THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

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

Appellate Case No. 2024-002019

THE STATE,

Petitioner,

vs.

KIERIN MARCELLUS DENNIS,

Respondent.

REPLY BRIEF OF PETITIONER

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ARGUMENT IN REPLY

Petitioner, the State of South Carolina, hereby makes a Reply Brief to the Brief of Respondent, Kieron Dennis (hereinafter "Dennis").

Argument in Reply I.

Dennis and the Court of Appeals fail to mention critical facts that drove the denial of immunity by the circuit courts

In his Brief, Dennis fails to mention anywhere critical facts that drove both the decision of Judge Russo to deny immunity and Judge Hood to deny immunity. This is because mention or admission of these facts defeats all of his arguments in his Brief.

Prior to the murder of the victim in this case, students from Dutch Fork High School (DFHS) were celebrating their team's victory over Lexington High School (LHS) in basketball by dancing in a loosely-formed circle in the parking lot outside the LHS gym when Dennis approached them and interrupted their celebrations. (R. 161, 178, 252; 2181, 2598-99). Things got tense, and Dennis challenged them to meet up at the local *Cook-Out* restaurant later to "settle this" as the police ordered everyone to leave the parking lot. (R. 247, 359-362; 2007-08; 2019, 2139, 2168-69). While Dennis denies in his Brief that he spoke to anyone after the game, neither Judge Russo nor Judge Hood found Dennis credible. Instead, both found Dennis was not without fault in bringing on the difficulty because he instigated the conflict and then drove to the Cook-Out and further instigated the conflict. These factual findings and legal conclusions, and the evidence that supports them are fatal to all of Dennis' claims in his Brief including that he was entitled to immunity before both Judge Russo and Judge Hood. Further, Dennis drove to the *Cook-Out*, even though it was noticeably full. (R. 14-15; 2442).

A friend of Dennis parked by a *PetSmart* while Will Zander and Dennis parked their cars further down by a car wash. (R. 14, 119; 1931-33; R. 2218-28). Dennis was driving a gold or tan Ford Explorer (SUV). (R. 289-90). One of Dennis' long-time friends, Austin Sanders, was leaving the *Cook-Out* when Dennis and his friends arrived, and he told the group, "Yeah, I was in the drive-thru and a whole bunch of Dutch Fork kids were just – started getting rowdy in the drive-thru, shaking people's cars, and stuff like that." (R. 250). So, the evidence clearly showed that **Dennis and his friends knew the DFHS students were near the drive-thru and what they were doing.** Dennis and his friends chose to go into *Cook-Out* anyway. (R. 250). After a verbal exchange with DFHS students inside, Dennis went outside and his 4 friends followed him along with Michael James. James was walking to his car when Morgan Zander, Will's sister, said something to him, so he turned around and threw his hands up, and said, "Are y'all still salty?" (R. 16-18, 80).

Surveillance video shows the DFHS students then immediately came out of the restaurant. (R. 81-85, 323-324; 1925-33). Dennis and his friends went to their cars, but no one assaulted or attempted to assault them as they were on their way. (R. 448, 463). Once they were in their 3 cars, Dennis drove his SUV from his parking spot near the car wash to another area of the parking lot, and Dennis and his friends pulled up next to each other in their cars and discussed for about 5 minutes how they would exit the parking lot. (R. 126-127, 257-258). They could have left the parking lot in several different ways, but they chose instead to drive into the DFHS students that they already knew about from their friend who approached them as they entered the *Cook-Out* earlier. Dennis' friend Keith left the parking lot first and turned right toward Main Street. (R. 44-46). Will Zander drove next to the DFHS crowd and stopped his car, rolled down the window, and threw money out of the car, saying, "Hey, this what y'all are worth." (R. 544, 569). Dennis, in the *PetSmart* parking lot, maneuvered his SUV to face the DFHS students while Will Zander was

doing this, i.e. taunting the DFHS crowd. (R. 51, 327-328). Dennis then pointed his SUV at the crowd of DFHS students and rapidly accelerated his SUV into the wrong lane of traffic and almost hit 2 DFHS students, Tyreke Farrow and Devon Chatman, before finally stopping his SUV by the opposite curb. (R. 451-452, 543-547). Xavier Holliday had to push Tyreke out of the way to prevent Dennis' SUV from hitting him. (R. 547).

DFHS students then gathered around Dennis' SUV and heated words were exchanged because Dennis had almost hit 2 DFHS students. (R. 412-413, 506, 547). Will Zander did not leave the parking lot after taunting the crowd but parked his car diagonally in front of Dennis' SUV, exited his vehicle, and got a metal pipe out of his trunk. (R. 50, 62, 135, 151). After approximately a minute of this heated exchange, Dennis motioned in a "come here" fashion to 2 of the DFHS students, rolled his window down further, and told them, "You don't want what I got. You don't want what I got."[1] (R. 436-438, 516, 548). Dennis was leaning over in his seat, slumped toward the center console with his right hand down and out of view when he rolled the window down further, grabbed a knife from the center console, and abruptly stabbed Da'Von Capers, who was outside his driver's side window, in the chest. (R. 262-263, 285, 375-377, 453; 547-48; 553; 2230-34). Some witnesses testified Capers did not reach inside Dennis' SUV and others testified that he did, some saying it was only after Dennis stabbed Capers in the chest. (R. 547-51; 553; 1729-31, 1893-94). Dennis sped away and the victim was pronounced dead at Lexington Medical Center shortly after. (R. 372; 1907-08; 2230-35).

