THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of General Sessions

The Honorable Diane S. Goodstein, Circuit Court Judge

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

Unpublished Opinion No. 2015-UP-212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

PETITION FOR A WRIT OF CERTIORARI

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July 17, 2015

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that a Petition for Rehearing was filed with the Court of Appeals on May 7, 2015 and denied by Order dated June 18, 2015.

INTRODUCTION

This Petition asks the Court to consider the reach of the "Protection of Persons and Property Act," S.C. Code § 16-11-410 *et seq.* ("the Act"), and its impact on the substantive law of self-defense. More specifically, a single, novel question of law is at the heart of this appeal: does the Act *substantively* expand the common law Castle Doctrine, independent of the Act's *procedural* mechanism for immunity?

Petitioner respectfully submits that there are special and important reasons for the Court to grant certiorari and resolve this question. Since its enactment in 2006, South Carolina's appellate courts have rarely had occasion to consider the Act. The cases that have addressed the Act provide ample guidance on its immunity provision, but touch little on the Act's substantive impact on the law of self-defense. Indeed, in this Court's most recent decision on the Act, *State v. Curry* (2013), the Court expressly left open the precise question posed by this case: whether the Act contains substantive provisions of self-defense that extend beyond the common law Castle Doctrine.

In this case, the Court of Appeals' presumed to answer this question of first impression in the negative, holding that Petitioner waived the right to a jury instruction on the Act by failing to seek a pretrial hearing on immunity. In doing so, the Court of Appeals misconstrued Justice Pleicones' concurrence in *Curry* and ignored the Act's material expansion of the common law Castle Doctrine's right to "stand your ground." If permitted to stand, the Court of Appeals' decision significantly diminishes the General Assembly's intention for the Act, not only by denying Petitioner the right to a jury

instruction on the Act's substantive provisions regardless of immunity, but by precluding *any* jury from *ever* considering the Act in reaching a verdict.

This case is ideal for the Court to rectify the Court of Appeals' error and clarify the Act's reach. Unlike any prior case considering the Act, this case involves the Act's extension of the common law Castle Doctrine to those who, like Petitioner, used deadly force only after being attacked in an occupied vehicle. The trial court erroneously denied Petitioner a jury instruction on the Act's application to occupied vehicles, and the Court of Appeals erroneously affirmed, not based on the facts, but based on a finding that the Act contained no substantive provisions independent of immunity sufficient to warrant a jury instruction. In the nearly ten years since the Act was enacted, no other appellate case has presented facts implicating any of the Act's extensions of the common law Castle Doctrine, nor addressing the availability of a jury instruction for those defendants who choose not to seek immunity pretrial.

This case presents the Court with a unique opportunity to resolve these issues and provide guidance to lower courts on the full reach of the Act. For these reasons, Petitioner respectfully requests that this Petition for a Writ of Certiorari be granted.

QUESTIONS PRESENTED

I. Whether the Court of Appeals erred in holding that Petitioner waived the right to a jury instruction under the Protection of Persons and Property Act by failing to seek a pretrial determination of immunity, when the Act includes substantive provisions materially expanding the law of self-defense, independent of the Act's procedural mechanism for immunity.

II. Whether the trial court erred in denying Petitioner's request for a jury instruction under the Protection of Persons and Property Act, when Petitioner presented evidence that the alleged victim attacked Petitioner and threatened imminent deadly violence while Petitioner was inside his vehicle, and that Petitioner exited his vehicle to confront the attack and fired shots only after reasonably believing the alleged victim was reaching for a deadly weapon.

STATEMENT OF THE CASE

A. The Alleged Crime

On April 21, 2011, Petitioner was in the passenger seat of his car on St. Helena Island while his friend, King David Williams, was driving. (R. p. 168, ln. 23—p. 170, ln. 2; p. 242, lns. 4-10.) Petitioner and Williams approached a stop sign and observed the alleged victim, Kenneth Treyvon Nichols, at the corner. (R. p.170, lns. 9-19; p. 269, lns. 2-13.)

