THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of General Sessions

The Honorable Diane S. Goodstein, Circuit Court Judge

Appellate Case No. 2012-213026

The State.....Respondent,
v.
Jabari Linnen .....Appellant.

Unpublished Opinion No. 2015-UP-212
Heard March 2, 2015—Filed April 22, 2015

APPELLANT'S PETITION FOR REHEARING

The Court's April 22, 2015 Order affirms the trial court's denial of Appellant's request for a jury charge on the Protection of Persons and Property Act, S.C. Code §§ 16-11-410 et seq. ("the Act"), solely because Appellant failed to seek a pretrial hearing on immunity under the Act. Pursuant to S.C.A.C.R. 221(a) and 240(e), Appellant Jabari Linnen respectfully submits the following Petition for Rehearing.

A. The cases cited by the Court do not support waiver.

In deciding this issue of first impression under the Act, the Court relied upon a series of three cases which, together, presumably supported the Court's conclusion that a defendant's failure to seek a pretrial finding of immunity from prosecution operates as a waiver of the defendant's right to a jury charge on the Act. *See State v. Duncan*, 392 S.C. 404, 409-10, 709 S.E.2d 662, 667 (2011) (holding that a pretrial determination of immunity from prosecution was the only way that the Act's immunity provision could be meaningfully enforced); *State v. Marin*, 404 S.C. 615, 625, 745 S.E.2d 148, 153-54 (Ct. App. 2013), *cert granted*, S.C. Supreme Court Order dated October 24, 2014 (affirming denial of jury instruction on subsection 16-11-450(A) of the Act because it contains only a procedural right to immunity and no substantive rights); *State v. Curry*, 406 S.C. 364, 373, 752 S.E.2d 263, 267 (2013) (holding that jury instruction on subsection 16-11-440(C) of the Act was error because defendant had sought and been denied immunity under the Act).

Appellant respectfully submits that the Court misapprehends the reach of these cases in holding that the failure to seek a pretrial hearing on immunity operates as a waiver of the Act in its entirety. This holding is error because the Act is not limited to providing a procedural mechanism for seeking immunity from prosecution. The Act also includes substantive provisions which materially change the law of self-defense in South Carolina, and there is no indication that the legislature intended those substantive provisions to apply only in the context of a request for immunity from prosecution.

Appellant concedes that, under *Duncan*, he waived his right to seek immunity under the Act by failing to seek a pretrial hearing on the issue. *Duncan* holds that the

legislature intended the Act's immunity provision to be a "bar to prosecution," which can only be vindicated by deciding the issue pre-trial. 392 S.C. at 409-10, 709 S.E.2d at 664-65. If Appellant were appealing the denial of a mid-trial motion to dismiss grounded in the Act's immunity provision, *Duncan* would dictate that the right to seek immunity had been waived by failing to seek a hearing on the issue pre-trial.

But Appellant's appeal is not based on the trial court's failure to grant him immunity under the Act. Appellant never sought "immunity" from prosecution, neither pre-trial nor otherwise, and does not seek immunity at this stage. Appellant requested a jury instruction on the Act's substantive provisions, **not** the Act's procedural immunity provision, and appeals the trial court's denial of that instruction. Therefore, *Duncan* is not determinative of this case.

The Court's reliance on *Marin* is similarly misplaced. In *Marin*, the defendant appealed the trial court's denial of a jury instruction on subsection 16-11-450(A) of the Act, which is the procedural immunity provision. 404 S.C. at 625, 745 S.E.2d 148, 153-54; *see also* S.C. Code § 16-11-450(A) ("A person who uses deadly force as permitted by the provisions of this article or another applicable provision of law is justified in using deadly force and is immune from criminal prosecution and civil action for the use of deadly force. . . "). The Court affirmed the trial court, holding that subsection 16-11-450(A) does not contain any substantive provisions of law, but instead contains only the procedural immunity provision which is irrelevant to the work of the jury. *Marin*, 404 S.C. at 625, 745 S.E.2d at 153-54.

In this case, Appellant did not seek a jury instruction on subsection 16-11-450(A), because he was not seeking procedural immunity from trial. Appellant requested an

instruction on the Act's substantive provisions, particularly its extension of the common law Castle Doctrine to occupied vehicles, as codified in subsections 16-11-410(A), (D) and subsection 16-11-440(C). Therefore, *Marin* is not determinative of this case.