Dennis went home, changed his clothes, and buried the knife. (R. 269-271, 343-344; 1908-12). Dennis did not call or talk to police until they picked him up at his house later and never told

[1] Dennis's window was already rolled down some before he accelerated toward the DFHS crowd because he and his friends discussed how to leave the parking lot and **chose** to drive into the DFHS students they already knew about. (R. 2235, 2252, 2322, 2346, 2552, 2757-58).

them he was afraid for his life or that he had to act in self-defense. (R. 270-271; State's Ex. 2 and 35). Dennis admitted he stabbed the victim but, at trial, claimed he did it in self-defense because the DFHS students were reaching into his car to attack him. (R. 277-355; 2663-64; State's Ex. 2 and 35). However, no DNA or fingerprints from DFHS students were found on or in Dennis' vehicle. (R. 293-294, 403; 2753-62). Dennis told police in his first statement that no one touched his SUV or him. Dennis said in his second statement to police no one touched him. (R. 283-84). Dennis did tell police that his SUV was blocked, and he could not leave the parking lot, but surveillance footage shows 1or 2 cars driving past Dennis' SUV while it was parked by the curb. (R. 204-208, 276-277; 2228-29). Police arrested Dennis for Murder. Dennis also fails to mention in his Brief, that the State established below that he could have left the *Cook-Out* through other exits rather than driving into the DFHS students while his friend Will Zander was taunting the DFHS students. (R. 276).

Simply said, Dennis cannot and did not establish he was entitled to immunity by a preponderance of the evidence where he cannot and did not meet the first element of self-defense, that he had no fault in bringing on the difficulty. All of Dennis' other arguments in his Brief, including his argument of newly discovered or exculpatory evidence, and the argument he was entitled to immunity before Judge Russo and Judge Hood, fail because of this one fact and legal finding by both Judge Russo and Judge Hood. Dennis cannot change the fact that he was not without fault in bringing on the difficulty. The Court of Appeals' Opinion must be reversed.

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

restaurant **while still at LHS** just outside the arena.[2] *State v. Dennis*, 444 S.C. 353, 363, 907 S.E.2d 142 (Ct. App. 2024). This critical fact, which drove the decision of Judge Russo [and Judge Hood] to deny immunity, after a full immunity hearing, is completely left out of the Opinion and is nowhere mentioned. *Dennis*. Dennis denies this fact in his Brief based on his testimony which was found not to be credible by the Circuit Court. Dennis also tellingly completely ignored in his Brief the evidence presented below that he instigated the conflict beginning at the high-school. The Court of Appeals error omitting this critical fact must be corrected.

The Court of Appeals also omitted from its Opinion and Dennis ignores that Dennis eventually intentionally drove his car to the *Cook-Out* looking for DFHS students or fans for the previously mentioned fight he instigated while still at LHS outside the arena.[3] While the Court of Appeals mentioned Judges Russo [and Hood] found Dennis was not without fault in bringing on the difficulty, the Court nowhere sets forth there was actual testimony this occurred **supporting Judge Russo's [and Judge's Hood's] finding and conclusion**. This is further aggravated by no mention in the Opinion Dennis began the conflict at LHS after the game by challenging DFHS fans or students to fight or "settle this" at the *Cook-Out*.

The Court of Appeals also omitted that after arriving at the *Cook-Out*, Dennis parked his SUV near the car wash, entered the *Cook-Out* where numerous DFHS students and alumni were eating, left the restaurant, re-entered his SUV, drove to the *PetSmart* parking lot, communicated with his associates in their cars about how to leave the parking lot, watched 1 friend leave the parking lot without incident, watched his other friend drive near the crowd and taunt the crowd by throwing money out the window, Dennis intentionally pointed his SUV directly toward a group of

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[2] (R. 161, 178, 247, 252, 359-62; 2007-08; 2139, 2168-69 2182, 2598-99).

[3] (R. 14-15; 161, 178, 247, 252, 359-62; 2007-08; 2099; 2139, 2168-69 2182, 2442 2598-99).

DFHS students, and then intentionally drove his SUV from the area of the *PetSmart* aggressively into a group of DFHS students or fans near the *Cook-Out* almost striking 2 of them which further instigated and aggravated the conflict with the DFHS students ***started at LHS***. And, Dennis then called 2 DFHS students over to his SUV and further instigated the conflict by taunting the group of DFHS students that they did not want what Dennis had in his SUV.[4] These facts were also critical in Judge Russo's [and Judge Hood's] determination Dennis was not without fault in bringing on the difficulty, did not act reasonably, had other means of avoiding the danger than to act as he did, was not in a place where he had a right to be, and had not proved he was entitled to immunity under the Act by a preponderance of the evidence. These facts were also critical in the jury's determination Dennis was guilty of murder and did not act in self-defense. Yet, even though these facts drove the lower courts' determination of immunity, these facts are not mentioned anywhere in the Opinion. The Opinion must be corrected.