Petitioner presented testimony that he and Nichols had been "beefing" since high school, and that Nichols, who was frequently at the same corner, routinely threatened Petitioner as Petitioner drove by. (R. p. 186, lns. 18-22; p. 206, lns. 5-17; p. 207, lns. 2-6; p. 248, lns. 15-23.) On previous occasions, Nichols threw glass bottles into the street as Petitioner's car was approaching the intersection and ran up to Petitioner's car and kicked the door as Petitioner drove past. (R. p. 191, lns.2-9; R. p. 246, ln. 19—p. 247, ln. 24.) Petitioner also presented testimony that Nichols had a reputation in the community for fighting and violence. (R. p. 195, lns. 12-18; R. p. 245, lns. 3-19.) Nichols had been arrested for several incidents of violence in the months prior to the shooting, including battery of his grandfather and assault of his grandmother and mother. (R. p. 135, ln. 3—p. 136, ln. 11.) Petitioner was aware of Nichols' reputation for violence and Nichols' frequent interactions with police. (R. p. 244, ln. 21—p. 245, ln. 16; 530, lns. 19-24.)

Petitioner and Williams testified that, as Petitioner's car came to a stop at the stop sign, Nichols aggressively approached Petitioner's car and began cursing at Petitioner and calling him names. (R. p. 125, lns. 3-6; p. 131, lns. 11-22; p. 161, lns. 3-5; p. 189, ln. 6—p. 190, ln. 13; p. 270, lns. 3-4.) Williams testified that he believed Nichols wanted to fight Petitioner, and further testified that Nichols is physically much bigger than Petitioner. (R. p. 189, ln. 6—p. 190, ln. 13; p. 193, lns. 10-14.) Petitioner testified that he was afraid of Nichols. (R. p. 251, lns. 9-18.) Petitioner testified that Nichols repeatedly stated, '[t]his is my hood, nigga. What the fuck you doing around here? This ain't your turf." (R. p. 269, ln. 18—p. 270, ln. 2.) When Nichols reached Petitioner's car, Nichols threw a soda can into Petitioner's car, striking Petitioner. (R. p. 125, lns. 7-11; R. p. 171, ln. 10—p. 172, ln. 9; R. p. 159, ln. 14—p. 160, ln. 15; R. p.270, lns. 3-10.) Williams testified that Nichols then told Petitioner, "get out of the car, pussy." (R. p. 206, 18-23.)

Petitioner exited the car to confront the attack. (R. p. 172, ln. 2—p. 173, ln. 20; R. p. 270, lns. 8-15; R. p. 275, ln. 22—S.R. p. 21, ln. 2.) Petitioner remained in the roadway, very close to the car. (R. p. 173, lns. 1-15.) Nichols quickly approached Petitioner, where they met immediately outside the vehicle on the driver's side and continued to argue. (R. p. 187, ln. 19—p. 189, ln. 5; R. p. 211, lns. 7-13.) Nichols was hostile and motioning with his arms. (R. p. 127, lns. 7-13.) Nichols made the statement, "[y]o, sup nigga, so you ready to die, nigga?" (R. p. 270, lns. 16-24.) Petitioner testified that he saw Nichols reach inside the waist of his pants, presumably for a weapon. (R. p. 283, ln. 3—p. 285, ln. 2.) In fear for his life, Petitioner removed a handgun from his waist and began firing. (R. p. 270, ln, 20—p. 271, ln. 18; R. p. 273, lns. 17-22; R. p. 294, lns. 12-20.) Nichols was shot several times in the thigh, arm, and torso, but survived the incident. (R. p. 130, lns. 19-20.)