The Court appears to rely primarily on *Curry* in reaching the result in this case, but Appellant submits that *Curry* is not determinative either. In *Curry*, the Supreme Court held that the trial court should not have charged the substantive law of subsection 16-11-440(C), because the defendant sought and was denied immunity under the Act. 406 S.C. at 373, 752 S.E.2d at 267. However, the Court found that the trial court's error in charging the jury on both the Act and common law self-defense was harmless, because the Castle Doctrine does not apply to social guests, neither at common law nor under the Act. *Id.* at 374, 752 S.E.2d at 267-68.

Curry stands solely for the proposition that the denial of a motion for immunity under the Act supports the denial of a request to charge the jury on the Act's recitation of the common law elements of the Castle Doctrine found in Section 16-11-440(C). *Id.* at 373, 752 S.E.2d at 267. *Curry* expressly leaves open the question of whether the Act contains additional substantive provisions that reach beyond the common law Castle Doctrine, which may exist independent of a motion for immunity: "[t]he full reach of the Act and whether statutory provisions in the Act extend beyond the common law Castle Doctrine are questions for another day." *Id.*

The Court did not need to resolve that question in *Curry*, because *Curry* did not implicate any substantive extension of the Castle Doctrine. The common law Castle Doctrine, as codified by the Act, would not include a social guest, and the Act did not expressly extend the Castle Doctrine to social guests.

But the question left for another day in *Curry* is exactly the question posed by this case. Appellant's requested charge sought to instruct the jury on the Act's substantive extension of the common law Castle Doctrine to those attacked in occupied vehicles, which absolves such persons from the duty to retreat. There has been no case law addressing the Act's extension of the Castle Doctrine to those in occupied vehicles since the Act was enacted in 2006, and thus Appellant's case presents an untested issue on the Act's scope that this Court must resolve.

B. Justice Pleicones' concurrence in *Curry* does not dictate the result of this case.

In affirming the trial court in this case, the Court quotes Justice Pleicones' concurrence and partial dissent in *Curry*, in which Justice Pleicones agreed that the trial court should not have charged the jury on the Act's codification of the common law Castle Doctrine because the defendant had sought and been denied immunity under the Act. *Id.* at 375, 752 S.E.2d at 268. Justice Pleicones explained his reasoning that, "[w]hile a criminal defendant is entitled to have the issue of statutory immunity decided prior to trial by a judge, once the case goes to trial a defendant's right to a jury charge on these defenses is determined under common law principles." *Id.* In this case, it appears that the Court interprets this broad language as providing that a defendant waives a right to a jury charge on the Act by failing to seek a pretrial hearing of immunity.

Appellant respectfully submits that Justice Pleicones' concurrence and partial dissent in *Curry* does not warrant a holding that the failure to seek immunity operates as a wholesale waiver of the Act. As an initial matter, Justice Pleicones' reasoning is dicta, to the extent the Court interprets it as barring a jury charge on the Act when the defendant **never** sought immunity, because that question was not presented in *Curry*. The

defendant in *Curry* sought and was denied immunity under the Act, and that was the precise basis for the majority's opinion that an instruction on the Act was in error. More specifically, the trial court had already determined, in the course of the immunity hearing, that the defendant did not satisfy the requirements of the common law Castle Doctrine, and thus the Court held that an instruction on the Act's codification of the common law Castle Doctrine was inappropriate. *Id.* at 373, 752 S.E.2d at 267. Because, in this case, Appellant never requested an immunity hearing, the same logic does not justify the trial court's denial of Appellant's requested instruction on the Act.

Moreover, the Court's interpretation of Justice Pleicones' dicta purports to answer the precise question expressly left open by the *Curry* majority, by holding that the Act does not substantively change the common law Castle Doctrine, and instead merely provides a procedural mechanism to seek immunity pre-trial, such that Appellant's failure to seek immunity leaves no basis for a charge on the Act. But neither Justice Pleicones nor the *Curry* majority were faced with that issue, as *Curry* did not present a question of the Act's substantive extension of the Castle Doctrine—it presented only the question of the consequences if immunity under the common law Castle Doctrine is sought and denied. The Court's reliance on *Curry* to affirm the trial court under these circumstances is misplaced, as *Curry* did not present two issues critical to resolving this appeal.