The Protection of Persons and Property Act provides immunity from criminal prosecution for a person who has used deadly force if the trial court, after a *Duncan* hearing, finds the person was justified in using such force. *S.C. Code Ann.* §§ 16-11-410 to 450 (2006); *State v. Duncan*, 392 S.C. 404, 410, 709 S.E.2d 662, 665 (2011). To obtain immunity, a defendant must either satisfy all 4 elements of self-defense by a preponderance of the evidence, to the trial court's satisfaction, or 3 of the elements plus Sections (A) and (B) or Section (C) of the Act if it applies. *State v. Glenn*, 429 S.C. 108, 838 S.E.2d 491 (2019). A preponderance "stated simply is that evidence which

[4] (R. 14, 16-18, 37, 45-46, 50-51, 62 80-85; 119, 126-27; 135, 151, 154, 250-51, 257-258, 262-63, 213, 270, 285 316-319, 323-324, 327-28; 372; 375-77; 412-413, 428, 436-438, 448, 451-53, 463, 506, 516, 543-548, 569; 1729-31; 1893-94; 1907, 1931, 1925-33; 1953-54; 2218-28; 2230-34; 2100; 2486-88).

convinces us as to its truth." *Semken v. Semken*, 379 S.C. 71, 75, 664 S.E.2d 493, 496 (Ct. App. 2008). The elements of self-defense are:

> (1) he was without fault in bringing on the difficulty; (2) he actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger; (3) if his defense is based upon his actual belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief; and (4) the defendant had no other probable means of avoiding the danger of losing his life or sustaining serious bodily injury than to act as he did in this particular instance.

State v. Davis, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984). If the court finds a defendant has failed to satisfy 1 of the first 2 elements of self-defense, he may deny immunity and the case may proceed to trial. *See State v. Bixby*, 388 S.C. 528, 554, 698 S.E.2d 572, 586 (2010). However, if a trial court finds a defendant has only failed to prove reasonable fear, if the defendant uses deadly force while the victim was unlawfully entering a dwelling, residence, or occupied vehicle that belonged to the defendant, the Act provides a rebuttable presumption of reasonable fear of imminent peril and the court must apply it accordingly. *S.C. Code Ann.* §§16-11-440(A) and (B) (2006). This presumption does not apply if defendant is engaged in an unlawful activity or is using the dwelling, residence, or vehicle to further an unlawful activity. *S.C. Code Ann.* §16-11-440(B)(3). Further, if the place of the event was not a residence, dwelling, or occupied vehicle, and/or the victim also had an equal right to be where the defendant was when the event occurred, the defendant is not entitled to the presumption of reasonable fear and the court must apply and analyze Section (C) and the defendant must prove (1) he was not engaged in unlawful activity; (2) he was attacked; (3) he was in a place he had the right to be; and (4) he reasonably believed the use of deadly force was necessary to prevent death or great bodily injury to himself or others. *S.C. Code Ann.* § 16-11-440(C) (2006); *State v. Jones*, 416 S.C. 283, 294–97, 301, 786 S.E.2d 132, 138–39, 142 (2016). If he proves all of the above elements, the court must conclude he had no

duty to retreat and had the right to meet force with force, including deadly force. *Id.* The standard for determining whether the belief was reasonable is objective rather than subjective. *State v. Douglas*, 411 S.C. 307, 320, 768 S.E.2d 232, 239 (Ct. App. 2014).

Judge Russo properly found Dennis did not meet his burden of proving the elements of self-defense by a preponderance of the evidence. "Th[e elemental structure of self-defense] places the burden on the defendant to produce some evidence to support the existence of each element." *State v. Williams*, 427 S.C. 246, 249, 830 S.E.2d 904, 906 (2019). Judge Russo properly and correctly found Dennis had not proven by a preponderance of the evidence that the victim was unlawfully entering his SUV at any time before or while Dennis stabbed him as no fingerprints or DNA from the victim or any DFHS student was found on or in Dennis' SUV. Dennis also told police no one touched his SUV or him. Further, the testimony of whether the victim had put his hand inside Dennis' SUV varied wildly. Some testified the victim did not reach into Dennis' SUV. Others testified the victim only reached in after he was stabbed. That credibility determination was for Judge Russo who found Dennis' **was not credible** regarding his belief that unlawful or deadly force was about to or was occurring. He also found Dennis failed to prove by a preponderance of the evidence **he was not without fault in bringing on the difficulty**. *State v. Marshall*, 428 S.C. 11, 832 S.E.2d 618 (Ct. App. 2019). He was not entitled to a presumption of fear.

As Judge Russo found, the credible evidence was Dennis challenged the DFHS students to a fight at the *Cook-Out* **while they were all still at LHS**, he voluntarily went into the *Cook-Out* even though it was full of DFHS students, he moved his SUV to another location in the parking lot rather than leaving the *Cook-Out*, he pointed his SUV and accelerated his SUV directly at DFHS students almost striking 2, and he called DFHS students to his SUV and taunted them. Judge Russo found Dennis' actions were reasonably calculated to bring on the difficulty, that no

reasonable man would have believed he was in danger, and, as a result, he had a duty to retreat before meeting force with force. And, the record showed Dennis had numerous avenues of retreat and could have avoided the difficulty altogether by not going to *Cook-Out* after instigating the conflict at LHS, by not going into the restaurant and antagonizing those he had challenged to fight at LHS earlier, and by not driving his SUV into a group of DFHS students he knew were there, but simply leaving the parking lot where he parked, and by not calling DFHS students over to his SUV and taunting them, and by pulling away before stabbing anyone. Judge Russo properly analyzed the elements of self-defense and Sections (A), (B), and (C) and properly denied immunity. The Court of Appeals should have reviewed and affirmed that determination and erred in not doing so.