B. Petitioner's Requested Jury Instruction

Petitioner was indicted by the Beaufort County grand jury on one count of attempted murder and one count of possession of a firearm during the commission of a violent crime. (R. pp. 1-4.) Petitioner did not make a pretrial motion for immunity from prosecution under the Protection of Persons and Property Act, S.C. Code § 16-11-410 *et seq.*

On September 18-21, 2012, Petitioner proceeded to a jury trial. (R. p. 7.) Following closing arguments, the Court instructed the jury on the law of the case, including common law self-defense. The Court denied Petitioner's request to instruct the jury on the Protection of Persons and Property Act ("the Act"), specifically the Act's effect on the duty to retreat following an attack in an occupied vehicle.[1] Petitioner's counsel timely objected to the Court's refusal to instruct the jury on the Act. (R. p. 364, ln. 24—p. 365, ln. 10.) The Court overruled the objection, stating:

> ... [L]et me just say that I do not believe that the Castle Doctrine, with regards to the vehicle, applies to these facts. Given the dictates of the Castle Doctrine, give the facts of this matter that there was the Coke can that was thrown, and then this gentleman chose to get out of his car while on the public way, get out of the car, walk around the car, and walk towards the alleged victim and begin shooting. I don't believe that this is what is contemplated by the Castle Doctrine. We will know one day, because it is a developing theory, so we will know.

(R. p. 365, ln. 25—p. 366, ln. 9.)

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[1] It is undisputed that Petitioner's Request to Charge 4, titled "Right to Stand Your Ground," stated: "The Castle Doctrine, which recognizes that a person's home is his castle has been extended to include an occupied vehicle. Residents and visitors of South Carolina have the right to remain unmolested and safe within their vehicles. A person who is not engaged in an unlawful activity and who is attacked in another place where he has a right to be 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 crime." S.C. Code §§ 16-11-420(A),(D), 16-11-440(C).

C. Petitioner's Conviction

The jury returned a verdict of not guilty of attempted murder, guilty of assault and battery of a high and aggravated nature, and guilty of possession of a firearm during the commission of a violent crime. (R. p. 369, ln. 22—p. 370, ln. 10.) The court sentenced Petitioner to twenty years imprisonment for assault and battery and five years for possession of a firearm, to run concurrently. (R. p. 374, ln. 21—p. 375, ln. 4.)

D. Court of Appeals' Order

Petitioner filed a timely appeal with the Court of Appeals, arguing that the trial court erred in denying Petitioner's requested instruction on the Act and requesting that Petitioner be granted a new trial with the benefit of the requested instruction. (*See* App. pp. 398-416.) On April 22, 2015, the Court of Appeals issued an unpublished order affirming the trial court. (*See* App. pp. 453-54.) The Court of Appeals' order did not address whether Petitioner presented sufficient evidence at trial to warrant an instruction on the Act. Instead, the Court of Appeals held that the Petitioner waived any right to an instruction on the Act by failing to file a pretrial motion for immunity. (*Id.*)

On May 7, 2015, Petitioner filed a timely Petition for Rehearing with the Court of Appeals. (App. pp. 455-65.) The Court of Appeals denied the Petition for Rehearing on June 18, 2015. (App. p. 473.) The instant Petition for a Writ of Certiorari follows.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN HOLDING THAT PETITIONER'S FAILURE TO SEEK A PRETRIAL HEARING ON IMMUNITY UNDER THE ACT WAIVED HIS RIGHT TO A JURY INSTRUCTION ON THE ACT'S SUBSTANTIVE PROVISIONS.

Petitioner respectfully submits that there is neither case law nor a reasonable statutory interpretation that precludes a criminal defendant from seeking a jury

instruction on the Act's substantive provisions instead of seeking immunity from prosecution in a pretrial hearing. The Court of Appeals' holding mistakenly presumes that the Act adds nothing to the substantive law of self-defense in South Carolina, aside from its prosecutorial immunity provision, such that the right to an instruction on the Act is waived by the failure to timely seek immunity. In reaching that result, the Court of Appeals misapplied case law addressing procedural aspects of the Act's immunity provision, and ignored express language in the Act reflecting the General Assembly's intention to *expand*, not to *restrict*, the substantive rights of self-defense for those attacked in certain circumstances.

For these reasons, Petitioner respectfully requests that the Court grant certiorari to clarify the availability of a jury instruction on the Act's substantive provisions, independent of the Act's procedural mechanism for immunity.

A. The cases cited by the Court of Appeals do not support its premise that the failure to seek immunity operates as a waiver of the Act.

In deciding this issue of first impression under the Act, the Court of Appeals relied on a series of three cases which presumably supported its conclusion that a defendant's failure to seek a pretrial hearing on 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).

