

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of General Sessions

The Honorable Diane S. Goodstein, Circuit Court Judge

The State.....Respondent,

v.

Jabari LinnenPetitioner.

Unpublished Opinion No. 2015-UP-212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

**PETITIONER'S REPLY TO RETURN TO PETITION FOR A WRIT OF
CERTIORARI**

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August 27, 2015

Counsel for Petitioner Jabari Linnen

INTRODUCTION

On August 17, 2015, Respondent submitted a timely Return to the instant Petition for a Writ of Certiorari (the "Petition"). Pursuant to S.C.A.C.R. 242(g), Petitioner Jabari Linnen ("Petitioner") respectfully submits the following Reply.

The Petition asks the Court to consider whether the "Protection of Persons and Property Act," S.C. Code § 16-11-410 *et seq.* ("the Act"), contains substantive provisions of law sufficient to support a jury charge on the Act, notwithstanding Petitioner's decision against seeking a pretrial hearing on immunity from prosecution.

In response to Petitioner's recitation of the "special and important reasons" warranting certiorari, Respondent asserts that "the Court of Appeals employed a straightforward application of the provisions of the Act" in holding that Petitioner waived the Act in its entirety by failing to seek a pretrial determination of immunity. Respondent also argues that, even if the Act did include substantive provisions independent of immunity, Petitioner failed to present facts sufficient to support a jury charge on those provisions, justifying the denial of Petitioner's requested charge.

In reply, Petitioner submits that the plain language of the Act does not limit application of the Act's provisions to a pretrial hearing on immunity; an affirmative defense sufficient to justify a jury instruction is also available. Moreover, Respondent's argument that Petitioner failed to present facts sufficient to support a jury charge on the Act relies solely on an inapplicable provision of the Act for which Petitioner did not seek a jury charge. Petitioner presented evidence sufficient to support his requested instruction on the Act, and the trial court's failure to provide that instruction was in error.

Therefore, Petitioner respectfully renews his request that the Petition be granted.

REPLY

A. The Act is not limited to procedural immunity.

Citing § 16-11-450(A), Respondent argues that the Act “clearly” limits its application to a pretrial determination of immunity, such that, once the trial began, Petitioner’s right to a jury charge on issues of self-defense encompassed by the Act was limited to “traditional common law defenses.” (*See* Return, p. 11.)

The very statutory language Respondent cites suggests the opposite result. Section 16-11-450(A) of the Act provides:

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. . .

S.C. Code § 16-11-450(A). Two clauses of this provision are inconsistent with Respondent’s interpretation of the clarity of this statutory command.

First, as Petitioner previously noted (*see* Petition, p. 15, n.4), the General Assembly did not limit a defendant’s “newly created right to seek pretrial immunity” (Return, p. 11) to defenses expressly covered by the Act. Instead, the Act provides that immunity is available to any person who uses deadly force **either** “as permitted by the provisions of this article **or** another applicable provision of law.” *Id.* (emphasis added). This plain language of the Act gives defendants a procedural right to seek immunity from prosecution, even when the use of deadly force is allegedly justified by a non-statutory, common law theory of self-defense. The “source” of the legal entitlement to the use of deadly force—whether statutory or common law—is irrelevant to whether the defendant is entitled to seek “immunity from prosecution” under the Act.

Second, the Act does not provide that the effect of its principles is limited to immunity. A person “permitted” to use deadly force (whether “permitted” by the Act or at common law) is **both** “justified in using deadly force **and** immune from criminal prosecution.” *Id.* (emphasis added). Thus, the plain language of the Act provides an outcome wholly independent of “immunity from prosecution” for those persons entitled to use deadly force; such persons are also “justified” in the use of deadly force.

Respondent’s theory of the Act cannot be reconciled with either provision of § 16-11-450(A). If, as Respondent suggests, the General Assembly intended to codify *only* a procedural mechanism for immunity, and did not intend for the Act’s substantive provisions to be available as an affirmative defense, the General Assembly could have simply stated that a person permissibly using deadly force is “immune from criminal prosecution.” But the General Assembly did not limit the effect of permissibly using deadly force to immunity; the Act also provides that such a person is “justified in using deadly force.” The Court is duty-bound to interpret the Act in a manner that gives meaning to this language, and a straightforward interpretation suggests that the legislature intended to provide **both** immunity **and** an affirmative defense. This statutory interpretation is not novel for this Court. *See State v. Duncan*, 392 S.C. 404, 410, 709 S.E.2d 662, 665 (2011) (holding that “the legislature intended to create a true immunity, and not **simply** an affirmative defense”) (emphasis added).

