THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions
John C. Hayes, III, Circuit Court Judge

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SC Court of Appeals

Appellate Case No. 2015–001810

State of South Carolina..Respondent,

vs.

Marquez D. Glenn...Appellant.

BRIEF OF APPELLANT

Christopher T. Brumback
John H. Scully
1 Augusta Street, Suite 301D
Greenville, SC 29601
(864) 414-9097
Attorneys for Appellant

Roy F. Harmon, III
Harmon & Major, PA
PO Box 8954
Greenville, SC 29604
(864) 467-1712
Attorney for Appellant

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STATEMENT OF ISSUES ON APPEAL

I. The trial court's denial of Appellant's Motion for Immunity pursuant to S.C. Code Ann. § 16-11-450(A) solely on the ground that Appellant was in violation of a three year old Trespass Notice for loitering was an abuse of discretion because Appellant, as an invitee of a tenant, was in fact in a place where he had a right to be when he was forced to defend himself, a position consistent with a recent and well-reasoned opinion of the South Carolina Attorney General's Office, South Carolina property law jurisprudence, and the canons of statutory construction.

II. The housing project's use of S.C. Code Ann. § 16-11-620 in conjunction with the project's "Ban List" is in violation of the United States Housing Act's statutory mandate and HUD's implementing regulations such that they cannot constitute the grounds for the forfeiture of an individual's statutory right to self-defense.

III. The use of a general non-specific allegation of loitering as a basis for a summary adjudication of a trespass violation on a public housing project property is unconstitutionally vague.

IV. The use of a three year old trespass notice as a bar to statutory immunity under the PPPA deprives the Appellant of his right to due process of law.

STATEMENT OF THE CASE

This is an appeal from criminal proceedings in the matter of State v. Marqeuz Devon Glenn. See generally State v. Glenn, 2013A2330203357 and 2013A2330203356. This appeal concerns matters of law in trial court criminal proceedings and specifically the immunity hearing that was held pursuant to S.C. Code Ann. §§ 16-11-450(A) and 16-11-440(C).

The trial Court criminal proceedings before the Greenville County Court of General Sessions concerned charges for Attempted Murder, Assault, Assault and Battery of a High and Aggravated Nature, and Possession of a Weapon During a Violent Crime. See generally Glenn, 2013A2330203357 and 2013A2330203356. The charges arise out of an incident wherein Appellant defended himself with the use of a handgun from an unprovoked attack by two (2) individuals while Appellant was leaving an apartment complex. See Immunity Hr'g Tr. 63:11–193:24.

Appellant filed a pretrial Motion for Statutory Immunity based on S.C. Code Ann. §§ 16-11-450(A) and 16-11-440(C), on the grounds that Appellant was immune from prosecution because he had a legal right to use a firearm in self-defense when he was attacked by two (2) assailants at the Spring Grove Apartment Complex. See Immunity Hr'g Tr. 210:18–220:2. The pretrial hearing to consider Appellant's Motion for Statutory Immunity began on August 3, 2015 and concluded on August 4, 2015. See id. at 59:18–221:10. The pretrial hearing was conducted outside of the presence of the jury and was considered and ruled upon by Judge John C. Hayes III. See id.

On August 4, 2015, Judge Hayes ruled from the bench, orally denying Appellant's Motion for Statutory Immunity because Judge Hayes found "that the immunity argument fail[ed] solely on the issue of whether or not [Appellant] had a right to be there" at the time Appellant acted in self-defense. Immunity Hr'g Tr. 221:15–17 (emphasis added). Judge Hayes concluded that Appellant met the remaining criteria to qualify for Statutory Immunity under the protections of S.C. Code Ann. §§ 16-11-450(C) and 16-11-450. See id. at 220:3–222:16 (concluding that Appellant would be entitled to "immunity but for his not being allowed on the property").

Following the trial court's denial of Appellant's pretrial Motion for Statutory Immunity, Appellant was tried by jury in a trial that began on August 4, 2015 and concluded on August 5, 2015. On August 5, 2015, the jury acquitted Appellant on the charge of Attempted Murder, but convicted Appellant of the lesser included charge of Assault and Battery of a High and Aggravated Nature and Possession of a Weapon During a Violent Crime.

Appellant's Notice of Appeal was properly and timely served upon all parties of interest in this matter on August 17, 2015 seeking review of the trial court's oral ruling denying Appellant's Motion for Statutory Immunity "solely on the issue of whether or not [Appellant] had a right to be [on the property]" at the time Appellant was attacked and forced to act in self-defense. See Notice of Appeal; Immunity Hr'g Tr. 221:15–222:14. In seeking review of the trial court's oral ruling denying immunity, Appellant is also appealing his convictions for Assault and Battery of a High and Aggravated Nature and

Possession of a Weapon During a Violent Crime that resulted from the trial court's denial of Appellant's pretrial Motion for Statutory Immunity.

For the reasons stated in this Brief, it is the Appellant's position that the trial court committed an abuse of discretion by denying Appellant's Motion for Statutory Immunity, that Appellant is entitled to Statutory Immunity as a matter of law, and that, in light of Appellant's entitlement to Statutory Immunity, Appellant's conviction for Assault and Battery of a High and Aggravated Nature and Possession of a Weapon During a Violent Crime must be vacated.

STATEMENT OF FACTS

The appeal arises out of an incident on the evening of April 12, 2013 at the Spring Grove Apartment Complex, a Section VIII, government-subsidized housing complex, located at 1900 Boling Road Extension, Taylors, SC 29687 (hereinafter "Spring Grove" or "the Complex"), in the County of Greenville, South Carolina. See Immunity Hr'g Tr. 60:10–61:22, 194:15–200:2; see also 2010 Model Lease for Subsidized Programs.

The individuals involved in the events of the night in question are Marquez Glenn (hereinafter "Mr. Glenn"), a social guest of Shelricka Duncan (hereinafter "Shelricka"), who was a tenant at Spring Grove at the time, Kevin Bruster (hereinafter "Kevin"), and Elfonzo Bruster (hereinafter "Elfonzo"), Kevin's nephew. See Immunity Hr'g Tr. 150:10–23, 155:16–18, 180:4–12. Both Kevin and Elfonzo are substantial larger than Mr. Glenn, who is fairly small in stature. See id. Tivarius Henderson (hereinafter "Tivarius") was also involved in events earlier in the evening that ultimately led Kevin and Elfonzo to attack Mr. Glenn See id. at 60:8–62:19.

On the evening of April 12, Kevin, who was heavily intoxicated at the time, arrived at Spring Grove to find and speak with Gloria Duncan (hereinafter "Gloria"), the mother of Shelricka. See Immunity Hr'g Tr. 61:23–62:3, 85:13–89:2, 204:10–20, 209:15–18, 279:2–6. Gloria previously had a romantic relationship with Kevin. See id. At the time Kevin was angrily and drunkenly seeking Gloria, she was in the apartment of Shelricka, her daughter, with a number of other people, including Tivarius. See id. at 85:13–89:2, 151:9–152:3, 188:11–24. Shelricka's apartment is also the same apartment to which Mr. Glenn had been invited by Shelricka and in which Mr. Glenn had been hanging out with friends prior to taking a friend to the convenient store. See id. Having already left on the aforesaid errand, Mr. Glenn was not present at Shelricka's apartment when Kevin forcibly entered Shelricka's apartment. See id.

Upon determining Gloria's location, Kevin forcibly entered Shelricka's apartment (hereinafter "27C"). See id. at 86:3–13. After violently forcing his way into 27C uninvited, Kevin used a razor blade that he had concealed in his mouth to cut Tivarius in the eye and arm as Tivarius attempted to protect the inhabitants of 27C, leaving Tivarius bleeding and with a substantial laceration above his eye. See id. at 61:23–62:20, 86:13–20. After Tivarius got Kevin outside 27C and Kevin's attack abated, Kevin went to the apartment of his nephew, Elfonzo's, where he engaged in an effort to incite Elfonzo to violence. See id. at 93:13–99:24, 109:3–13, 115:1–7, 160:13–15, 204:14–205:7. In response to Kevin having attacked Tivarius and forcibly entered 27C, law enforcement was at some point contacted and dispatched to Spring Grove. See id. at 63:2–10.

At approximately the same time Kevin was recruiting and urging Elfonzo join him in attacking Tivarius and his family, Mr. Glenn returned to Spring Grove from sober-driving several friends to the convenient store. See id. at 151:9–152:3, 188:11–24. Upon returning to Spring Grove, Mr. Glenn was approached by the police officers who had reported to the scene as a result of Kevin's earlier assault of Tivarius. See id. at 152:9–14, 154:20–155:5. The police officers inquired as to Mr. Glenn's knowledge of the events that had transpired at the Complex involving Kevin, to which Mr. Glenn responded that he had no knowledge of any such events as he had been away from the Complex at the time the assault in question transpired. See id. at 152:10–18.