Petitioner respectfully submits that the Court of Appeals misapprehended 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.

Petitioner concedes that, under *Duncan*, he waived his right to seek immunity from prosecution 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 Petitioner were appealing the denial of a motion to dismiss grounded in the Act's immunity provision, *Duncan* would dictate that his right to seek immunity had been waived by failing to seek a pretrial hearing. But Petitioner's appeal is not based on the trial court's failure to grant him immunity; Petitioner never sought "immunity" from prosecution, neither pre-trial nor otherwise, and does not seek immunity in this appeal. Petitioner requested a jury instruction on the Act's substantive provisions, **not** the Act's procedural immunity provision, and appeals the denial of that instruction. Therefore, *Duncan* is not determinative of this case.

The Court of Appeals' reliance on *Marin* is similarly misplaced. In *Marin*, the defendant appealed the trial court's denial of a jury instruction on § 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 of Appeals affirmed the trial court, holding that § 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, unlike *Marin*, Petitioner did **not** seek a jury instruction on subsection 16-11-450(A), because he was not seeking procedural immunity from trial. Petitioner requested an instruction on the Act's substantive extension of the common law Castle Doctrine to occupied vehicles, as codified in §§ 16-11-410(A),(D) and § 16-11-440(C). Therefore, *Marin* is not determinative of this case.

The Court of Appeals appears to have relied primarily on *Curry* in affirming the trial court, but *Curry* is not determinative of this case either. In *Curry*, the defendant shot and killed an acquaintance during a fight at a party in his mother's apartment. 406 S.C. at 368-69, 752 S.E.2d at 265. The trial court denied the defendant's motion for immunity under the Act, but still charged the jury on § 16-11-440(C) of the Act, the provision codifying the common law Castle Doctrine. *Id.* at 373, 752 S.E.2d at 267. On appeal, this Court held that the trial court erred by charging the jury on § 16-11-440(C), because the trial court had already determined, in denying the defendant's earlier motion for immunity, that the defendant was a visitor and/or social guest in his mother's apartment, and thus outside the scope of the common law Castle Doctrine, as codified by the Act. *See* 406 S.C. at 373, 752 S.E.2d at 267.

Curry stands solely for the proposition that the *denial* of a motion for immunity under the Act supports the denial of a later 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* does not justify the Court of Appeals'

holding in this case, because *Curry* did not involve the question presented here: whether a defendant who *never* sought immunity from prosecution under the Act waived the right to a jury instruction under the Act—specifically, an instruction related to the Act's substantive extension of the Castle Doctrine to those attacked in occupied vehicles.

In further support of its holding in this case, the Court of Appeals cited Justice Pleicones' concurrence in *Curry*, in which Justice Pleicones concurred 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 previously sought and been denied immunity under the Act. *Id.* at 375, 752 S.E.2d at 268. The Court of Appeals quoted Justice Pleicones' 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.* The Court of Appeals read this language as dictating that a defendant like Petitioner waives the right to **any** jury charge on the Act by failing to seek immunity pretrial.

The Court of Appeals misconstrued Justice Pleicones' concurrence by failing to account for two material differences in *Curry*'s factual context. First, as noted above, Justice Pleicones was commenting on a defendant's right to a jury instruction on the Act when, as in *Curry*, immunity under the Act had been sought and denied—not when, as in this case, immunity was never sought. Second, Justice Pleicones was commenting on a defendant's right to a jury instruction on the Act, following the denial of immunity, when the instruction related *solely* to the Act's codification of the common law Castle Doctrine—not when, as here, the requested instruction related to the Act's substantive extension of the common law Castle Doctrine. *See* 406 S.C. at 373, 752 S.E.2d at 267.

