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SEP 21 2016

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

THE STATE,

PETITIONER,

V.

THEODORE MANNING,

RESPONDENT

Appeal from Richland County

G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 27664

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, counsel for Theodore Manning petitions the Court for rehearing. Counsel respectfully submits that the Majority Court overlooked the fact that a hearing to make a pre-trial determination on whether Respondent met his burden to prove immunity by a preponderance of the evidence never occurred. It is overlooked that the Trial Court merely heard argument from the parties concerning whether the Protections of Persons and Property Act (the Act) was applicable and then summarily ruled that it was not. The Trial Court did not determine that Respondent failed to meet his burden of proof, but that the Act itself did not apply to the case. The Trial Court committed reversible error in denying Manning a pretrial evidentiary hearing regarding whether he could prove immunity under the Act. By ruling that a Defendant is only afforded an

evidentiary hearing to determine immunity on a “case by case” basis, the Majority Court misapprehends the procedure set forth in State v. Duncan, 392 S.C. 404, 709 S.E.2d 402 (S.C. 2011) to determine immunity, and the intent of the South Carolina Legislature to create a substantive right and not merely an affirmative defense. In its reliance on the rationale from State v. Wessinger, 408 S.C. 416, 759 S.E.2d 405 (2014), the Majority Court overlooks the rulings of neighboring states, with virtually identical immunity statutes, requiring pretrial determinations on the issue of immunity to come in the form of full evidentiary hearings. In limiting a defendant’s meaningful opportunity to be heard so that he can meet his burden of proving immunity, the Majority Court overlooks the fact that this also denies a defendant fundamental procedural due process rights.

I. The Majority Court Misapprehends the Record in Manning’s Case

The Majority Court misapprehends the Record on Appeal when it states that “Respondent’s counsel *relied* upon Respondent’s statement to police, introduced as an exhibit by the state, to support his immunity claim.” State v. Manning, Opinion No. 27664 at 3 (S.C. Sept. 7 2016) (emphasis added). Furthermore, the Majority repeatedly refers to Respondent’s statement as the “undisputed” recitation or version of the facts. Id. at 4 and 11. To the contrary, trial counsel strongly disputed that Manning’s brief law enforcement typed statements were in fact the true and detailed version of events, as was evidenced by Manning’s vivid trial testimony regarding McPhatter’s attack, and the numerous challenges to the unrecorded nature of Manning’s lengthy interrogations as well as the interrogation tactics employed. R. 1492-1496, R. 1511, ll 1-4, R. 1542, ln 21- R 1544, ln 20. Trial counsel did not seek to “rely” upon Manning’s typed statement, it sought to rely upon his testimony as well as its forensic expert witness Kelly Fite; however, that request was denied by the Trial Judge. R. 189, ln 3 -R. 190, ln 24; R. 471 ll 1-7. The Majority Court overlooks the fact that this was a case of first impression for the Trial Court as well as the attorneys involved on either side.

Neither the Trial Court nor the attorneys had the benefit of the cases that have followed to help clarify and instruct on both the procedural and substantive provisions of the Act. See State v. Duncan, 392 S.C. 404, 709 S.E.2d 402 (S.C. 2011), State v. Curry, 406 S.C. 364, 752 S.E.2d 263 (S.C. 2013), State v. Isaac, 405 S.C. 177 S.E.2d 677 (S.C. 2013), State v. Douglas, 411 S.C. 307, 768 S.E.2d 232 (Ct. App. 2014), State v. Jones, 416 S.C. 283, 786 S.E.2d 132 (S.C. 2016). Trial counsel for Manning did not “rely” upon his statement as a recitation of “undisputed” facts, but rather as an initial showing that Manning was attacked and entitled to an evidentiary hearing on the issue of immunity. R. 463, ln. 1- R. 464, ln 7. Without having the benefit of the cases supra, trial counsel only had the plain text of the Act to direct their course in seeking immunity in 2010. Under the immunity provision of the Act, 16-11-450(B) provides the only indication regarding procedure or burden on a party when it states, “a law enforcement agency may use standard procedures for investigating the use of deadly force as described in subsection (A), ***but the agency may not arrest the person for using deadly force unless probable cause exists that the deadly force used was unlawful***”(emphasis added). It is clear from the record that trial counsel believed that Manning’s statement indicated that McPhatter had, during the course of an argument, pointed a gun at him, and then even once disarmed continued to advance toward him while upset and hitting the gun. It was trial counsel’s position, with no other guidance, that under the Act this was a prima facie showing that Manning was immune unless the State could rebut this evidence by showing probable cause that the deadly force used by Manning was unlawful. This was why an evidentiary hearing was requested. R. 188, ln 9 – R. 190, ln 21. Today, having the benefit of the aforementioned cases, the Act has been explained and clarified, and we now know that the defendant has the burden of proof by the preponderance of the evidence to show immunity. Accordingly, trial counsel does not “rely”