Argument in Reply II.

Dennis erroneously argues the Court of Appeals did not err in making evidentiary findings and in instructing the circuit court on whether it should find certain facts and presumptions favorable to Dennis below.

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

Second, and even more troubling, these evidentiary and legal findings in this section of the Opinion and directions to the Circuit Court to follow them would require the Circuit Court, which

is the sole determiner of the facts and elements at an immunity hearing, to follow the factual findings and legal conclusions of the Court of Appeals which would abdicate the Circuit Court's statutory role in immunity proceedings to the Court of Appeals. *S.C. Code Ann.* Sections 16-11-410 to 450 (2006); *State v. Manning*, 418 S.C. 38, 43, 791 S.E.2d 148, 150 (2016); *State v. Isaac*, 405 S.C. 177, 187, 747 S.E.2d 677, 682 (2013); *Duncan*, 392 S.C. 404, 709 S.E.2d 662; *State v. McCarty*, 437 S.C. 355, 878 S.E.2d 902 (2022). This Court has repeatedly held a Circuit Court may not abdicate its fact finding and legal conclusion determinations in an immunity hearing to another body. *McCarty*, 437 S.C. at 372, 366, 878 S.E.2d at 911 ("[T]he circuit court must weigh the evidence and make its own credibility and factual findings before reaching a decision as to immunity"); *State v. Chhith-Berry*, 437 S.C. 527, 542-43, 878 S.E.2d 352, 360 (Ct. App. 2022); *State v. Cervantes-Pavon*, 426 S.C. 442, 452 827 S.E.2d 564, 569 (2019); *State v. Glenn*, 429 S.C. 108, 116, 838 S.E.2d 491, 495 (2019); *McCarty*, 437 S.C. at 375, 878 S.E.2d at 913 ("the circuit court is in the best position to assess witness credibility and make the necessary findings of fact"); *State v. Gray*, 488 S.C. 130, 141, 882 S.E.2d 469, 475 (Ct. App. 2022); *State v. Ford*, 439 S.C. 261, 886 S.E.2d 710 (Ct. App. 2023) ("[T]he circuit court, sitting as fact-finder, must make specific fact findings that support its immunity decision.").

The Court of Appeals duty was to conduct appellate review of the Circuit Court's immunity determination not to dictate to the Circuit Court what to find or what inference to grant to Dennis on remand. *Jones*, 416 S.C. at 290, 786 S.E.2d at 136 ("A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard, which [appellate courts review [] under an abuse of discretion standard of review."), quoting *State v. Curry*, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013). The Court of Appeals exceeded its appellate review and authority in this section of the Opinion, and this must be corrected by this Court otherwise

Circuit Judges will feel obligated to follow this language of a published Opinion no matter the facts in a case.

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

Dennis argues in his Brief, that because he was in his SUV, he was in a place he had a right to be. The fact that Dennis was in his SUV does not mean he was in a place where he had a right to be. Otherwise, a defendant could drive a vehicle intentionally into a crowd on a public street, injuring or killing numerous victims, and claim because he was inside a car or truck, that he was in a place he had a right to be and was entitled to immunity under the Act or certain presumptions. Similarly, a defendant could be in his car but trespassing, and when the lawful owner, lessee, or invitee sought to eject him, kill that person and claim entitlement to immunity under the Act or certain presumptions since he was in his car. That was never the intent of the Legislature as set forth in the Act. Further, the credible evidence was the victim was stabbed outside the car.

The Court of Appeals erred in giving the Circuit Court instructions on what it should find below and what presumptions it must apply in Dennis's favor on remand, as Judge Russo found the credible record does not support Dennis was without fault in bringing on the difficulty, he acted reasonably after instigating the conflict, he had no other means of avoiding the difficulty, or he even was in a place he had a right to be. Further, the credible evidence below was *the situs of the crime* was outside Dennis' SUV. This portion of the Court of Appeals' Opinion must be struck.

Argument in Reply III.

Dennis erroneously argues a mistrial entitles one to a new immunity hearing

In his Brief, Dennis continues to erroneously argue a mistrial entitles a criminal defendant to a new immunity hearing and determination under the Protections of Persons and Property Act. It does not. A mistrial does not entitle a criminal defendant to another, 2nd, or 3rd immunity hearing. An immunity hearing is a statutory right to seek immunity **from prosecution**. *S.C. Code Ann.* §§ 16-11-410 to 450 (2006). It goes neither to evidence nor defense. *See Duncan*, 392 S.C. at 410, 709 S.E.2d at 665 ("we find that, by using the words 'immune from criminal prosecution,'

the legislature intended to create a true immunity, and not simply an affirmative defense."). *See also Isaac*, 405 S.C. at 183, 747 S.E.2d at 679 ("An order denying an immunity request is not an order involving the merits in that it does not finally determine a substantial cause of action or defense."); *Curry*, 406 S.C. at 373, 752 S.E.2d at 267 ("the trial court had denied Appellant immunity, and section 16–11–440(C) should not have been charged to the jury Act, "); *Cf. Curry*, 406 S.C. at 370, 752 S.E.2d at 266 ("A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard, which this court reviews under an abuse of discretion standard of review.").