While Mr. Glenn was assisting and cooperating with the police in their investigation, he noticed, but did not think anything of, Kevin and Elfonzo lurking in the shadows of a nearby apartment building. See id. at 153:10–24. Upon concluding his conversation with the police and the police departing the scene, Mr. Glenn, out of concern over what the police had just told him transpired in his absence, retrieved his belongings from the apartment with the intent to depart from Spring Grove. See id. While walking to his car after obtaining his belongings, Kevin and Elfonzo, seeing Mr. Glenn alone, quickly and intentionally blocked Mr. Glenn's path and began threatening Mr. Glenn. See id. at 109:16–113:8. Upon Kevin and Elfonzo's approach of Mr. Glenn and throughout escalation of the confrontation, Elfonzo had his hand in his waistband as one would do when concealing a handgun. See id. at 75:1–77:13, 124:8–126:16, 161:11–162:15.

Immediately upon accosting Mr. Glenn, both Kevin and Elfonzo began aggressively yelling at Mr. Glenn about the prior altercation instigated by Kevin with Tivarius, in 27C. See id. at 155:15–156:7. Having been at the store during the time of the prior altercation involving Kevin, Mr. Glenn denied any involvement or knowledge of the subject about which Kevin and Elfonzo were berating him. See id. at 71:14–21, 160:3–24. Contemporaneous with Mr. Glenn responding to Kevin and Elfonzo in an attempt to extricate himself from what was now clearly a dangerous situation, Kevin verbally threatened Mr. Glenn's life, stating, "Man, fuck that, [Elfonzo], let's do what we said—-what you just said what we came to do. You said we gonna get one of these niggers in this white Lincoln right here, we gonna get all these niggers right here, so let's do what we came to do." Id. at 156:2–6; see also id. at 65:13–18. The car to which Kevin was referring, the white Lincoln, was Mr. Glenn vehicle.

At that point Kevin then violently attacked Mr. Glenn, punching him full-force in the throat and neck. See id. at 189:11–16. In addition to striking Mr. Glenn in the neck and knocking him backwards and off-balance, Kevin's punch struck a cup in Mr. Glenn's left hand, sending the entire contents of Mr. Glenn's drink into Mr. Glenn's eyes, blinding him momentarily. See id. at 156:11–19. As Mr. Glenn regained his balance and struggled to regain his vision by wiping his drink from his eyes with his left coat sleeve, a female witnessing Kevin and Elfonzo's attack of Mr. Glenn yelled "GUN!" just in time for Mr. Glenn to see Elfonzo, who by all indications was carrying a gun and who is known to do so by Mr. Glenn, pulling a handgun from his waistband. See id. at 76:6–25, 124:8–18, 157:13–158:20, 161:11–162:15. Mr. Glenn, in response to Elfonzo pulling a

handgun and in reasonable fear for his life and that of his family, pulled a handgun of his own, which until that moment had been concealed and known only to Mr. Glenn, and fired three (3) almost simultaneous shots in self-defense. See id. at 64:24–78:1, 125:14–126:1, 155:13–163:7.

ARGUMENT

I. The trial court's denial of Mr. Glenn's Motion for Immunity pursuant to S.C. Code Ann. § 16-11-450(A) solely on the ground that Mr. Glenn was in violation of a three year old Trespass Notice for loitering was an abuse of discretion because Mr. Glenn, as an invitee reasonably egressing the residence to which he was invited at the time he was attacked, was in fact in a place where he had a right to be when he was forced to defend himself.

For Mr. Glenn the evening of April 12, 2013 began like so many other unremarkable Friday nights, with an invitation from a friend who lived at the Spring Grove to come hang out with a group of mutual friends. Immunity Hr'g Tr. 60:22-61:14. Despite the violent assault perpetrated by Kevin while Mr. Glenn was driving some friends to the convenient store, Mr. Glenn's evening continued on its uneventful course upon his return from the store. See id. at 61:18-63:7.

Unaware of the events that transpired in his absence, the danger of his soon-to-be assailants who were concealing themselves in the shadows and lying in wait, or that he allegedly did not have a right to be at the Complex, Mr. Glenn willingly cooperated with the the police officers investigating the reports of the assault perpetrated by Kevin with a razor blade. See id. at 62:19-63:10, 151:1-164:1 And, having concluded his conversation with the police, who said nothing of Mr. Glenn not being allowed to be on Spring Grove property, and shared his knowledge, or lack thereof, concerning the assault perpetrated by

Kevin, Mr. Glenn's visit to his friend's apartment would have concluded unremarkably but for the violent and criminal acts of Kevin and Elfonzo, who without provocation attacked Mr. Glenn as he attempted to peaceably leave Spring Grove. See id. at 162:1-169:20.

Despite the finding of the trial court that neither Mr. Glenn's actions nor his alleged violation of a three (3) year old Trespass Notice on the night of April 12, 2013 in any way contributed to or caused him to be the target of Kevin and Elfonzo's criminal acts, the trial court, in direct opposition to the expressly stated legislative intent of the South Carolina Protection of Persons and Property Act (hereinafter "the PPPA") and as a misinterpretation of South Carolina trespass laws, nonetheless denied Mr. Glenn's Motion for Immunity "solely" on the ground that Mr. Glenn was not in a place where he had a right to be at the time he was attacked. See id. 221:15-222:14 (finding that Mr. Glenn was not "engaged in an illegal activity[] which would prevent him from—from having immunity but for his not being allowed on the property.").

Although the question before the Court intertwines the interpretation of the PPPA and South Carolina trespass law, and specifically S.C. Code Ann. § 16-11-620, it is fundamentally a determination of the scope of a bona fide individual's right to defend himself against attack. Accordingly, in the final analysis, it is fundamentally a determination of the scope of a bona fide individual's right to defend himself against attack. Therefore the proper resolution of the issue, and ultimately whether Mr. Glenn is entitled to immunity, should turn on the intent of the General Assembly in enacting the PPPA.

The expressly stated intent of the General Assembly in passing the PPPA was to (1) codify the right of "law-abiding citizens to protect themselves, their families, and others from intruders and attackers without fear of prosecution or civil action for acting in defense of themselves and others" and (2) ensure "that no person or victim of crime should be required to surrender his personal safety to a criminal, nor should a person or victim be required to needlessly retreat in the face of intrusion or attack." S.C. Code Ann. §§ 16-11-420(B), (E) (emphasis added).

Stated more simply, the PPPA is intended to extend the right to defend one's self to victims of crime and other bona fide individuals indiscriminate of where an attack may occur and without obligation to flee when attacked. Given that "[t]he primary rule of statutory construction is to ascertain and give effect to the intent of the legislature," it is through this lens that a bona fide individual's right to self-defense as expanded by the PPPA must be construed. State v. Duncan, 392 S.C. 404, 709 S.E.2d 662, 664 (2011).

Moreover, the canons of statutory construction further require that the language of the PPPA "must be construed in the light of the intended purpose of the statute" and in such a way as to avoid (1) "a result so plainly absurd that it could not possibly have been intended by the Legislature" or (2) an interpretation that "would defeat the plain legislative intention." State v. Douglas, 411 S.C. 307, 768 S.E.2d 232, 244 (Ct. App. 2015) (citation omitted; emphasis added). In essence, 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." Id. (citation and quotation marks omitted).

Despite the exceedingly clear legislative intent of the PPPA and the applicable canons of statutory construction, the trial court nevertheless interpreted the PPPA, and specifically S.C. Code Ann. § 16-11-440(C), in a manner that not only led to an absurd result in the case at bar, but that, from a policy standpoint, also vitiates the plainly stated purpose of the PPPA—that no victim of a crime should be required to surrender his person safety to a criminal.[1]

A. Mr. Glenn's status as a guest and licensee of a resident of the apartment complex conferred on Mr. Glenn a license to ingress and egress through the common areas of the complex such that Mr. Glenn, while reasonably exercising his license to egress, was "in [a] place where he ha[d] a right to be" when he defended himself from an unprovoked attack. S.C. Code Ann. § 16-11-440(C).

In addition to the fact that the trial court's sole ground for the denial of immunity flies directly in the face of the expressly stated intent of the PPPA, it also is contrary to proper interpretation of S.C. Code Ann. § 16-11-620, which states in pertinent part that:

> Any person who, without legal cause or good excuse, enters into the dwelling house, place of business, or on the premises of another person after having been warned not to do so or any person who, having entered into the dwelling house, place of business, or on the premises of another person without having been warned fails and refuses, without good cause or good excuse, to leave immediately upon being ordered or requested to do so by the person in

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[1] S.C. Code Ann. § 16-11-440(C) states that "[a] person who is not engaged in an unlawful activity and who is attacked in another place where he has a right to be, including, but not limited to, his place of business, has no duty to retreat and has the right to stand his ground and meet force with force, including deadly force, if he reasonably believes it is necessary to prevent death or great bodily injury to himself or another person or to prevent the commission of a violent crime as defined in section 16-1-60." (emphasis added).