C. Rehearing is necessary to resolve Appellant's issue on appeal.

Because *Curry* does not foreclose this Court's opportunity to find that the Act contains substantive provisions of law which exceed its procedural mechanism for immunity and justify a jury charge on the Act, Appellant respectfully requests a rehearing so that the Court may consider the three remaining questions presented by Appellant's

appeal: (1) does the Act contain substantive provisions of law, independent of the procedural immunity mechanism, which justify a jury charge if warranted by the facts; (2) if so, did Appellant present facts entitling him to a jury charge on the Act; and (3) if so, was the trial's denial of the charge prejudicial to Appellant, so as to justify a new trial. The answer to all three questions is yes.

1. The Act contains material substantive provisions, which cannot be vindicated if limited to a procedural mechanism for immunity.

The Act's includes two material, substantive changes to the law of self-defense. As primarily relevant to this case, the Act expressly extends the Castle Doctrine to those attacked in occupied vehicles, a major substantive change that never existed at common law. Subsection 16-11-440(C) is the statutory provision essentially codifying the common law Castle Doctrine, absolving those attacked in their homes of the duty to retreat and extending that right to any place the defendant has a right to be, which, pursuant to section 16-11-420, expressly includes occupied vehicles.

But the extension of the Castle Doctrine to occupied vehicles is not the only substantive change provided by the Act. Subsection 16-11-440(A) goes materially farther than the common law Castle Doctrine; that subsection also provides that, in certain limited circumstances involving active intrusion into the home, vehicle, or place of business, the defendant not only has not duty to retreat, but also is presumed to be in reasonable fear for his safety. By contrast, a defendant who used force in circumstances not covered by subsection 16-11-440(A) may still be absolved of the duty to retreat under the codification of the common law Castle Doctrine in subsection 16-11-440(C), but still must prove that he reasonably feared for his safety.

This additional presumption provided in subsection 16-11-440(A) was never part of the common law Castle Doctrine. Indeed, imposing a presumption of reasonable fear in certain circumstances is a major, substantive change to the law of self-defense that is totally independent of the common law Castle Doctrine. The legislature was not merely providing a procedural mechanism for immunity pursuant to the common law Castle Doctrine; it was also materially adding to the law of self-defense in South Carolina.

But the legislative intent in enacting those changes to the law would be diminished if the Court's holding in this case were correct. Indeed, under the Court's interpretation of *Curry*, a criminal defendant would **never** be entitled to a jury charge on the Castle Doctrine. The defendant would either: (a) successfully move for immunity pre-trial and never be prosecuted; (b) unsuccessfully move for immunity and, under *Curry*, be denied the right to a charge on the Act; or (c) fail to move for immunity altogether and, under this Court's interpretation of *Curry*, be denied the right to a charge on the Act.

Contrary to the legislature's express intentions for the Act as set forth in section 16-11-420, this result would significantly **restrict** the right to self-defense. A jury would never be entitled to consider that South Carolina law imposes certain favorable presumptions on persons who use force to defend themselves in their homes, places of business, or occupied vehicles. Instead, the defendant would only be afforded the benefit of the Act's presumptions if he satisfies the **court**, at a pre-trial hearing and by a preponderance of the evidence, that his conduct satisfies each element of self-defense, as modified by the Act's codification of the Castle Doctrine.

This result would impermissibly shift the burden of proof to the defendant to prove entitlement to the protections of the Castle Doctrine, in stark contrast to well-established law that, once raised, the solicitor must disprove self-defense beyond a reasonable doubt at trial. There is nothing in the Act to suggest that this is the result the legislature intended. The reasonable reading of the Act is that the General Assembly intended to not only create procedural mechanism to seek immunity from prosecution altogether, but also to set forth substantive changes to the common law of self-defense, independent of a defendant's election to utilize the procedural mechanism available.[1]

Because the Act goes far beyond a procedural mechanism for immunity, Appellant respectfully requests a rehearing to determine whether the trial court erred in denying him a jury charge on substantive provisions of the Act, particularly its extension of the common law Castle Doctrine to those attacked in occupied vehicles.

2. Appellant presented facts entitling him to a charge on the Act.

The trial court has a duty to give a requested instruction that is supported by the evidence and correctly states the law applicable to the issues. *State v. Peer*, 320 S.C. 546, 553, 466 S.E.2d 375, 380 (Ct. App. 1996). If there is any evidence to support a jury charge, the trial judge should give a requested charge on the matter. *State v. Burriss*, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999).