The denial of immunity under the Act by Judge Russo, by Order (R. 2905-14), after the 1st immunity hearing, was appealable after Dennis was convicted of murder, by the second jury as he was in this case. The Act does not provide for an interlocutory appeal because the defense is not precluded from arguing self-defense at trial, i.e., the matter has not yet been concluded for purposes of Rule 201, SCACR, requiring "final judgment" for appeal). *S.C. Code Ann.* §§ 16-11-410 to 450 (2006). *See Brown v. County of Berkeley*, 366 S.C. 354, 362, 622 S.E.2d 533 (2005)(order denying immunity was not an order involving the merits of the case or an order that affected a substantial right and as such could not be immediately appealed.); *Isaac*, 405 S.C. at 187, 747 S.E.2d at 682 (Order denying the defendant's request for an immunity hearing on charges of murder under the Act was not a final determination and thus was not an immediately appealable interlocutory order.).

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

process. This confusion further led directly to the Court of Appeals' Opinion in this case reviewing the 2nd immunity hearing and what Judge Hood did or did not do. There was no and is no legal purpose to conduct a 2nd hearing here and Dennis was not entitled to a 2nd ruling on whether he was entitled to immunity. Judge Hood improperly, yet harmlessly, held a 2nd immunity hearing and issued a 2nd judgment regarding Dennis' non-entitlement to immunity. Dennis was simply not entitled to a second bite at the apple, on the question of immunity because of a mistrial. The 2nd immunity hearing was gratuitous. And Judge Hood still correctly denied immunity.

Dennis, in his Brief, still misapprehends the nature of the pre-trial immunity determination as did the Court of Appeals. Immunity is not a question for the jury and logically so. An immunity determination is not a determination of the admissibility of evidence such as drugs or a confession during the trial. *See Keels v. Powell*, 213 S.C. 570, 572–73, 50 S.E.2d 704, 705 (1948). The Legislature could not have intended for the defendant to be granted a 2nd immunity hearing otherwise if the defendant received multiple mistrials, *for whatever reasons*, he would be entitled to two, three, four, ... [innumerable] immunity hearings which would make no sense, would not serve judicial economy, and would be redundant. It could also result in the defendant being granted immunity after multiple mistrials, when multiple previous trial judges had denied immunity considering the same or similar evidence. It could also result in the same judge having to conduct another unnecessary immunity hearing if he is the trial judge upon retrial after a mistrial.

The denial of immunity is a determination separate from the trial of the case. In fact, it is a determination **whether the defendant has to go through a trial or not.** The Court of Appeals erred in ruling Dennis was entitled to a 2nd immunity hearing, and now a 3rd hearing. Dennis was only entitled to 1 immunity hearing, the one he had before Judge Russo and was appropriately denied immunity. This Court must correct the Court of Appeals' error.

In his Brief, Dennis simply does not respond to the fact that this appeal involves a question of exceptional importance to this state's criminal justice system. The published Opinion below, is precedent if it remains unaltered. It erroneously held a criminal defendant upon mistrial or new trial is entitled to an entirely new immunity hearing regardless of the reason for reversal, mistrial, or grant of new trial; and, regardless of whether the defendant had a full immunity hearing and denial of immunity with no legal or factual error. The holding has severe implications for our criminal justice system, the administration of justice, and an overly crowded criminal docket and does not serve judicial economy. Dennis did not address any of these concerns in his Brief, yet they are powerful reasons for this Court to reverse the Opinion below. One can easily foresee circuit courts being required to conduct a new immunity hearing when there has been no showing of newly or after-discovered evidence under our case law, or when the same evidence is to be presented again, which was already presented once before and immunity denied. This would result in one circuit judge overruling another circuit judge contrary to precedent and the S.C.R.Crim.P. *Cook v. Taylor*, 272 S.C. 536, 252 S.E.2d 923 (1979); Rule 4(b), S.C.R.Crim.P.

Also, a trial judge would be required to conduct a new immunity hearing when he heard the exact same evidence before and denied immunity and the grant of a mistrial or reversal had absolutely nothing to do with the pre-trial immunity hearing or the denial of immunity. Under this published Opinion, one can easily foresee, a mistrial being granted due to something occurring during opening statement or the presentation of witnesses, and the court could not re-try the case until it granted another unnecessary immunity hearing.[5] A defendant could also provoke a mistrial

[5] A mistrial could occur for a multitude of reasons unrelated to the immunity determination such as a misstatement in opening argument, premature deliberations, outside influence, a sleeping juror, etc. The mistrial could occur so early in the case, a new jury could be drawn and the case completed; yet, under the Opinion below a trial judge would not be able to because he must conduct a new immunity hearing after mistrial.

during opening statement, presentation of witnesses, or closing argument, if he did not like the pre-trial immunity hearing ruling, in order to obtain a new immunity hearing. One can also foresee defense attorneys arguing by extension that whenever a defendant is granted a new trial after verdict or after direct appeal, the defendant should be entitled to a new immunity hearing when there was nothing wrong with the original immunity hearing or determination of immunity and the immunity issue was not even raised on appeal and should be the law of the case. Further, one can foresee the State being overly cautious in making a mistrial motion and the trial court being overly cautious in granting the same, even when justified, because the result will be the trial court will have to conduct a new immunity hearing when it had previously heard and denied the same. Dennis did not address any of these concerns in his Brief because he cannot address them.