> possession or his agent or representative shall, on conviction, be fined not more than two hundred dollars or be imprisoned for not more than thirty days.

(emphasis added). That the trial court's interpretation and application of S.C. Code Ann. § 16-11-620 resulting in the denial of immunity to Mr. Glenn under the PPPA constitutes clear error of law is plainly and inexorably supported by a recent and well reasoned opinion of the South Carolina Attorney General, well-settled and fundamental principles of South Carolina property law, and a wealth of persuasive jurisprudence from a myriad of other jurisdictions.

The Attorney General opinion in question, which is on all fours with the central issue presented by this appeal, was promulgated by the current South Carolina Attorney General in 2013 to respond to a request for opinion from the Honorable Danny Singleton of Seneca on the subject of whether "a person placed on trespass notice with regards to an apartment complex or housing project may enter upon such property at the invitation of a tenant." See Op. S.C. Att'y Gen., p. 5 (June 5, 2013). The Attorney General's opinion provides in-depth and persuasive analysis of the respective property rights of landlords and tenants in housing complexes and the ability of tenants to lawfully invite persons to a complex over objection of the landlord.

Specifically the Attorney General opinion reconciles a property manager's ability to place individuals on trespass notice pursuant to S.C. Code Ann. § 16-11-620 with tenants' rights to possession, use, and quiet enjoyment of their property to conclude that while a property manager or owner possesses the right to place individuals on trespass notice, that right is limited, bound, and superseded by the right of the tenant to invite an

individual onto the leased property for lawful purposes. See Op. S.C. Att'y Gen., p. 4 (June 5, 2013) ([W]e believe a court would hold that § 16-11-620 may not be applied so as to infringe upon a tenant's right of access to his or her residence, including the right to admit an invited guest.") (emphasis added). In arriving at its conclusion, the Attorney General found the "reasoning [of the Massachusetts appellate courts] to be sound, stating that:

> Particularly instructive here, the courts of one state have held that a person placed on trespass notice with regards to an apartment complex or housing project is not guilty under a statute similar to § 16-11-620 if the person enters the property at the invitation of a tenant and the person's presence in the common areas of the property is limited to [] that which is necessary for the purpose of entering and leaving the tenant's residence.

Op. S.C. Att'y Gen., p. 4 (June 5, 2013); see Mass. v. Richardson, 48 N.E.2d 678 (Mass. 1943); Mass. v. Nelson, 909 N.E.2d 42 (Mass. App. Ct. 2009).

Thus, turning to the reasoning of the Richardson and Nelson courts, those courts adroitly weighed and balanced the respective rights of tenants and landlords to conclude that:

> It is settled that, when a landlord lets a property to be occupied by several tenants, although he retains for certain purposes control of the common doorways, passageways, stairways and the like, he grants to his tenants a right of way in the nature of an easement, appurtenant to the premises let, through those places that afford access thereto .... It is also settled that this easement extends to members of the tenant's family and to all his guests and invitees.

Richardson, 48 N.E.2d at 682 (citations omitted and emphasis added); Nelson, 909 N.E. 2d 42, 45-46 (extending the holding of Richardson to public housing developments on the grounds that "[a]lthough Richardson involved a private landlord, its reasoning did not depend on the identity of the landlord, but on the nature of residential tenancy," and

holding accordingly that "a conviction for trespass cannot stand against a defendant who is found to be passing through the halls of a [] property in order to reach a tenant's apartment at the tenant's invitation.").

Although the trial court took apparent issue with the fact that the reasoning and conclusion of the Attorney General's opinion quoted heavily from just the Richardson and Nelson cases (see Immunity Hr'g Tr. 221:3-7), the cases espousing the reasoning and underlying principals of the Richardson and Nelson decisions are legion. See In re Jason Allen D., 733 A.2d 351 (Md. Ct. Spec. App. 1999) (holding the housing authority's no-trespass order did not supersede the defendant's invitation given by a resident of the housing complex) (emphasis added); Or. v. Schneider, 265 P.3d 36 (Or. Ct. App. 2011) (holding that a tenant had the right to invite guests to the common areas of an apartment complex and accordingly reversing a criminal conviction for trespass because the defendant was privileged to be in the parking lot at the time of his arrest); Vt. v. Dixon, 725 A.2d 920, 922 (Vt. 1999) ("The common law is clear that the landlord may not prevent invitees or licensees of the tenant from entering the tenant's premises by passing through the common area. Moreover the law is clear that an invitee or licensee who does so, even after a specific prohibition by the landlord is not a trespasser and does not violate a criminal trespass statute.") (emphasis added); Folgueras v. Hassle, 331 F.Supp. 615, 625 (W.D. Mich., 1971) (holding that "[o]ne of the rights of tenancy with which the landlord may not interfere is the right to invite and associate with guests of the tenant's own choosing," and that "[w]hether the court regards the question of access to [a tenant's dwelling] as one of constitutional law, the rights surrounding the ownership of real

property or the rights of tenants in relation to their landlord, the law compels a single conclusion. The fundamental underlying principle is simply that real property ownership does not vest the owner with dominion over the lives of those people living on his property."); Anthony v. Chicopee Mfg. Corp., 147 S.E. 887, 888-89 (Ga. 1929) ("Where premises are rented to another, the landlord has no right, during the tenancy, to forbid a third person to go upon the rented premises for a lawful purpose with the permission of the tenant."); Albee v. Collins, 463 S.E.2d 922, 925 (Ga. App. 1995) ("The tenant's invitation to a third party carries with it the same rights enjoyed by the tenant to ingress and egress to the rented premises to the extent such ingress and egress are necessary to the purpose of the invitation. It follows that the invitation also carries with it the same rights enjoyed by the tenant to common areas in a multi-dwelling apartment complex to the extent the use of such common areas is connected to the purpose of the invitation.") (citations omitted); Bremerton v. Widell, 51 P.3d 733, 738-39 (Wash. 2002) (reaffirming and holding that "landlords and tenants possess joint control over the common areas of a multiunit dwelling" such that an invitee of a tenant cannot be guilty of trespass so long as the invitee "proceed[s] only through those common areas necessary for ingress and egress from the tenant's unit."); L.D.L. v. Fla., 569 So.2d 1310, 1312 (Fla. Dist. Ct. App. 1990) (holding that "[a] landlord generally does not have the right to deny entry to persons a tenant has invited to come onto his property[,] [that] [t]his law also applies to the common areas of the premises....[and that] [o]ne who thus comes upon the premises upon the invitation of the tenant, although expressly forbidden to do so by the landlord, is not guilty of criminal trespass.") (emphasis added); D.L. v. Fla., 87 So. 3d 824. 825 (Fla.

Dist. Ct. App. 2012) (holding that a landlord generally does not have the right to deny entry to a tenant's invitees and accordingly reversing and discharging a trespass conviction where the prosecution "failed to rebut [defendant's] testimony that he had been invited onto the property by a tenant"); Conn. v. Schaffel, 229 A.2d 552, 562 (Conn. Cir. Ct. 1966) ("The implication which necessarily flows from the tenant's control and possession is that it is the tenant, not the landlord, who has the final word as to the person or persons who may enter upon the demised premises. The landlord has neither the power of exclusion nor the power of selection."); Pa. v. Burford, 73 A. 1064, 1067 (Pa., 1909) ("The right [to ingress and egress] being appurtenant to [a rental property], it included not only the right of the lessee to the use of it, but that it might be used by his family and others who with the permission of the tenant visited his home for any lawful purpose."); see also Todisco v. Tishman Realty & Const. Co., 62 N.Y.S.2d 458, 459 (Sup. Ct. 1946) (holding that tenants' invitees have the right to reasonable use of the tenants' means of ingress and egress of the building without being considered a trespasser); Right of third person to enter premises against objection of the landlord, 6 A.L.R. 465 (stating that a landlord generally does not have the right to deny entry to social guests a tenant has invited to come onto the tenant's property).