Justice Pleicones agreed with the *Curry* majority that, under those circumstances, a "defendant's right to a jury charge on these defenses is determined under common law principles." *Id.* at 375, 752 S.E.2d at 268. And because the trial court had already determined during the immunity hearing that, based on "common law principles," the defendant's status as a visitor or social guest at the time of the shooting took him outside the scope of the Castle Doctrine, Justice Pleicones concurred with the majority that the trial court should not have given the jury an instruction on the Act's codification of the common law Castle Doctrine. *Id.*

Because Justice Pleicones' concurrence in *Curry* was **not** commenting on cases like this one, which implicate the Act's substantive extensions to the common law Castle Doctrine, and thus may be subject to something other than "common law principles" for determining the defendant's entitlement to a jury charge, *Curry* does not support the Court of Appeals' holding that Petitioner's failure to seek immunity operates as a wholesale waiver of the Act's substantive provisions. Indeed, because the case clearly did **not** involve any substantive provision of the Act, the *Curry* Court expressly left open the question of whether the Act contains substantive provisions that reach beyond the common law Castle Doctrine, 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." 406 S.C. at 373, 752 S.E.2d at 267.

This question left for another day in *Curry* is precisely the question posed by this case. Petitioner did not seek immunity under the Act, but instead sought a jury instruction on the Act's express extension of the common law Castle Doctrine to those attacked in occupied vehicles. The Court of Appeals erred by relying on *Duncan*, *Marin*,

and *Curry* in affirming the trial court's denial of Petitioner's requested instruction, because those cases do not address whether the Act includes substantive provisions independent of its immunity provision, nor do they address the Act's extension of the Castle Doctrine to those attacked in occupied vehicles.

For these reasons, Petitioner's case presents a novel issue on the Act's scope, and Petitioner respectfully requests that the Court grant certiorari to resolve this issue.

B. The Act includes substantive provisions, independent of immunity, which would be diminished by the Court of Appeals' holding.

The Court of Appeals' mistaken reliance on *Curry* presents this Court with the opportunity to consider whether the Act contains substantive provisions of law, beyond its procedural mechanism for prosecutorial immunity, sufficient to support a jury charge on the Act. The Court of Appeals' holding suggests that the Act did no more than codify the common law Castle Doctrine and add a mechanism for immunity, such that a defendant's failure to timely seek immunity leaves no statutory basis for a jury charge. Petitioner respectfully submits that the General Assembly intended to substantively amend the common law of self-defense in South Carolina, not simply create a procedural immunity for the common law Castle Doctrine, and thus a jury instruction on the Act should be available, regardless of whether the defendant seeks immunity.

Determining whether the Act contains substantive provisions independent of immunity is an issue of statutory construction, requiring the Court to consider legislative intent. "All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute." *Broadhurst v. City of Myrtle Beach Election Comm'n*, 342 S.C. 373, 380, 537 S.E.2d 543,

546 (2000) (citation omitted). "A statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers," and "the language of the statute must be read in a sense that harmonizes with its subject matter and accords with its general purpose." *Sparks v. Palmetto Hardwood, Inc.*, 406 S.C. 124, 128, 750 S.E.2d 61, 63 (2013) (citation and quotation marks omitted).

Beyond its immunity provision, the Act includes two material, substantive changes to the common law of self-defense, which go far beyond the common law Castle Doctrine.[2] First, and as primarily relevant to this case, the Act expressly extends the Castle Doctrine to those attacked in occupied vehicles, a major substantive change to the law of self-defense that *never existed* at common law. *See* S.C. Code § 16-11-420(A) ("It is the intent of the General Assembly 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. . .*") (emphasis added). More specifically, § 16-11-440(C) of the Act essentially codifies 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 § 16-11-420, expressly includes occupied vehicles. *See State v. Douglas,* 411 S.C. 307, 328-31, 768 S.E.2d 232, 244-45 (Ct. App. 2014) (cert

[2] There are generally three elements of a common law self-defense claim: (1) the defendant must have been without fault in bringing on the difficulty; (2) the defendant must have subjectively believed he was in imminent danger of losing his life or sustaining serious bodily injury, and that belief must be objectively reasonable to a reasonably prudent man of ordinary firmness and courage; and (3) the defendant must have had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act in self-defense—i.e. the defendant has a "duty to retreat" before using deadly force. *See Curry*, 406 S.C. at 371 n.4, 752 S.E.2d at 266 n.4 (*citing State v. Davis*, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984)). At common law, the Castle Doctrine absolved the defendant from the "duty to retreat" element, if the attack requiring the use of self-defense occurred within the defendant's home. *See id.*

petition pending) (holding that § 16-11-440(C) codifies the Castle Doctrine and is intended to extend its protections to occupied vehicles and places of business).