Argument in Reply IV.

There is no newly discovered evidence or *Brady* material justifying a 2nd or 3rd immunity hearing.

In his Brief, Dennis argues he has newly discovered evidence or *Brady*[6] material that justifies his entitlement to a 3rd immunity hearing. Dennis is wrong. His so-called "new" evidence is not newly discovered evidence or *Brady* material at all, but evidence Dennis had or could have discovered and/or presented at the 1st immunity hearing but failed to do so. The evidence presented at the 2nd immunity hearing before Judge Hood, that Dennis claimed was "new" **was not** "newly discovered evidence" or *Brady* material but evidence available through the discovery provided to Dennis **before the 1st immunity hearing before Judge Russo** and could have been presented **at**

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

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

Elizabeth Bettini's testimony, mentioned in the Opinion below, was not newly discovered evidence. Bettini was available to be called as a witness at the 1st immunity hearing. There was no *Brady* violation either. Bettini gave multiple statements to the police shortly after the crime. **These were turned over to Dennis' counsel before the 1st immunity hearing.** Bettini's police body-cam statements referenced in the Opinion below were provided to Dennis before the 1st immunity hearing as well. Yet, Dennis chose not to call Bettini at the 1st immunity hearing. Dennis either made a strategic decision not to call Bettini **or** Dennis failed to interview Bettini, a witness he knew about, before the 1st hearing, or review the discovery provided. Regardless, the State did not prevent Dennis from interviewing Bettini and as noted in the Opinion, police only told Bettini shortly before trial not to talk *to the media*. They did not tell Bettini at any time not to talk to Dennis or his counsel. (R. 1783, ll. 21-25). Bettini's testimony **was not newly or after-discovered evidence** as defined by our case law. *Spann*, 334 S.C. at 619-620, 513 S.E.2d at 99 (evidence is newly or after-discovered evidence only if it could not have been discovered before trial). Dennis could have interviewed Bettini before the 1st immunity hearing as he was aware of her, and he could have reviewed her written and recorded statements provided to him before the 1st immunity

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

hearing. **(R. 1668. ll. 7-25; 1669-70; 1679, ln. 23-1680, ln. 6; 1680, ln. 15-1681, ln. 5; 1681, ln. 24 – 1682, ln. 25; 1683, ln. 13-1684, ln. 9).** There was no *Brady* violation either.

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

Dennis admitted as much in his Return that Bettini and Lynch were interviewed at the scene and Bettini and Lynch were on both Officer Voravudhi's and Officer Holliday's video cam footage at the crime scene. (Return to Cert., p. 12). Their written and recorded statements to police were disclosed to Dennis before the 1st immunity hearing, which the State asserted and **Dennis repeatedly admitted below. (R. 1668. ll. 7-25; 1669-70; 1679, ln. 23-1680, ln. 6; 1680, ln. 15-1681, ln. 5; 1681, ln. 24 – 1682, ln. 25; 1683, ln. 13-1684, ln. 9).** Bettini and Lynch's testimony cannot be newly or after discovered evidence or a *Brady* violation. *Spann*, 334 S.C. at 619-620, 513 S.E.2d at 99; *Brady v. Maryland.*

Further, Bettini's *testimony* about her 911 call recited in the Opinion below was available to Dennis before the 1st immunity hearing as **her previous written and recorded statements to police were provided to Dennis before the 1st hearing. (R. citations above including R. 1680, ln. 15- 1681, ln. 5).**[8] Dennis admitted below that **the portions of Bettini's testimony that were so critical are on the videotape provided to him** before the 1st immunity hearing. (***R. 1680, ln. 15- 1681, ln. 5**). As a result, there was no *Brady* violation in this regard. Dennis admitted below:

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

(R. 1680, ll. 1-3). Dennis goes on to admit the State turned over the videos and audios in a stack of disks before the 1st immunity hearing but argued there was so much discovery Dennis could not review it all. **(R. 1680, ll. 3-11).** Dennis then admits again that the State turned over the relevant discovery in the case but complains about statements that police did not take and how police took the statements they did take, and compares this case to a products liability case so he, Dennis, missed things in the discovery provided. **(R. 1682, ln. 23-1683, ln. 12). Dennis claimed below that reviewing the discovery in this case was like drinking water from a fire hose.** Dennis either made a strategic decision not to call Bettini as a witness at the 1st immunity hearing or **as Dennis asserted below**, Dennis failed to review the discovery thoroughly or interview Bettini before the 1st hearing. **(R. 1677, ln. 20-1684, ln. 9).** There was no *Brady* violation. Dennis had