In addition to the vast majority of case law from jurisdictions that have considered the question of whether an invitee of a tenant can be considered a trespasser, the propriety of the conclusion reached by the Attorney General's opinion finds further support in the Department of Housing and Urban Development (hereinafter "HUD") implementing regulations for the the United States Housing Act, 42 U.S.C. § 1437 (hereinafter the

"Housing Act"), which substantively prohibits subsidized apartment complexes like Spring Grove from "unreasonably interfering with tenants' ability to entertain guests in the tenants' public housing apartments." Diggs. v. Hous. Auth., 67 F. Supp. 2d 522, 532 (D. Md. 1999); 24 C.F.R. Sec. 966.4(d) (stating that a "lease shall provide that the tenant shall have the right to exclusive use and occupancy of the leased premises which shall include reasonable accommodation of the tenant's guests or visitors ...."). Consistent with both the available caselaw and the Housing Act and HUD implementing regulations, modern law review articles have also engaged in in-depth analysis of the trespass issue and concluded that:

> [I]t is important to stress that tenants, not landlords, have the right to choose who may enter the property in order to visit a tenant in her place of residence. Since a tenant may determine who shall be allowed to enter her home, persons who enter a building with the permission of a tenant cannot be deemed a trespasser, even if they have been forbidden from entering by the landlord. The same analysis applies to persons using roads or walkways to reach a tenant's apartment pursuant to an invitation.

Elena Goldstein, Responding to Public Housing No-Trespass Policies, 38 HARV. C.R.-C.L. L. REV. 215, 221 (2003) (emphasis added); see also Gregory A. Beck, Ban Lists: Can Public Housing Authorities Have Unwanted Visitors Arrested?, 2004 U. Ill. L. Rev. 1223, 1224-38, 1259 (2004) (discussing the common law and statutory background for tenants' right to invite guests to their residence over the objection of landlords and recommending that "ban list policies should recognize an exception for invitees [for] [w]hile an invitation may not give the visitor the right to unrestricted access to the premises, it should at least allow visitation to the tenant's apartment and access to all the common areas necessary for ingress and egress").

Moreover, though the volume of caselaw supporting the position espoused by the Attorney General's June 5, 2013 Opinion is impressive, the more persuasive fact is that each of the above-cited cases are based on consistent and generally applicable legal touchstones that are consistent with those found in South Carolina jurisprudence. Specifically, in reaching the consistent conclusion that tenants may invite guests to a leased property over the objection of a landlord, the courts have frequently focused on the principle that a tenant's easement is equivalent to a license by which tenants and their social invitees may pass through the complex's common areas in order to access the tenant's apartment. See Minn. v. Hoyt, 304 N.W.2d 884, 890 (Minn. 1981) (holding that "[o]ne in possession of premises by permission of a tenant who is entitled to possession is not a trespasser but a licensee," and that license bestowed by the tenant "is actually a justification for acts done under the license, a sort of immunity from trespass") (emphasis in original, citation omitted). Consequently, as a "license for tenants to grant or withhold, one embraced within the easement conferred upon them by the letting...and one which the tenants could exercise notwithstanding the objections of the landlord," the landlord or owner "could not revoke the license any more than he could an invitation extended by the tenant to one calling upon any legitimate business." Richardson, 48 N.E.2d at 683.

Although the courts of South Carolina have yet to have the opportunity to join the chorus of courts that have properly concluded that, based on the rights of tenants, an invitee of a tenant cannot be guilty of trespass so long as the invitee stays within the scope of the invitation, our appellate courts have nevertheless hinted around the edges of

such a principle when discussing various other aspects of South Carolina property jurisprudence.

For example, the South Carolina Supreme Court recently held that "[a] trespass is an invasion of the interest in the exclusive possession of land, as by entry upon it." Babb v. Lee County Landfill SC, LLC, 405 S.C. 129, 747 S.E.2d 468 (2013) (quoting Restatement (Second) of Torts § 821D (1979)). Implicit in the Supreme Court's holding in Babb is the converse conclusion that where possession is not exclusive, an appropriate defense to a claim of trespass is the assertion of license, privilege, invitation, or legality. See also Neil v. Byrum, 288 S.C. 472, 473, 343 S.E.2d 615, 616 (1986) (holding that "[a] social guest is a licensee. A licensee is a person who is privileged to enter or remain upon land by virtue of the possessor's consent.") (emphasis added).

Accordingly, it logically follows that when a landlord has ceded a portion of his right to "exclusive possession" of a leased property by bestowing upon a tenant a portion of the landlord's bundle of property rights, and specifically the right to use and quiet enjoyment of property which necessarily includes the right to determine who may enter the property to visit the tenant, a guest of a tenant cannot be deemed a trespasser if the tenant is reasonably exercising his license of ingress and egress within the scope of the invitation of the tenant, regardless of the objection of the landlord. See Shramek v. Walker, 152 S.C. 88, 149 S.E. 331, 336 (1929) (citing the proposition that "[i]t is a well-settled principle that the occupant of any house, store, or other building, has the legal right to control it, and to admit whom he pleases to enter and remain there, and that he also has the right to expel from the room or building any one who abuses the privilege

which has been thus given him.")(citation omitted; emphasis added); Babb v. Lee County Landfill SC, LLC, 405 S.C. 129, 747 S.E.2d 468 (2013) ("A well-known principle of property law is that property consists of a bundle of rights. . .included in the value of property are the rights of exclusive possession and use and enjoyment. . . ."). Stated simply, the invitee's right to be on leased property over the objection of a landlord flows directly from the rights given up by the landlord in leasing the property, such that the landlord cannot exercise a right he has previously given up to a tenant. This premise is further proven by the fact that even a landlord who owns a property can be convicted of trespass after notice.[2] The fact that the right to place someone on trespass notice arises from a right to exclusive possession also indicates that trespass notices are gross in nature because they benefit a particular person or entity and not the land itself.[3]

Furthermore, existing South Carolina property jurisprudence also implies that to permit a landlord or property manager's placement of a resident's social guest on a trespass notice and thereby prohibit visitation by a tenant's invitees would breach tenant's

[2] In addressing this issue directly the Court of Appeals in State v. Tyndall, 336 S.C. 8, 17, 518 S.E.2d 278, 283 (Ct. App. 1999) held that "regardless of who owned the property on the date in question, the home was Tyndall's father's "dwelling house." The language of section 16-11-620 does not exclude an owner from the class of persons who may be convicted of trespass after notice. The section provides that "[a]ny person" who violates the statute may be convicted. A record owner's right to be on the property may be circumscribed if another person peaceably possesses the property. For example, the South Carolina Residential Landlord and Tenant Act restricts the access of a landlord, even one who is the owner, to property in the possession of a tenant. See S.C. Code Ann. § 27-40-530 (1991) (restricting a landlord's access to property in possession of a tenant)." (emphasis in original).

[3] It bears noting that between the time that Mr. Glenn was given the oral trespass notice in 2010 and the date in question, April 12, 2013, Spring Grove was sold to a different owner. Accordingly, given the gross nature of trespass notices, the trespass notice should not longer have had any force or effect after Spring Grove changed owners.

fundamental rights to use and quiet enjoyment of their leased premises. Sea Cabins On The Ocean IV Homeowners Assn. Inc. v. North Myrtle Beach, 345 S.C. 418, 431, 548 S.E.2d 595, 602 (2001) (quoting Nolan v. California Coastal Comm'n, 483 U.S. 825 (1987) for the proposition that "the right to exclude others is one of the most essential sticks in the bundle of rights that are commonly characterized as property") (internal quotations omitted). The right to exclude, and as a corollary the right to invite, have been described as a right "valued so highly that their abolishment will result in [an] offending law being declared unconstitutional." Op. S.C. Att'y Gen., p. 4 (Aug. 5, 2014) (quoting Jan G. Laitos, Law of Property Rights Protection: Limitations on Governmental Powers, ch. 5, § 5.03[A], p. 5-16 (1999). These principles are also support by other courts, including the Diggs court which held that "it would be patently unreasonable to prohibit public housing tenants from entertaining guests." 67 F. Supp. 2d at 531.

Consequently, given the concord amongst the majority of states that have addressed this issue, the Attorney General's opinion finding the reasoning of Richardson and Nelson "to be sound," and well settled touchstones of South Carolina property jurisprudence, this Court should seize the opportunity to explicitly hold that individuals placed on trespass notice by a landlord, but who are social invitees of tenants, possess a license to reasonable ingress and egress through a complex's passageways and common areas such that the invitee cannot be deemed a trespasser in the exercise of that license.

B. Though S.C. Code Ann. § 16-11-620 is silent as to whether intent is a requirement of the offense, the express language of the statute implies an intent requirement through the creation of a "good excuse" exception

Further supplementing the conclusion that Mr. Glenn, as a matter of law, should not have been denied immunity "solely" on the ground that Mr. Glenn was not in a place he had a right to be when he was attacked by Kevin and Elfonzo is the language of S.C.Code Ann. § 16-11-620 itself. Though S.C.Code Ann. § 16-11-620 is seemingly silent as to whether intent is a necessary element to conviction for trespass pursuant to § 16-11-620, the express language of § 16-11-620 creates an exception to liability "where a person has 'legal cause or good excuse' to enter the premises" or remain thereon. Op. S.C. Att'y Gen., p. 4 (June 5, 2013) (quoting S.C. Code Ann. § 16-11-620); see also Wright v. United Parcel Service, Inc., 315 S.C. 521, 523, 445 S.E.2d 657, 659 (Ct. App. 1994) (describing S.C.Code Ann. § 16-11-620 as a "statute imposing criminal liability for one to remain on the premises of another, without legal cause or good excuse, after being asked to leave") (emphasis added).