on Manning's statement as the "undisputed" version of the facts, but instead presented it as an initial showing they believed to be procedurally required to show that immunity applied.

Just as trial counsel did not have the benefit and instruction of case law on the issue of immunity, the Trial Court also lacked guidance on this issue. It is clear from the record that he believed the Act only applied to home invasion type intrusions and not to a "domestic argument" that was "between lovers." R. 469, ln 6- R 471, ln 10. The Trial court held no hearing and simply sided with the State's argument that the Act did not apply to Manning's case, given his mistaken understanding of the Act. We now know through cases such as State v. Douglas and State v. Jones that 16-11-440(C) of the Act applies to attacks by those who are invited into the home or are even domestic partners with a right to be in the home, so long as the elements of self-defense are met, but for the duty to retreat. Jones at 295. The Majority Court not only misapprehends the error of the Trial Court in not granting an evidentiary hearing on immunity, but also overlooks the basis for the Trial Court's finding that the Act was "not applicable," due to its faulty interpretation of the Act as only applying to home invasion type intrusions and not attacks of a domestic nature as approved in Jones.

In the Majority Court's misapprehension of the record, it has overlooked the fact that no hearing was held at all regarding the issue of immunity under the Act, evidentiary or otherwise. The Trial Court simply agreed with the State argument that the Act did not apply to Manning based on a mistaken interpretation that the Act could only be used against home invader type attacks and not for attacks in domestic situations.

II. The Majority Court Overlooked Guidance from Other States that have Ruled on the Issue of Whether Evidentiary Hearings are Required under Similar Statutes

In ruling that full evidentiary hearings in determining immunity under the Act are only required on a “case by case” basis in keeping with State v. Wessinger, 408 S.C. 416, 759 S.E.2d 405 (2014), the Majority overlooks the fact that this very issue has been considered by the highest courts from neighboring states that have virtually identical immunity provisions as South Carolina’s Act. Rather than taking guidance from these states, as it did in Duncan when determining the burden of proof to be applied and when the issue of immunity was to be determined, the Court instead looked to Wessinger, which concerned itself with Sexually Violent Predator (hereinafter SVP) determinations under S.C. Code 44-48-30(2). Unlike claims for immunity under the Act, the SVP determinations were not cases with facts in material dispute, most being a matter of public record. Whether a citizen is classified as SVP under that statutory scheme is a matter of complete discretion by the court, with no moving party required and no burden of proof or persuasion. In stark contrast to immunity claims, SVP determinations necessarily deal with factual scenarios involving convicted defendants and whether they should be given an additional classification as a violent predator. Whereas immunity determinations under the Act are concerned with immunity from civil and criminal prosecution, with the crux of the matter being a request to shield the defendant from liability altogether. Given how dissimilar immunity claims are as compared to SVP determinations, the Majority Court’s reliance on Wessinger for its “instruction” is misplaced. It is understandable that the Majority Court seeks a solution to the undeniable fact that claims for immunity under the Act create an obstacle to the prosecution of criminal cases in a criminal justice system already under the strain of a massive criminal docket. However, attempts to save judicial resources cannot be made at the expense of fundamental due process. In its reliance on the “case by case” approach

taken in Wessinger, the Majority Court limits the ability of a criminal defendant to present evidence necessary to meet the same evidentiary burden it has tasked him with to prove immunity under State v. Duncan thus denying him fundamental procedural due process.