Second, § 16-11-440(A) of the Act departs altogether from the common law Castle Doctrine, providing that, in certain limited circumstances involving an active intrusion into the home, vehicle, or place of business, the defendant is not only absolved of the duty to retreat, but also is presumed to be in reasonable fear for his safety, thereby satisfying both the "reasonable fear" and "duty to retreat" elements of a valid self-defense claim.[3] By contrast, a defendant who used force in self-defense in circumstances **not** covered by § 16-11-440(A) may still be absolved of the duty to retreat under the codification and extension of the common law Castle Doctrine in § 16-11-440(C), but still must prove that he reasonably feared for his safety at the time of the incident allegedly requiring the defendant to act in self-defense.

This additional presumption of reasonable fear provided in § 16-11-440(A) of the Act is a material, substantive departure from the common law Castle Doctrine that never existed at common law. Along with the extension to occupied vehicles, the Act's inclusion of a presumption of reasonable fear in certain circumstances reflects the General Assembly's intention to not only codify the common law Castle Doctrine and

[3] "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: (1) 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 (2) who uses 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 § 16-11-440(A).

provide a mechanism to seek immunity, but to materially expand the right of self-defense in South Carolina, in a manner never contemplated by the Castle Doctrine.

But the legislative intent in enacting those expansions to the law of self-defense would be diminished if the Court of Appeals' holding in this case were correct. Indeed, the Court of Appeals' holding would significantly **restrict** the right to self-defense in South Carolina, because a criminal defendant would **never** be entitled to a jury charge on the Act, or on the common law Castle Doctrine.[4] The defendant would either: (a) successfully move for immunity pretrial and never be prosecuted; (b) unsuccessfully move for immunity and, under *Curry*, be denied the right to a jury instruction on the Act; or (c) fail to move for immunity altogether and, under the Court of Appeals' interpretation of *Curry*, be denied the right to a jury instruction on the Act. This result itself would be a significant diminution of the common law Castle Doctrine, when a defendant who used force in alleged self-defense in his home was entitled to a Castle Doctrine jury instruction. *See, e.g. State v. Hewitt* 205 S.C. 207, 31 S.E.2d 257 (1944) (granting a new trial because the jury was insufficiently charged on absence of the duty to retreat following an attack in one's home).

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[4] The Act's procedural immunity provision, § 16-11-450(A), provides that "[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. . . " (emphasis added). This language of the Act presumably extends the availability of immunity to common law theories of self-defense which are not expressly covered in the Act. If the Court of Appeals' holding were correct, and the failure to seek immunity under § 16-11-450(A) of the Act operates as a waiver of a jury instruction on defenses for which immunity is available under the Act, then a defendant is theoretically *never* entitled to a self-defense jury instruction of any kind, whether related to the Castle Doctrine or not. This could not be the General Assembly's intention.

Nothing in the Act supports the Court of Appeals' conclusion that, despite a clear legislative intent to expand the right to self-defense, the General Assembly intended to provide an immunity provision, yet preclude a jury from being charged on the Act. If the Court of Appeals were correct, 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, a criminal defendant would only be afforded the benefit of the Act if he satisfies the **court**, at a pretrial hearing and by a preponderance of the evidence, that his conduct satisfies each element of self-defense, as modified by the Act. The jury would never be instructed on the legal relevance of the location of the alleged attack to a claim of self-defense.

This result would not only diminish the General Assembly's intention to expand the right of self-defense, but would impermissibly shift the burden to the defendant to prove self-defense under the Act by a preponderance of the evidence, in stark contrast to well-established law that, once raised, the state has the burden of disproving self-defense beyond a reasonable doubt. Indeed, this material difference in the burden of proof in an immunity hearing compared to trial presents a clear justification for why a defendant may sensibly choose not to move for immunity, but still seek to prove his entitlement to the protections afforded by the Act at trial.