Through the express creation of an exception trespass after notice for persons that enter or remain on property on the basis of "good excuse," the General Assembly tacitly imposed a criminal intent requirement for violation of S.C.Code Ann. § 16-11-620. Springdale v. Butler, 299 S.C. 276, 384 S.E.2d 697, 699 (1989) (implying that trespass after notice is not a strict liability offense and holding that S.C. Code Ann. § 16-11-620 is not applicable, even in the face of an express request of a property owner to leave the premises, where the person entering or remaining on the property does so with "legal cause or good excuse"); see also Chesterfield v. Ratliff, 53 S.C. 563, 30 S.E. 593, 593-94

(1898) (discussing a statute that prohibited the shooting of firearms "without a reasonable excuse" and holding that the offense implicitly required an element of intent because "the offense denounced by the ordinance consists not merely [i]n shooting firearms...but doing so 'without reasonable excuse...[such that] when one is prosecuted for a violation of the ordinance it must appear, not only that the accused fired a pistol...but also that he did so without reasonable excuse").

The imposition of an intent requirement through the express creation of a "good excuse" exception to § 16-11-620 necessarily carries with it the acknowledgement of a bona fide claim of right defense to the crime of criminal trespass. See Hoyt, 304 N.W.2d at 890-91 (vacating a conviction for criminal trespass on the grounds of a bona fide claim of right and stating that "[c]riminal intent is an essential element of the statutory offense of trespass, even though the statute is silent as to intent, and if the act prohibited is committed in good faith under claim of right or color of title, although the accused is mistaken as to his right...no conviction will lie, since it will not be presumed that the legislature intended to punish criminal acts committed in ignorance, by accident or under claim of right, and in the bona fide belief that the land is the property of the trespasser, unless the terms of the statute forbid any other construction") (quoting 75 Am. Jur. 2d Trespass § 87 (1974)); O'Banion v. Va. 519 S.E.2d 817, 821 (Va. Ct. App. 1999) (interpreting a criminal trespass statute similar to § 16-11-620 that does not contain an express requirement of intent and holding that since the courts of Virginia have uniformly required proof of intent for criminal trespass to lie, "one who enters or stays upon another's land under a bona fide claim of right cannot be convicted of trespass"); see also

Jones v. Va., 443 S.E.2d 189, 191 (Va. Ct. App. 1994) (holding that "a good faith claim of right to be on the premises negates the requisite intent to engage in a criminal trespass"); Beck, Ban Lists: Can Public Housing Authorities Have Unwanted Visitors Arrested?, 2004 U. Ill. L. Rev. at 1231 noting that "[e]ven some trespass statutes that do not explicitly contain [a good faith] exception have been held to implicitly contain a requirement that the trespass be willful, and courts have crafted exceptions for guests who have a good faith claim of right to be on the property") (emphasis added).

In South Carolina "bona fide" has been defined as "in good faith[,] without fraud or deceit." Dep't of Revenue v. Blue Moon, Inc., 387 S.C. 467, 693 S.E.2d 21, 23 (Ct. App. 2010) (quoting Black's Law Dictionary 168 (7th ed. 1999)). Though no South Carolina appellate court has had the opportunity to interpret "good excuse" or a bona fide claim of right as they apply to S.C. Code Ann. § 16-11-620, the South Carolina definition of bona fide is consistent with the definitions used by various other courts such that the analysis of those courts with regard to the issue of criminal trespass is instructive to the case at bar.

In the light of the prosecution's argument in the immunity hearing that Mr. Glenn could not be a legal invitee to Spring Grove because the "model" leases he presented to the trial court contained a provision stating that it was a default of a tenant's lease to invite guests that had been placed on trespass notice to the Complex, the case of In re

Jason Allen D., 733 A.2d 351 (Md. Ct. Spec. App. 1999) is particularly instructive given the striking similarity between the facts of that case and Mr. Glenn's.[4]

In In re Jason Allen D. the "State argued that Morris's [the minor tenant] invitation was ineffective to confer bona fide status upon [the defendant], either because Morris was a minor, or because a tenant's right to invite a social guest is superseded by the Housing Authority's right to exclude non-residents." Id. at 363. In reversing the criminal trespass conviction of the defendant on the ground that the defendant had a bona fide claim of right as a guest of housing project tenant, the court reasoned in pertinent part that:

> In our view, the State has confused an actual or enforceable legal right with a bona fide claim of right. To be sure, the term "bona fide" is not coextensive with an established legal right. On the continuum, a bona fide claim of right does not necessarily measure up to a valid claim of right. Thus, whether Jason's cousin, a Sagner resident, could lawfully invite Jason to enter the Sagner property is beside the point, because Jason only needed a bona fide claim of right to enter the Sagner property...Further, even if a minor's right to invite guests to the housing complex does not match the lessee's right, there was no evidence offered by the State to show that appellant knew or should have known that his cousin had neither authority, permission, nor the right to invite him to Sagner. Indeed, absent a sophisticated understanding by Jason of landlord-tenant rights or property rights, or knowledge that Morris had been prohibited by a parent or guardian or the lease itself from inviting Jason to visit him at Sagner, we do not see how Jason could have known that his cousin was unable to invite him lawfully to Sagner property.

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[4] At the outset, it is important to observe that Mr. Glenn would have no means of knowing what provisions were contained in the "model" lease. Additionally, no evidence was presented that the 2010 "model" lease proffered by the prosecution was the operative legal document defining Shelricka's rights as a tenant. In fact, in terms of reasonable belief, Mr. Glenn had every reason to assume the position of the South Carolina Attorney General was correct, i.e., that passage through common areas at the express invitation of a tenant was an acceptable and innocent act.

Id. at 367 overruled on other grounds by In re Antoine M., 907 A.2d 158 (Md. Ct. Spec. App. 2006); see also In re Antoine M. 907 A.2d 158, 166 (Md. Ct. Spec. App. 2006) ("To make culpable the inadvertent trespasser and the trespasser who entertains a reasonable belief that his conduct was proper would be unreasonable, illogical, inconsistent with common sense, and contrary to the interests of justice.") (citation omitted emphasis in original).

The acknowledgement of a bona fide claim of right defense to criminal trespass under S.C. Code Ann. § 16-11-620 is logically consistent with the plain language of the statute and the intent of statute—to protect the rights of the owners or those in control of private property. Greenville v. Peterson, 239 S.C. 298, 303, 122 S.E.2d 826, 828 (1961) rev'd on other grounds sub nom., Peterson v. Greenville, 373 U.S. 244 (1963) (stating that the intent of the precursor to S.C. Code Ann. § 16-11-620 was "clearly for the purpose of protecting the rights of the owners or those in control of private property"). For, as noted by the Minnesota Supreme Court in Hoyt in discussing a bona fide claim of right defense to criminal trespass, "a false claim would not be a claim at all." 304 N.W. 2d at 890 (citation omitted). Therefore, given that a false claim or bad excuse would be no bar to prosecution for criminal trespass, the acknowledgement of a bona fide claim of right defense neither diminishes or circumscribes the protections provided to private property owners or possessors nor expands the "good excuse" exception affirmatively created by § 16-11-620; rather it would simply expound upon and illuminate what it means for one to have a "good excuse" to a charge of criminal trespass.

Given that "good excuse" and bona fide claim of right are two sides of the same coin, the question with which the trial court concerned itself in ruling on immunity should not have been whether Mr. Glenn had a legal right to be at Spring Grove on the night in question, but rather whether Mr. Glenn had a good faith reasonable belief that he was allowed to visit his friend who invited him to her apartment. In re Antoine M. 907 A. 2d 158, 169 (holding that [w]hile a teenage daughter may not, as a matter of property law, have even able to 'countermand' [a trespass] notice," that is not the appropriate standard for determining whether a defendant was guilty of criminal trespass or whether the defendant had a bona fide claim that he was permitted on the property in question").