The Majority Court overlooked numerous jurisdictions for guidance, tacking these same issues under virtually identical immunity laws, after originally turning to them in Duncan. Florida's Supreme Court considered the exact same issue of this present appeal in Dennis v State, 51 So.3d 456 (2010), the same year the Trial Court denied Manning an evidentiary hearing. Examining Florida's virtually identical immunity provisions, Dennis affirmed and clarified State v. Peterson, 983 So.2d 27 (Fla. App. 1 DCA 2008) which was the first Florida case to address their immunity Act. In Dennis, an appeal stemming from a domestic homicide conviction, the Court ruled that it was error for the trial court to deny the defendant an *evidentiary hearing* on his claim of statutory immunity. Id. at 463 (emphasis added). The Dennis Court goes on to explain why evidentiary hearings are necessary in its analysis of their identical immunity law:

While Florida law has long recognized that a defendant may argue as an affirmative defense at trial that his or her use of force was legally justified, Section 776.032 contemplates that a defendant who establishes entitlement to the statutory immunity will not be subjected to trial. Section 776.032(1) *expressly grants defendants a substantive right to not be arrested, detained, charged, or prosecuted as a result of the use of legally justified force. The statute does not merely provide that a defendant cannot be convicted as a result of legally justified force.*

Id. at 462 (emphasis added). Given that this same substantive right has been created by the Legislature under our Act, providing not only justification for a use of force but a shield from arrest, prosecution, and a trial itself, it is clear error to not hold an evidentiary hearing on such an important claim. Additionally, of note is the recent Florida Supreme Court opinion of Bretherick v. State, 170So. 3d 766 (2015), reiterating that the defense had the burden of proof and not the state to disprove immunity. Bretherick actually cites State v. Duncan in including South Carolina as one of

several states that requires a pretrial evidentiary hearing. Bretherick goes on to affirm that “[t]hese courts have adopted the procedure in which the defendant bears the burden of proof, by a preponderance of the evidence at a *pretrial evidentiary hearing*, in the context of their analogous immunity laws” Bretherick, at 775 (emphasis added). Citing State v. Duncan, 392 S.C. 404, 709 S.E.2d 662, 665 (S.C. 2011); Bunn v. State, 284 Ga. 410, 667 S.E.2d 605, 608 (Ga. 2008); People v. Guenther, 740 P.2d 970, 972 (Colo. 1987). Also instructive is LeMont v. State, CR-14-1326 (Ala. Crim. App. June 3, 2016) which adopts the holding from Harrison v. State, CR-13-0429 (Ala. Crim. App. 2015) in ruling that it is reversible error for a trial court to not provide an evidentiary hearing to determine immunity pretrial. In LeMont, under facts remarkably similar to Manning’s case, the trial court granted a “hearing” to address the issue of immunity but refused to allow the defense to call a witness it had under subpoena. The court ultimately denied immunity claiming it did not have the authority to determine such an issue. In following Harrison, the Alabama Court of Criminal Appeals ruled that the judge committed error by not holding a pretrial evidentiary hearing and reversed and remanded.

In Harrison, like Brethreick, the Court cites South Carolina as one of the similar jurisdictions that requires pretrial immunity determinations in the form of evidentiary hearings. Having not had the benefit of reading the latest Manning opinion that is the subject of this petition, one can see how the Bretherick and Harrison Courts would view Duncan as requiring pre-trial evidentiary hearings when holding that the burden is on the defendant by a preponderance of the evidence and relying so heavily on Dennis. It is axiomatic that full evidentiary hearings would be the vehicle by which to prove preponderance of the evidence in these scenarios. This seems particularly evident in light of the pains this Court took in Duncan to analogize the “true immunity” our Act provides, as not merely an affirmative defense, in keeping with the rationale from State v.