Specifically, a reasonable defendant could determine that his ability to satisfy the Act's requirements presents a "quintessential jury question," such that he may not be able to establish immunity by a preponderance of the evidence at a pretrial hearing. *See Curry*, 406 S.C. at 372, 752 S.E.2d at 267. Under *Curry*, if the defendant moves for immunity and is denied, the defendant arguably loses the opportunity for a jury charge on

the Act altogether. Therefore, a reasonable defendant could choose not to seek 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.

Contrary to the Court of Appeals' holding, the most reasonable intepretation of the Act is that the General Assembly intended to not only create procedural mechanism to seek immunity from prosecution altogether, but also to enact substantive changes to the common law of self-defense, wholly independent of the defendant's election to utilize the procedural immunity mechanism. There is no indication that the General Assembly intended the Act's substantive provisions to apply only in the context of a request for immunity, and never to apply at trial.

For these reasons, Petitioner respectfully requests that the Court grant certiorari to reverse the Court of Appeals and hold that a criminal defendant may be entitled to a jury instruction on the Act, regardless of whether the defendant seeks immunity pretrial.

II. THE TRIAL COURT ERRED BY DENYING PETITIONER'S REQUESTED JURY INSTRUCTION ON THE ACT, AND ITS ERROR WAS PREJUDICIAL AND NOT HARMLESS.

Because the Court of Appeals erroneously held that the Act is limited to a pretrial immunity mechanism and *never* provides the right to a jury instruction on its substantive provisions, the Court of Appeals never ruled on Petitioner's ultimate question presented: whether Petitioner presented sufficient evidence at trial to warrant a jury instruction on the Act, and whether the denial of that instruction warranted a new trial. Petitioner respectfully requests that the Court grant certiorari to hold that the trial court erred in

finding that the Petitioner failed to present sufficient evidence to justify an instruction on the Act, and that the trial court's error in denying the instruction was not harmless.

A. Petitioner was entitled to an instruction 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).

Petitioner requested a jury instruction pursuant to §§ 16-11-410(A), (D) and § 16-11-440(C) of the Act, which, together, extended the common law Castle Doctrine to occupied vehicles. *See Douglas,* 411 S.C. at 328-31, 768 S.E.2d at 244-45. In order to be entitled to a charge on these provisions, Petitioner needed only present evidence that he was attacked in his vehicle. Petitioner did not seek an instruction on the presumption of reasonable fear provided by § 16-11-440(A), which requires a heightened showing of an active intrusion in order to meet the requirements of that section. Therefore, Petitioner 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.

Petitioner presented evidence that he was attacked in his own occupied vehicle immediately prior to the shooting at issue in this case. Specifically, while Petitioner was stopped at a stop sign, the alleged victim initiated an altercation with Petitioner by approaching his vehicle, striking Petitioner with a soda can, and threatening Petitioner with violence. Petitioner exited the vehicle to confront the attack. In response, the alleged victim rapidly approached Petitioner's vehicle, threatened to kill Petitioner, and appeared to be reaching for a weapon. In fear for his life and without a means of escape,

Petitioner shot the alleged victim immediately outside the vehicle. Petitioner presented further evidence that his fear of the alleged victim was reasonable, given his knowledge of the alleged victim's propensity for violence and recent arrests.

Based on this record, Petitioner presented sufficient evidence to warrant a jury instruction on the Act's extension of the common law Castle Doctrine to those attacked in occupied vehicles. Petitioner's exit of the vehicle to confront that attack is irrelevant to his entitlement to the charge; whether Petitioner's conduct took him outside the scope of the Act is a "quintessential jury question" that the jury was fully capable of resolving.[5] As such, Petitioner was entitled to an instruction under the Act, and the trial court erred by denying Petitioner's requested instruction.