Thus, turning to the facts presented in the immunity hearing, it is important to again note the marked similarity to the circumstances in the Nelson and Richardson cases and those in In re Jason Allen D. and In re Antoine M. Shelricka, as a tenant of Spring Grove, had the right to bestow upon those persons she chooses to invite to her residence a right of way in the nature of an easement through such common areas, stairs, breezeways, and passageways which afford access to her apartment. Having exercised her fundamental property rights to the use and quite enjoyment of her property by expressly inviting Mr. Glenn to her apartment on the night of April 12, 2013, Glenn was a social invitee of Shelricka that was, consequently, licensed and "entitled to use the means of ingress and egress to make such visitation possible . . . ." Hoyt, 304 N.W.2d at 890; see Immunity Hr'g Tr. 84:11-88:5. The license bestowed upon Glenn by Shelricka "was [one] for [her] to grant or withhold . . . notwithstanding objections of the landlord, who could not revoke the license any more than he could an invitation extended by [a] tenant

to one calling upon any legitimate business. Richardson, 48 N.E.2d at 683. As noted earlier, one cannot exercise a right, of which he previously voluntarily divested himeslf. Therefore, acting within the scope of the invitation extended by a tenant of Spring Grove, Mr. Glenn clearly had a bona fide and good faith claim of right constituting a "good excuse" to be on the property at the time he was attacked by Kevin and Elfonzo. At no time did the prosecution offer any evidence to controvert Mr. Glenn's plainly established and bona fide good excuse for being at Spring Grove on April 12, 2013.

Moreover, despite the Spring Grove Model Leases for Subsidized Programs that state that it is a breach of a tenant's lease for the tenant to invite any person onto the property or into their unit who is listed on the site's Trespass List, the tenant's breach of her lease in no way impacts the bona fide and good faith nature of Mr. Glenn's claim of right to visit Spring Grove at the invitation of a tenant.[5] In re Jason Allen D., 733 A.2d at 367 (holding that a defendant was not guilty of criminal trespass at a housing project because the defendant had been invited to the complex by a tenant and "absent a

[5] In addition to the fact that the provisions of a lease between a landlord and tenant should have no bearing on a third party's ability to defend a charge of criminal trespass and that the "normal remedy for a lease violation…is eviction, not criminal arrest," the Model Leases presented by the prosecution during the immunity hearing were not the operative lease signed by Shelricka, the tenant, but were simply unsigned "model" leases for Spring Grove. See also Williams v. Nagel, 643 N.E.2d 816, 823 (Ill. 1994) (Harrison, J. dissenting) (arguing that holding that a third party not in privity to a lease between a landlord and tenant can be prosecuted for a tenant's violation of the terms of her lease is "tantamount to finding that private parties have the right to alter the criminal law through contractual agreements"). Accordingly, given that the prosecution did not present the lease signed by Shelricka and instead proffered a "model" lease from several years before the time of the incident in question, there is no evidence establishing that Shelricka's lease even contained a provision stating that it is a breach of a tenant's lease for the tenant to invite any person onto the property or into their unit who is listed on the site's Trespass List.

sophisticated understanding by [defendant] of landlord-tenant rights or property rights, or knowledge that Morris had been prohibited by a parent or guardian or the lease itself from inviting [defendant] to visit him at Sagner, we do not see how [defendant] could have known that his cousin was unable to invite him lawfully to Sagner property"). Therefore, regardless of the terms of the any lease that may have existed between Shelricka and Spring Grove, or whether Shelricka violated the terms of any such lease, it was an abuse of discretion for the trial court to deny Mr. Glenn immunity "solely" on the ground that Spring Grove, as Shelricka's landlord, could impose lease provisions on whether she had a pet and who she could invite to her apartment. See Immunity Hr'g Tr. 220:24-221:2 (denying immunity on grounds of the lease between Shelricka and Spring Grove because "[a]s the way of example, [tenants] can be told they can't have pets, they can be told they can't have a business, they can be told only have a certain number of occupants, they can be told that the occupants have to be relatives."). Criminalizing a tenant's breach of a lease as to a third party not in privity to the lease is wholly unconnected to the intent of S.C. Code Ann. § 16-11-620 and certainly leads to a result so plainly absurd that it could not possibly have been intended by the Legislature. Instead of looking to the relationship between Shelricka, as tenant, and Spring Grove, as landlord, to ascertain whether Mr. Glenn was somewhere he had a right to be at the time he was attacked by Kevin and Elfonzo, the trial court should have focused its inquiry on whether Mr. Glenn had a bona fide claim of right to be at Spring Grove on the evening of April 12, 2013.

The uncontroverted evidence offered during the immunity hearing plainly established that Mr. Glenn was invited to Spring Grove on the evening of April 12, 2013 by Shelricka to take part in a social gathering with mutual friends, a completely peaceable and lawful endeavor. See Immunity Hr'g Tr. 60:22-61:14, 85:21-86:2, 150:20-151:16. In accepting Shelricka's invitation Mr. Glenn at all times operated within the scope of the invitation, passing through the common areas of the Complex only to reasonably ingress and egress from Shelricka's apartment and stopping only at the explicit request of law enforcement officers to assist them in the investigation of the assault previously perpetrated by Kevin. See id. at 151:24-152:14. At no time during the immunity hearing did the prosecution or any witnesses therefor provide any evidence that Mr. Glenn knew anything about any alleged provision in Spring Grove leases prohibiting Shelricka or any other tenant from inviting him to the Complex. Moreover, there was also no evidence offered controverting Mr. Glenn's stated good faith belief that he was permitted to visit a tenant of Spring Grove at the tenant's invitation. Accordingly, having acted on a bona fide claim of right and only passed through the necessary common areas to visit and depart the apartment of a tenant of whom he was a guest, it was an abuse of discretion from both a matter of law and a factual standpoint for the trial court to deny Mr. Glenn immunity "solely" on the ground that "he was not at a place he had a lawful right to be" when he was violently and criminally attacked by Kevin and Elfonzo. S.C. Code Ann. § 16-11-440(C).

Based on the caselaw discussed herein and the clear intent of the General Assembly with regard to both the PPPA and S.C. Code Ann. § 16-11-620, it is abundantly

evident that the trial court's denial of immunity to Mr. Glenn "solely" on the ground that Mr. Glenn did not have a "lawful right" to be at the Complex when he was attacked was an abuse of discretion. Specifically, to uphold the trial court's ruling would fly in the face of the PPPA's intent to ensure "that no person or victim of crime should be required to surrender his personal safety to a criminal, nor should a person or victim be required to needlessly retreat in the face of intrusion or attack." S.C. Code Ann. §§ 16-11-420(B), (E) (emphasis added). There is no disagreement as to the fact that Mr. Glenn was at Spring Grove on the night in question for a lawful and peaceable purpose. However, to follow the reasoning of the prosecution and ultimately the trial court, despite Mr. Glenn's bona fide and peaceable presence as an invitee, he was required to surrender his personal safety in the face of a violent and criminal attack from Kevin and Elfonzo. Based on the testimony concerning the violent acts of Kevin and Elfonzo there can be no doubt that someone was going to be injured as a result of Kevin and Elfonzo's attack of Mr. Glenn. Requiring Mr. Glenn to choose between (1) suffering great bodily injury and/or death at the hands of unprovoked assailants or (2) suffering a twelve (12) year prison sentence for defending himself is certainly exactly the type of plainly absurd outcome that our canons of statutory construction are meant to protect against. This is especially true given that the intent of the PPPA clearly indicates a desire to protect persons, regardless of their location, from unprovoked attacks that arise through no fault of the victim. Moreover, upholding the trial court's denial of immunity on the stated grounds will have a undoubted chilling effect on bona fide persons ability to defend themselves under the PPPA, for where is the line drawn? Is an innocent person who is jaywalking when they

are attacked not entitled to defend themselves pursuant to the PPPA? The imposition of a bona fide element to the issue of whether an individual was in a place they had a right to be, similar to the examination of proximate cause with regard to the unlawful activity element of self-defense, gives effect to the intent of the General Assembly and is consistent with the Court's other jurisprudence concerning self-defense. See State v. Burriss, 334 S.C. 256, 262 (1997) ("[A] person can be acting lawfully, even if he is in unlawful possession of a weapon, if he was entitled to arm himself in self-defense at the time of the shooting.") (emphasis added); State v. Goodson, 312 S.C. 278, 280, 440 S.E. 2d 370, 372 (1993) (holding the "burden rests upon the State to prove beyond a reasonable doubt that the unlawful act in which the accused was engaged was at least the proximate cause of the homicide.").

Therefore, given the uncontroverted evidence produced during the immunity hearing and based on a proper interpretation of the PPPA and S.C. Code Ann. § 16-11-620, Appellant requests that this Court reverse the trial court's denial of immunity, and grant Appellant immunity as a matter of law pursuant to S.C. Code Ann. § 16-11-450(A).