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[8] Bettini's 911 call was recorded and inadvertently recorded over by the 911 agency 90 days after the crime. (R. 1876-90). The police timely requested all 911 calls for this crime before the 90 days, but through a clerical error the 911 agency did not provide Bettini's 911 call to the police because it was made from a different address than the crime, was the 2nd call and considered a duplicate, and was not logged on a CAD report. (R. 1876-90). The call was subsequently recorded over by the 911 agency. Before the 1st immunity hearing, the State requested any CAD reports of 911 calls, and they were told there was not one of Bettini. (R. 1876-90). It was only later, in 2017, upon further request, the State received confirmation that Bettini did call 911 and this fact was turned over to the defense before the 2nd immunity hearing and 2nd trial. (R. 1876-90; 1681).

possession of Bettini's and Lynch's written and recorded statements. Their testimony cannot be newly or after discovered evidence as defined by our law. *Spann.* This cannot be the basis for a new immunity hearing either. Otherwise, our courts would have to engage in numerous immunity hearings where counsel failed to recognize some fact in the discovery he later deems relevant or important to the case. Dennis fails to mention in his Brief the above facts and statements by counsel before the lower court, including his admission that he had possession of Bettini's and Lynch's written and recorded statements before the 1st immunity hearing, nor does the Court of Appeals.

In fact, after hearing the argument and statements of Dennis' counsel on this issue, Judge Hood noted on the record that one of the reasons he was allowing Dennis to present his so-called "new" evidence was to prevent a later PCR hearing or issue with no record development on whether counsel was ineffective for failing to review the discovery provided including a videotape or interview witnesses of which counsel was aware. (R. 1692-98).

Additionally, if the above were not enough, Dennis cannot show Bettini's or Lynch's testimony was after or newly discovered evidence or *Brady* material for another reason, because it would not change the result or was not material. *Spann; Brady.* Both Bettini and Lynch testified at 2nd immunity hearing, and immunity was still denied. Further, Dennis did not even call Lynch or Bettini at the 2nd trial and the jury unanimously convicted Dennis of murder. *Id.* (See Record).[9]

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

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[9] Dennis also mentions or argues the State met with Bettini on September 2, 2016 *after the 1st immunity hearing* and *denial of immunity* by Judge Russo *but before the 1st trial.* This September 2, 2016, interview took place when the State was preparing for the 1st trial. Bettini and her potential testimony had already been disclosed to Dennis through the discovery including a written statement and video statements as shown above. Further, after this meeting, Dennis met with Bettini and called her as a witness at the 1st trial and presented her full testimony. Dennis cannot show a *Brady* violation here. Nor can this be newly discovered evidence. *Spann.*

investigative file, her name is listed on the police report, and her body-cam footage of Bettini and Lynch was turned over to Dennis before the 1st immunity hearing. The State did not hide her existence or the substance of her testimony. There was no *Brady* violation. Dennis simply chose not to call her at the 1st immunity hearing. Both the State and Dennis chose to call her at the 1st trial (R. 630-31; 1439-44). Dennis either made a strategic decision not to call Varavudhi at the 1st immunity hearing or as Dennis argued below, **Dennis failed to review the discovery thoroughly and/or interview her before the 1st hearing. (R. 1677, ln. 20-1684, ln. 9).** Either way, her testimony **was not** and **cannot be** newly discovered evidence under our law because it could have been discovered before the first immunity hearing. *Spann*, 334 S.C. at 619-620.

Further, Dr. Janice Ross, mentioned in the Opinion, was also available for the 1st immunity hearing. She was the pathologist who performed the autopsy on the victim; she issued an autopsy report, and the State provided Dennis with her report before the 1st immunity hearing. She was called as a witness in the 1st trial. (R. 1270-81). The State did not hide her testimony or findings. Dennis simply chose not to call her at the 1st immunity hearing. Dennis made a strategic decision not to call Dr. Ross at the 1st hearing or Dennis failed to review her report and interview her before the 1st hearing. Either way, Ross's testimony **is not** and **cannot be** newly or after-discovered evidence. *Spann*. There was no *Brady* violation. Further, it would not change the result; it was offered at the 2nd hearing and immunity was denied. (R. 1740-63). Ross testified at the 2nd trial and the jury convicted Dennis of murder.[10] *Spann*; *Brady*.

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[10] Dennis puts much argument into Ross' opinion the victim *could have been* bent over when stabbed; however, Dennis ignores the victim could have been in other positions when stabbed and Dennis was seated in an SUV and could have stabbed the victim, who was shorter than him, downward when he reached out of the SUV and stabbed the victim. (R. 289-98; 1740-63). Further, the angle of the wound and the possible positions of the parties is self-evident. And, Dr. Ross testified the crime could not have occurred as Dennis told police. (R. 1740-63).