B. The trial court's error in refusing Petitioner's requested instruction was prejudicial and not harmless.

Petitioner is entitled to a new trial only if the trial court's error in denying Petitioner's requested jury instruction on the Act was prejudicial and not "harmless." *Visual Graphics Leasing Corp., Inc. v. Lucia*, 311 S.C. 383, 389, 429 S.E.2d 839, 841 (Ct. App. 1993). Error is harmless where it did not contribute to the verdict obtained. *State v. Pagan*, 369 S.C. 212, 212, 631 S.E.2d 262, 267 (2006) (citation omitted). No definite rule of law governs finding an error harmless; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire

[5] Alternatively, because Petitioner was immediately outside his vehicle at the time of the attack and functionally unable to retreat any more easily than if he were inside the vehicle, Petitioner was in the protectable "curtilage" at the time of the attack, and thus within the scope of the common law Castle Doctrine, as extended to occupied vehicles by the Act. *See, e.g. State v. Wiggins*, 330 S.C. 538, 548 n.15, 500 S.E.2d 489, 494 n.15 (1998) (holding that the duty to retreat is absolved unless the underlying incident occurs in the accused's home or business or on the curtilage thereof, the accused generally has a duty to retreat).

case. *State v. Gillian*, 360 S.C. 433, 454-55, 602 S.E.2d 62, 73 (Ct. App. 2004) (*citing State v. Reeves*, 301 S.C. 191, 391 S.E.2d 241 (1990)); *State v. Mitchell*, 286 S.C. 572, 336 S.E.2d 150 (1985); *State v. Curry*, 380 S.C. 674, 636 S.E.2d 649 (Ct. App. 2006).

By requesting an instruction on the Act, Petitioner was requesting that the jury be permitted to consider that, pursuant to South Carolina law, 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 Petitioner before using force in self-defense.

The duty to retreat element of Petitioner's self-defense claim was likely the determinative element in Petitioner's conviction. There was no material factual dispute that the alleged victim brought on the attack, and that Petitioner shot the alleged victim only after the alleged victim threatened Petitioner's life and appeared to reach for a weapon. Those facts alone could support a jury finding that Petitioner established two of the three elements of a valid claim of self-defense; that is, that he was without fault at bringing on the attack, and that he reasonably feared for his life at the time of the attack.

The jury's verdict reflects that the jury rejected Petitioner's self-defense claim, presumably because Petitioner exited his vehicle during the attack and prior to shooting the alleged victim. Had the trial court properly instructed the jury on the Act, the jury could have determined whether the attack occurred within Petitioner's vehicle such that Petitioner had no duty to retreat. Therefore, the trial court's error in refusing the instruction was prejudicial and not harmless, as it likely affected the verdict obtained.

CONCLUSION

For these reasons, Petitioner respectfully requests that the Court grant certiorari to consider the Court of Appeals' April 22, 2015 Order.

This 17th day of July, 2015.

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THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of General Sessions

The Honorable Diane S. Goodstein, Circuit Court Judge

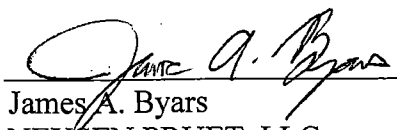
The State.....Respondent,
v.
Jabari Linnen .....Petitioner.

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

PROOF OF SERVICE

I hereby certify that I have served the foregoing Petition for a Writ of Certiorari 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 17th day of July, 2015.



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James A. Byars
Associate

July 17, 2015

BY HAND DELIVERY

The Honorable Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
1231 Gervais Street
Columbia, South Carolina 29201

Re: *The State v. Jabari Linnen*
Appellate Case No. 2012-213026

Dear Mr. Shearouse:

On behalf of Petitioner Jabari Linnen, please find enclosed for filing an original and seven (7) copies of a Petition for a Writ of Certiorari, with proof of service and certificate of counsel. Also enclosed for filing are three (3) copies of the Appendix, including one unbound copy. Please return one (1) clocked copy of the Petition and the Appendix with our courier.

By copy of this letter, I am filing a copy of the Petition with the Clerk of the Court of Appeals and serving counsel for the Respondent with a copy of the same.

Please contact me with any related questions. Thank you.

Sincerely,

Jimmy Byars

Enclosures

cc: J. Benjamin Aplin, Esquire
Robert M. Dudek, Esquire
The Honorable Jenny Abbott Kitchings, Clerk of the Court of Appeals

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