C. Even assuming arguendo that Appellant was trespassing on the project premises, the trial court erred in denying Appellant self-defense immunity on the sole ground that Appellant did not have a right to be at the housing project, because S.C. Code Ann. § 16-11-410 et seq.'s invocation of location rights refers to relative rights versus an attacker and does not contemplate an individuals forfeiture of protections during lawful egress from a posted property

From the intent and findings of the General Assembly, the purpose of S.C. Code Ann. § 16-11-410 et seq. was to confer rights on law abiding people as opposed to those

assaulting them. Even assuming arguendo that Mr. Glenn was in violation of a Trespass Notice when he crossed the common area of the Spring Grove complex, he would nonetheless have the right, and in fact, the obligation to leave the premises. When assaulted by his attackers, Mr. Glenn was in a place he had a right to be as he approached his car to leave.

The mischief that the State's argument would create if it were the law can be illustrated by example. A person who had been granted a permit for concealed carry could enter a business only to find that on another entrance the business posted a sign prohibiting concealed carry. Learning this, the patron promptly seeks to leave the premises. Under the State's view, the protection of S.C. Code Ann. § 16-11-410 et seq. would not apply even though the patron was in the process of exiting the premises. Certainly in that case an individual's right to defend himself pursuant to the PPPA would not be dependent upon whether he had made it back across the threshold of the business if he was attacked by a third party while in the process of peaceably and lawfully exiting the business. Likewise, if a person parked in a parking lot that posted a sign banning firearms on the premise and was attacked returning to her car, on the Prosecution's view, the victim would be deprived of the right to the immunity statute if a firearm were in the glovebox of the car.

As was discussed supra with regard to the havoc that would be wreaked as a result of the trial court's reasoning for the denial of immunity, this example further illustrates that the trial court's interpretation of the PPPA would lead to both (1) "a result so plainly absurd that it could not possibly have been intended by the Legislature" and (2) an

interpretation that "would defeat the plain legislative intention." State v. Douglas, 411 S.C. 307, 768 S.E.2d 232, 244 (Ct. App. 2015) (citation omitted). From its findings and clear statutory language it is obvious the General Assembly intended for the PPPA to provide broad protection for innocent persons who find themselves the victim of criminal activity to have the right to defend themselves. In codifying and expanding the common law Castle Doctrine it is further evident from the findings of the PPPA that the General Assembly intended to loose an innocent person's right to defend themselves from the archaic and technical limitations previously placed on the right to self-defense.

The clear purpose of the "another place where he has a right to be" statutory language is to preclude criminal actors from attempting to justify their use force against others rather than to impose technical restrictions on the right of an innocent people to defend themselves. As clearly contemplated by the legislative intent of the PPPA, the right to self-defense should not be based on the threshold of a doorway, or an arbitrary property line that is crossed by mistake or under a bona fide claim of right.

The fact that S.C. Code Ann. § 16-11-410's invocation of location rights refers to relative rights versus an attacker is further implicitly supported by existing South Carolina jurisprudence concerning the right to self-defense. For purpose of invoking the right to self-defense, it has long been a requirement in this State that the individual invoking the right of self defense cannot have been engaged in an unlawful activity at the time he defended himself. Based on the reasoning by which the trial court denied immunity on the sole ground that Mr. Glenn was not in a place where he had a "lawful right" to be, the simple fact that one was carrying a concealed weapon without a

concealed weapons permit would constitute an unlawful act that would preclude a claim of self-defense—even assuming the concealed weapon was not the cause of the incident. However, this line of reasoning that puts form above function and substance has been rejected by the Supreme Court of South Carolina time and again. See State v. Burriss, 334 S.C. 256, 262 (1997) ("[A] person can be acting lawfully, even if he is in unlawful possession of a weapon, if he was entitled to arm himself in self-defense at the time of the shooting.") (emphasis added); State v. Goodson, 312 S.C. 278, 280, 440 S.E.2d 370, 372 (1993) (holding the "burden rests upon the State to prove beyond a reasonable doubt that the unlawful act in which the accused was engaged was at least the proximate cause of the homicide.") (emphasis added). Consistent with the reasoning of the Burriss and Goodson cases the analysis of whether an individual is in a place where he has a right to be for purposes of self-defense under the PPPA should place substance above form to give full force and effect to the plain legislative intent.

Having found that Mr. Glenn was entitled to immunity but for not being somewhere he had a "lawful right" to be, it is clear that the trial court found that Mr. Glenn satisfied all other requirements for immunity pursuant to S.C. Code Ann. § 16-11-450(A). Moreover, the uncontroverted evidence in the record plainly establishes that Mr. Glenn, as he approached his car to depart from Spring Grove, was the victim of an unprovoked attack by Kevin and Elfonzo. Given the trial court's findings and the evidence in the record, as between Mr. Glenn and Kevin and Elfonzo, it was clearly Mr. Glenn who was the individual who had the bona fide right to be egressing through the common area of Spring Grove when the meeting between Mr. Glenn and Kevin and

Elfonzo transpired. As the innocent victim of Kevin and Elfonzo's criminal attack, Mr. Glenn should have had the right to defend himself pursuant to the PPPA and to cloak himself in immunity thereafter. Accordingly, it was an abuse of discretion for the trial court to deny Mr. Glenn immunity, even assuming a violation of a trespass notice, on the sole ground that Mr. Glenn did not have a "lawful right" to be on the Spring Grove property.

II. The housing project's use of S.C. Code Ann. § 16-11-620 in conjunction with the project's "Ban List" are in violation of the United States Housing Act's statutory mandate and HUD's implementing regulations such that they cannot constitute the grounds for the forfeiture of an individual's statutory right to self-defense

The Housing Act, 42 U.S.C. § 1437 and the HUD implementing regulations mandate that public housing leases shall not contain any "unreasonable terms and conditions," 42 U.S.C. § 1437d(1)(2), and that public housing leases "shall" provide "reasonable accommodation" of tenants' guests, 24 C.F.R. § 966.4(d)(1).[6] The regulation of public housing leases by the Housing Act and the HUD implementing regulation "substantively prohibits public housing authorities from unreasonably interfering with tenants' ability to entertain guests in the tenants' public housing apartments." Diggs, 67 F. Supp. 2d at 532.

Where a trespass policy is enforced as "a virtually permanent bar to a tenant's right to invite a guest into her own home," "all persons who have been issued a trespass citation, whether correctly or incorrectly are indefinitely prohibited from returning to the

[6] 24 C.F.R. § 966.4(d) states in pertinent part that a "lease shall provide that the tenant shall have the right to exclusive occupancy of the leased premises which shall include reasonable accommodation of the tenant's guests or visitors…."

[housing project] property even if a tenant personally escorts them from the public sidewalk into the tenant's own apartment," and "tenants have been told that they face eviction if they invite persons known to be on the trespass long into their homes," such trespass policies have been found to violate the Housing Act and its implementing regulations because the "policy impermissibly excludes many potential guests" and as such runs afoul of the requirement of "reasonable accommodation" for tenants' guests. Diggs, 67 F. Supp. 2d at 534; see Lancor v. Lebanon Hous. Auth., 760 F.2d 361, 363 (1st Cir. 1984) (holding that a trespass policy that gave "gave the management unfettered discretion to approve or disapprove the tenant's request, sticks us as neither necessary nor reasonable. This regulation also cannot be said to provide for the reasonable accommodation of a tenant's guests or visitors."); see also Beck, Ban Lists: Can Public Housing Authorities Have Unwanted Visitors Arrested?, 2004 U. Ill. L. Rev. at 1229-41 (discussing subsidized housing trespass policies with regard to the requirements of the Housing Act and the HUD implementing regulations and the effect thereof).

Turning to Spring Groves ban list trespass policy, the policy bears striking resemblance to the trespass policy invalidated by the court in Diggs. As testified to during the immunity hearing, once added to the Spring Grove trespass list the effect is virtually a permanent ban. Based on the evidence in the record it appears that there is no way for a tenant or an individual on the ban list to seek an individual's removal from the ban list. In addition to the unreasonableness of a ban lasting for perpetuity, the testimony concerning Spring Grove's ban list also indicates that it vests agents of the Complex with virtually unfettered discretion to outlaw a significant amount of innocent conduct. See

Beck, Ban Lists: Can Public Housing Authorities Have Unwanted Visitors Arrested?, 2004 U. Ill. L. Rev. at 1248 (discussing the unconstitutionality of trespass policies that leaves enforcement decisions to the standardless discretion of those enforcing the trespass policy). Moreover, from the evidence provided at the immunity hearing, no one but law enforcement is apparently privy to the full list of individuals who are on the Spring Grove ban list. See Immunity Hr'g Tr. 195:6-196:5. Finally, as with the trespass policy in Diggs, regardless of the absence of Shelricka's lease from the record, it is clear that Spring Grove's trespass policy carries the threat of eviction for tenants who invite persons on the ban list to Spring Grove. Furthermore, since the names on the ban list are not made known to the tenants, tenants are in essence forced to live beneath the ever present sword of Damocles should they dare to invite persons who do not live at Spring Grove to their apartment.

