly states that the defendant has no duty to retreat when he is acting legally in a place he had a right to be. The Cook Out was the

"hangout spot" for Lexington High School students after basketball games, and Respondent was acting legally in a place he had a right to be.

Respondent further proved by a preponderance of the evidence that he actually was in imminent danger of losing his life or sustaining serious bodily injury, or he believed he was in such danger. Respondent's car was surrounded by a mob of angry Dutch Fork students who had been taunting and threatening respondent and his friends. The evidence established the students were banging on respondent's car, reaching into his window, and yelling threats and profanity. Respondent reasonably feared the students were "trying to attack" him and "forcefully pull [him] out of the car." R. 260, ll. 8-15. Respondent feared for his life, as any reasonable person would have. Josh Brooks, an independent witness, testified the Dutch Fork students were banging on respondent's car "trying to scare him" while others were reaching in the window. Brooks believed respondent was being threatened and he himself "felt a sense of threat." R. 224, l. 22 – 225, l. 18.

As to the third element of self-defense, it is clear from the evidence that a reasonably prudent person of ordinary firmness and courage would have likewise believed he was in imminent danger, and that respondent was in fact in such imminent danger. Respondent proved by a preponderance of the evidence that the circumstances were such as would warrant a person of ordinary prudence, firmness, and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life. Again, a mob of Dutch Fork students surrounded respondent's car, threatened respondent, banged on his car, and reached in his window. Respondent was blocked in and could not leave. Any reasonably prudent person under these circumstances would have likewise believed in was in imminent danger and struck the fatal blow. Under the Act, respondent, as argued above, had no duty to retreat and had a right to stand his ground and meet force with force.

Respectfully, this Court should affirm the decision of the Court of Appeals. In the alternative, if this Court reverses the decision of the Court of Appeals and holds respondent is not entitled to a new immunity hearing, this Court should remand the case to the Court of Appeals to rule on respondent's remaining issues on appeal, including, but not limited to, whether respondent is entitled to immunity. In the second alternative, if this Court decides to rule on whether the circuit court erroneously denied respondent immunity for the first time on certiorari, respondent respectively requests this Court reverse his conviction and hold he is immune from prosecution pursuant to the Act.

CONCLUSION

Based on the foregoing argument, Respondent respectfully requests this Court affirm the decision of the Court of Appeals.

Respectfully submitted,

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Lara M. Caudy
Senior Appellate Defender

ATTORNEYS FOR RESPONDENT

This 27th day of June, 2025.