[1] This material difference in the burden of proof in an immunity hearing and at trial presents a clear justification for why a defendant may sensibly choose not to move for immunity pre-trial, but still seek to prove his entitlement to the protections afforded by the Act. A reasonable defendant could determine that his ability to satisfy the Act's recitation of the Castle Doctrine presents a "quintessential jury question" that he likely could not prove by a preponderance of the evidence so as to obtain immunity. See Curry, 406 S.C. at 372, 752 S.E.2d at 267. Under Curry, if the defendant moves for immunity and is denied, he loses the opportunity for a jury charge on the Act altogether. Therefore, a reasonable defendant could elect against seeking immunity, choosing instead to present his claim of self-defense at trial, seek a jury charge on the Act, and require the state to disprove his entitlement to self-defense, as modified by the Act, beyond a reasonable doubt. This result is sensible and consistent with the stated purpose of the Act, but impossible under the Court's holding in this case.

Appellant sought a charge pursuant subsections 16-11-410(A), (D) and subsection 16-11-440(C) of the Act, which, together extended the common law Castle Doctrine to occupied vehicles. In order to be entitled to a charge on these provisions, Appellant needed only present evidence that he was attacked in his vehicle. Because Appellant did not seek an instruction on the presumption of reasonable fear set forth in subsection 16-11-440(A), he did not have to present evidence sufficient to meet the circumstances set forth in that subsection in order to be entitled to the requested charge.

As fully set forth in Appellant's briefs in this matter, Appellant presented evidence that he was attacked in his vehicle immediately prior to the shooting at issue in this case, and thus he was entitled to a jury charge on the Act. Appellant's exit of the vehicle to confront that attack is irrelevant to his entitlement to the charge; whether Appellant's conduct removed him from the protections of the Act is a "quintessential jury question" that the jury was fully capable of resolving. As such, the trial court erred by denying Appellant's requested instruction on the Act.

3. The trial court's error was prejudicial and not harmless.

By requesting an instruction on the Act, Appellant was requesting that the jury be permitted to consider that, pursuant to South Carolina law, those persons attacked within their vehicles have no duty to retreat before using force to repel the attack. Because that request was denied, the jury was charged solely on the common law of self-defense, which imposed a duty to retreat on Appellant before using force in self-defense.

The duty to retreat could reasonably have been the determinative element in Appellant's conviction. There was no material factual dispute that the alleged victim brought on the attack and that Appellant shot the alleged victim only after the alleged

victim threatened Appellant's life and appeared to reach for a weapon. As such, the element of self-defense that was likely determinative of Appellant's conviction was the duty to retreat. Had the trial court properly instructed the jury on the Act as requested by Appellant, the jury could have determined whether the attack occurred within Appellant's vehicle such that Appellant had no duty to retreat. Therefore, the trial court's error in refusing the instruction was prejudicial and not harmless, and Appellant should be granted a new trial with the benefit of Appellant's requested instruction.

D. Conclusion

For these reasons, Appellant respectfully requests that the Court reconsider its April 22, 2015 Order affirming the trial court's denial of Appellant's request for a jury charge on the Protection of Persons and Property Act, S.C. Code §§ 16-11-410 et seq. ("the Act"), and grant a rehearing to further address this matter.

This 7th day of May, 2015.

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PROOF OF SERVICE

I hereby certify that I have served the foregoing Appellant's Petition for Rehearing on the Respondent by placing a copy of the same in the United States mail, addressed to J. Benjamin Aplin, Assistant Attorney General, at Rembert Dennis Building, 1000 Assembly Street, Columbia, South Carolina 29201.

This 7th day of May, 2015.

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May 7, 2015

BY HAND DELIVERY

The Honorable Jenny Abbott Kitchings
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Re: *The State v. Jabari Linnen*
Appellate Case No. 2012-213026

Dear Ms. Kitchings:

On behalf of Appellant Jabari Linnen, please find enclosed for filing an original and six (6) copies of a Petition for Rehearing with proof of service.

Please contact me with any related questions. Thank you.

Very truly yours,

James A. Byars

JAB/gpc
Enclosures
cc: J. Benjamin Aplin, Esquire
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