Given the ever-present specter of being evicted for unknowingly inviting the "wrong" person to Spring Grove as well as the other onerous provisions of the Spring Grove trespass policy, it is clear that the Spring Grove trespass policy "unreasonably interfere[s] with tenants' ability to entertain guests in the tenants' public housing apartments. As such the Spring Grove trespass policy should not have been enforceable against Mr. Glenn to prohibit him from visiting a tenant at Spring Grove at the tenant's invitation or against Shelricka to prohibit her from inviting Mr. Glenn, or anyone else she desired, to her apartment for lawful and peaceable purposes. Due to the Spring Grove trespass policy being unenforceable it was an error of law for the trial court to deny Mr. Glenn immunity based in any part of Spring Grove's trespass policy.

III. The use of a general non-specific allegation of loitering as a basis for a summary adjudication of a trespass violation on a public housing project property is unconstitutionally vague

Under the Fifth and Fourteenth Amendments "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." When a law fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement, the law violates this guarantee. See, Johnson v. United States, 135 S. Ct. 2551 (2015). The prohibition of vagueness in criminal statutes "is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law," and a statute that flouts it "violates the first essential of due process." Id., (citing Connally v. General Constr. Co., 269 U.S. 385, 391 (1926)).

The trial court's interpretation of the immunity and trespass after notice statutes would deprive citizens of an important liberty interest conferred by S.C. Code Ann. § 16-11-410 et seq. in an arbitrary fashion and without appropriate due process. The predicate conduct purportedly justifying the verbal trespass notice was "loitering."[7] The law enforcement officer giving the notice, who at the time was on the payroll of the apartment complex owner, gave no other cause for the notice.

The use of "loitering" charges has a checkered history of discriminatory enforcement. See, e.g., Bouie v. Columbia, 378 U.S. 347 (1964); cf., Chicago v. Morales, 527 U.S. 41 (1999) ("[i]f the loitering is in fact harmless and innocent, the dispersal order

[7] See Beck, Ban Lists: Can Public Housing Authorities Have Unwanted Visitors Arrested?, 2004 U. Ill. L. Rev. 1223, 1258 (citing Hicks v. Va., 535 S.E.2d 678, 686 (Va. Ct. App. 2000) for the proposition that "mere presence on property should never be enough get oneself banned…").

itself is an unjustified impairment of liberty.); see also Beck, Ban Lists: Can Public Housing Authorities Have Unwanted Visitors Arrested?, 2004 U. Ill. L. Rev. 1223, 1224-41, 1244-49 (discussing the history and use of ban lists and their impact on freedom of movement); Angela L. Clark, City of Chicago v. Morales: Sacrificing Individual Liberty Interests for Community Safety, 31 Loy. U. Chi. L. J. 113 (1999) (providing in-depth analysis of loitering laws and constitutional challenges thereto). In the case at bar, the apartment was government subsidized public housing and the law enforcement officer, though not on official public duty, acted under the color of state law by use of public resources, including his uniform, police cruiser computer, etc.

In the case at bar, the allegation was general and nonspecific. Neither the officer nor the prosecution cited the violation of any state or local ordinance prohibiting loitering. , Law enforcement did not issue Mr. Glenn a citation, He had no opportunity to be heard or challenge the verbal notice which led to his inclusion in a non-public database of "banned" individuals.

Moreover, violation of S.C. Code Ann. § 16-11-620 can only occur if the Defendant is "requested to do so by the person in possession or his agent or representative". In this case, the party in possession of the property at the time of the verbal notice was a company that sold the property several years prior to the date on which this incident occurred. Significantly, the record contains no proof of a nexis between the original verbal notice and a re-publication or ratification by the new property owner.

On this point the law is very clear. An agent's loss of capacity to do an act for the principal terminates or suspends his authority. (Restatement 2d of Agency, § 122(2) (2nd 2010)). The officer's capacity to serve as an agent of the housing project is further compromised by S.C. Code Ann. § 8-13-700(A) ("No . . . public employee may knowingly use his official office, membership, or employment to obtain an economic interest for himself.")

Under these circumstances, the State is depriving the Defendant of a fundamental liberty interest, i.e., statutory immunity, on the basis of an ill-defined offense predicated on "notice" given by one not authorized to act as an agent for the property and with no recourse to a factual or legal challenge. The alleged trespass violation on the vague and unproven claim of loitering cannot withstand judicial scrutiny.

S.C. Code Ann. § 16-11-620 provides a monetary fine or imprisonment as the remedy. (In fact, it does not even grant the landowner the right to eject. See, Springdale v. Butler, 299 S.C. 276, 279 (S.C. 1989)). To subject the availability of statutory immunity to the minimal procedural and notice standards of claims of loitering and trespass creates grave and constitutionally prohibited uncertainty as to the applicable law.

IV. The use of a three year old trespass notice as a bar to statutory immunity under the PPPA deprives the Appellant of his right to due process of law

The Fourteenth Amendment and the South Carolina Constitution both provide that no person shall be deprived of "life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1; Const. art. 1, § 3. Procedural due process requires notice and

an opportunity to be heard before the government can take a person's liberty or property interests.

Mr. Glenn's right to immunity under the PPPA constitutes an important liberty interest. The presumptions and immunities afforded under the PPPA are therefore entitled to protection as a matter of constitutional due process. As the U.S. Supreme Court has stated, "a person's liberty is equally protected, even when the liberty itself is a statutory creation of the State. The touchstone of due process is protection of the individual against arbitrary action of government." Wolff v. McDonald, 418 U.S. 539 (1974).

The trial court's assumption that Mr. Glenn was guilty of trespass violates his constitutional right to due process. The record shows at most that he was issued a verbal notice that he would be placed on a banned person list. No citation was ever given.[8]

A notice of trespass is not a judicial order. A trespass notice is not subject to the same deference or protections that attend judicial orders. See, e.g., Wash. v. Green, 239 P.3d 1130 (Wash. Ct. App. 2010).

As stated in Washington v. Green:

> [N]otice of trespass is merely an evidentiary tool in the prosecution for trespass. . . . Service of the notice of trespass proves only that the recipient had notice that the issuing authority considered her license to enter the property to have been revoked. On these facts, issuing the notice did not relieve the State of its burden to prove the elements of criminal trespass . . .

Green, 239 P.3d at 1136.

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[8] Violation of § 16-11-620 requires issuance of a citation. § 56-7-10 explicitly states that "[t]here will be a uniform traffic ticket used by all law enforcement officers in arrests for traffic offenses and for the following additional offenses:. . .Trespassing § 16-11-620 . . ."

The State must prove each element of criminal trespass beyond a reasonable doubt. That includes the predicate facts, such as the alleged "loitering" violation in the first instance, the presence of Mr. Glenn beyond the area of lawful egress, and so forth, as well as the constitutional validity of the trepass restriction in view of substantial authority that vague, blanket restrictions in public housing projects violate First Amendment rights to travel and to association with friends and family.

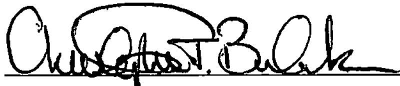
The liberty interest at stake in the case at bar is too important for the use of arbitrary action such as has occurred here. The original trespass notice gave no notice or opportunity to challenge the issue which – more than three years later – were to have the ex post facto result of depriving Mr. Glenn of fundamental self defense privileges otherwise available by statute.

The trial court's summary conclusion that the immunity protections were unavailable based upon unproved and constitutionally deficient trespass notice cannot withstand scrutiny under due process requirements.

CONCLUSION

Appellant Marquez D. Glenn respectfully requests that this Court REVERSE the August 4, 2015 Order of the lower court denying Appellant's Motion for Immunity pursuant to S.C. Code Ann. § 16-11-450(A), GRANT Appellant immunity from prosecution in connection with the events of April 12, 2013, and VACATE Appellant's convictions for Assault and Battery of a High and Aggravated Nature and Possession of a Weapon During a Violent Crime.

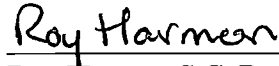
BRUMBACK & LANGLEY, LLC



Christopher T. Brumback S.C. Bar # 75410
John H. Scully S.C. Bar #100744
1 Augusta Street, Suite 301D
Greenville, SC 29601
(864) 414-9097

ATTORNEYS FOR APPELLANT
MARQUEZ D. GLENN

HARMON & MAJOR, PA



Roy Harmon S.C. Bar #
PO Box 8954
Greenville, SC 29604
(864) 467-1712
w/permission

ATTORNEY FOR APPELLANT
MARQUEZ D. GLENN

Date: March 17, 2016
Greenville, South Carolina