Similarly, Respondent’s “pretrial immunity or nothing” theory of the Act would deny a defendant a right to a jury charge on any provision of the law of self-defense, whether grounded in the Act’s substantive provisions or the common law. The General Assembly did not limit immunity from prosecution to those who use deadly force

pursuant to the Act's substantive provisions; immunity is also available to anyone who uses deadly force in accordance with "another applicable provision of law." S.C. Code § 16-11-450(A). If, as Respondent suggests, Petitioner's failure to seek pretrial immunity operated to preclude him from a jury instruction on the Act's substantive provisions, then Petitioner was equally precluded from a jury instruction on "traditional common law defenses" for which immunity was equally available. Thus, by the time Petitioner or any other defendant reached trial, the right to a jury charge on any theory in which the use of deadly force was allegedly permissible—whether based on the Act, common law self-defense, the common law Castle Doctrine, or otherwise—would be lost.

Respondent's theory could not have been the General Assembly's intention for the Act. Instead, the Act's plain language suggests that the General Assembly intended: (1) to create both an entitlement to immunity from prosecution and an affirmative defense; and (2) to extend the availability of immunity to common law theories justifying the use of deadly force. Thus, Petitioner was entitled to a jury instruction on the Act's substantive defenses which allegedly "justified" his use of deadly force, notwithstanding his failure to seek immunity. The Court of Appeals' holding that these defenses were waived by the failure to seek pretrial immunity was based on an erroneous construction of the Act, and thus Petitioner respectfully requests that a writ of certiorari be granted.

B. Petitioner did not request an instruction on § 16-11-440(A).

Respondent argues that, even if a jury instruction under the Act were available to Petitioner despite his failure to seek immunity trial, he would not have been entitled to such an instruction, because he failed to present evidence that he shot the alleged victim from an occupied vehicle. (*See* Return, pp. 12-13.) But Respondent's argument relies on

a reading of the facts justifying an instruction on § 16-11-440(A) of the Act, which is **not** the statutory provision for which Petitioner sought an instruction.

As previously noted by Petitioner (*see* Petition, p. 14), § 16-11-440(A) of the Act provides 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. S.C. Code § 16-11-440(A). Respondent argues that Petitioner was not entitled to an instruction on this subsection, because he failed to produce evidence that the alleged victim “unlawfully or forcibly entered Petitioner’s vehicle or . . . was attempting to remove Petitioner from his vehicle.” (*See* Return, p. 12.)

But Petitioner did not request an instruction on § 16-11-440(A); he requested an instruction on § 16-11-440(C). Under the plain language of the Act, a defendant who uses deadly force in circumstances not covered by § 16-11-440(A) may still be absolved of the duty to retreat under the Act’s codification and extension of the common law Castle Doctrine in § 16-11-440(C). That subsection requires only that the defendant was attacked in a place where he had a legal right to be. *See* S.C. Code § 16-11-440(C). Unlike a defendant proceeding under § 16-11-440(A), a defendant proceeding under § 16-11-440(C) 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. *Id.*

Petitioner sought an instruction on § 16-11-440(C), based on evidence that he used deadly force only after he was attacked in his vehicle and reasonably feared for his safety. (*See* Petition, pp. 5, 18-19.) Based on this evidence, Petitioner’s requested

instruction on § 16-11-440(C)'s extension of the common law Castle Doctrine to occupied vehicles was justified. On the other hand, because Petitioner did not request an instruction on § 16-11-440(A), he was not required to provide evidence of an active intrusion into his vehicle, as suggested by Respondent.

The trial court's failure to give a requested instruction supported by evidence was in error, and thus Petitioner respectfully requests that a writ of certiorari be granted.

CONCLUSION

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

This 27th day of August, 2015.



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PROOF OF SERVICE

I hereby certify that I have served the foregoing Reply to Return to 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 27th day of August, 2015.



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