Dennis argues Ervin Meggett as newly discovered evidence. The Opinion below mentions that 1 of Dennis' arguments for a new immunity hearing was information Meggett told police [actually the Solicitor] in August of 2016.[11] The Opinion mentions nowhere what Meggett actually testified to at the 2nd immunity hearing. Meggett could not remember stating what was contained in a Solicitor's Office's summary of speaking with him in August of 2016, that *allegedly* the victim was in the wrong when he approached Dennis' vehicle when Dennis was leaving the *Cook-Out*. (R. 2020-32). Regardless, this would not change the outcome. *Spann; Brady.* Meggett testified that **the victim was not leaning or reaching into Dennis' vehicle when stabbed. The victim was standing straight up or erect** and **outside of Dennis' SUV, 2 feet from Dennis' SUV,** when **Dennis reached outside of his SUV and stabbed the victim** and then drove off. (R. 2020-32). Meggett actually contradicted the 2 other witnesses mentioned in the Opinion below, Bettini and Lynch. (R. 2020-32). Meggett's testimony does not meet the definition of newly or after-discovered evidence, because it could have been discovered before the 1st immunity hearing, and it would not have changed the result. *Spann*. It confirmed the State's case and contradicted Dennis' defense. The 2nd immunity hearing judge denied immunity after hearing Meggett's testimony. Of note, **Dennis did not call Meggett at the 1st or 2nd trial before either jury even though he had been provided with the Solicitor's notes of Meggett's interview before both trials.** *Id.* No

[11] Meggett was captured in video at the *Cook-Out*. He was with the victim when the victim was stabbed by Dennis. (R. 2023-25). The information Dennis complains about, Dennis admits, was not provided to the State until after the 1st immunity hearing and denial of immunity. (See Return to Cert., 14-15). Dennis also admits the State properly turned over this information to him. (Id.). The State learned of Meggett after the 1st immunity hearing while preparing for trial and turned over its' interview notes immediately. (R. 1690-91). The State discovered Meggett by showing surveillance photos of Meggett at the crime scene to other witnesses in the case who identified him. (R. 1690-91). Dennis could have done the same before the 1st immunity hearing. *Spann.* There was no *Brady* violation. As soon as the State knew about Meggett and his testimony they disclosed him and their notes. *Id.*

court, not Judge Russo, Judge Hood, or the Court of Appeals has found any of this so-called "new" evidence is "actually newly or after discovered evidence" under *Spann* and its progeny. No court has found a *Brady* violation either. Meggett's testimony was turned over immediately to Dennis when the State learned of his existence and testimony. There was no *Brady* violation. Further, It was not material because it did not change the outcome. This Court must correct the Court of Appeals' error in granting a 3rd immunity hearing under these circumstances.

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

The omission of critical facts in the Opinion also leads to a misleading impression. Chauncey Meggett testified he did not remember telling the Solicitor's Office what was contained in a Solicitor's summary of an interview with him, but he did clearly remember the victim was outside Dennis' car and standing straight up when Dennis stabbed the victim by Dennis reaching out his car window and stabbing the victim. (R. 2020-32).

Dennis was not denied a fair 1st immunity hearing, he simply chose not to review the discovery provided thoroughly, not to investigate certain witnesses as available to him as the State, not to call certain witnesses, or not to present certain evidence. The Opinion below blatantly fails to acknowledge or point this out. The Opinion below must be reversed.

Argument in Reply V.

Dennis erroneously argues Judge Hood's order denying immunity should be reviewed

In his Brief, Dennis, like the Court of Appeals, continues to erroneously argue Judge Hood's order denying immunity is what should be reviewed. Dennis is wrong. Dennis was only entitled to 1 immunity hearing and Order, which he received from Judge Russo, (R. 2905-14), which should have been reviewed on appeal by the Court of Appeals but was not. This Court should review Judge Russo's determination on the issue of immunity, which was correct. The Court of Appeals erred when it ruled the 1st immunity hearing was a nullity without any finding of error, much less reversible error. Judge Russo held a complete immunity hearing on November 17-19, 2014. Testimony was received from 14 witnesses. Judge Russo denied immunity in an Order filed on February 10, 2015. (R. 2905-14). A jury trial was held in October 2016. The jury could not return a verdict (reporting that they were 11 to 1 in favor of conviction). The 1st immunity hearing transcript, and the Order denying immunity from that hearing, were contained in the record before the Court of Appeals. (*See* R. 1-586 and 2905-14). But the Court of Appeals erred in not reviewing Judge Russo's immunity determination and in determining Dennis was entitled to "a new, full immunity hearing" simply because of a hung jury.

Dennis misunderstands and the Court of Appeals misunderstood the State's argument as to appealability. The State submitted the remedy was for Dennis **to appeal the 1st immunity hearing Order after judgment**, i.e. after conviction by the second jury that found him guilty,

precisely what *Isaac*, 405 S.C. at 182, 747 S.E.2d at 679, provides. The State's argument below and on appeal was and still is Dennis was only entitled to 1 immunity hearing, the hearing he had before Judge Russo, who denied him immunity under the Act by Order. Dennis was not entitled to the 2nd immunity hearing which was completely gratuitous.[12]

CONCLUSION

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

Respectfully submitted,

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[12] Instead, the Court of Appeals erroneously reviewed the 2nd immunity hearing and Judge Hood's decision and criticized his use of the language "a quintessential jury issue." However, Dennis had a full hearing and denial of immunity by Judge Russo. The 2nd hearing was unnecessary and gratuitous. A statement by Judge Hood could not undermine Judge Russo's determination.