Dennis. Duncan at 410. In discussing the Dennis Court's conclusion that "the trial court should conduct a pre-trial evidentiary hearing to decide the factual question of the applicability of the statutory immunity," this Court's original intent was evident when one sentence later the Court stated, "[L]ikewise, we find that, by using the words "immune from criminal prosecution," the legislature intended to create a true immunity, and not simply an affirmative defense...[A]ccordingly, we find the trial court properly made a pre-trial determination of respondent's immunity." Duncan at 410. It was understandable that trial courts all over South Carolina have required evidentiary hearings to determine immunity under the Act as that requirement is so plainly clear from Duncan. The Majority Court now misapprehends the intent of the Act in its reliance on Wessinger, in an attempt to conserve "precious judicial resources." This flies in the face of the Court's previous analysis of the Act in Duncan in which it carefully and correctly analyzed the true meaning of the Act.

III. The Court Overlooked Established Procedure Used In Other Motions Requiring a Preponderance of the Evidence Standard

In following the "case by case" approach to evidentiary hearings in Wessinger, the Majority Court overlooks common motions that require a preponderance of evidence standard in criminal cases through the use of full evidentiary hearings. Motions challenging competency to stand trial are routine and require the burden on the defendant by a preponderance of the evidence. These motions are always proven through evidentiary hearings. *See State v. Nance*, 320 S.C. 501, 466 S.E.2d 349 (1996) (Defendant has burden of proving incompetence by preponderance of evidence). Motions for post-conviction relief are even more common with the burden on the defense by the preponderance of the evidence under Rule 71.1 of the Post-Conviction Relief Act. Both of these motions are accomplished by holding evidentiary hearings with the taking of evidence in the form of witness testimony, documents, reports, transcripts, and expert opinion in order for the defendant to meet his

burden. In either scenario it would be inconceivable for a trial judge or PCR judge to make a determination concerning competency or post-conviction relief based only on the argument of lawyers. In State v. Reed, 332 S.C. 35, 503 S.E.2d 747 (1998), the defendant challenged the finding of the trial judge that he was competent after his conviction for murder. The Court explained that “the trial court’s determination of competency will be upheld if it has evidentiary support and is not against the preponderance of the evidence.” Id. at 40. The Court in Reed further found that the trial court’s findings were “based on the forensic unit staffing report and the testimony of Dr. Behrmann and associates.” Id. It is evident in Reed that the “evidentiary support” the Court found in affirming the trial court’s conclusion on competency came by holding an evidentiary hearing. In Chambers v. State, 262 S.C. 202, S.E.2d 426 (1974), the post-conviction relief judge summarily dismissed the defendant’s application for post-conviction relief alleging ineffective assistance of counsel, without holding an evidentiary hearing on the merits. The South Carolina Supreme Court found this to be error by the judge as the mere denial of the applicant’s claim in the State’s return could not be said to conclusively refute his claim, and the applicant’s motion required an evidentiary hearing to make a determination. Chambers, at 206.

Conversely, the State has the burden of proof by a preponderance of evidence in motions to establish the voluntariness of defendant’s statement to law enforcement. Under the seminal case of Jackson v. Denno, 378 U.S. 368 (1964), it is a violation of Due Process under the 14th Amendment for a trial judge not to hold an evidentiary hearing when making a determination on the voluntariness of a defendant’s statement to police. This is not simply an issue for a jury to decide. Trial courts must make these determinations via “full evidentiary hearings” to settle disputes of fact and evidentiary conflicts. Id. at 392. In State v. Washington, 296 S.C. 54 (1988), the court reversed and remanded for a new trial after the trial court applied the wrong standard in making its

determination regarding the voluntariness of a defendant's statement as it is well established to be by a preponderance of the evidence. Id. at 56.

It is unimaginable, when given a clear standard of proof and burden of persuasion for the above three types of common motions, that any judge would make a determination without holding a full evidentiary hearing. It is axiomatic that evidentiary hearings are required. For example, it would be a clear abuse of discretion and violation of due process if a trial judge simply listened to arguments from opposing counsel without letting a defendant testify regarding the conditions of his interrogation before ruling that that his statement was voluntary and now admissible as evidence. Conversely, one can imagine the outrage by the State if the same trial judge ruled that the same confession was not admissible, without an evidentiary hearing, after agreeing with argument from defense counsel concerning an irregularity in the advice of rights form. It would as well be an abuse of discretion for a judge to make this determination without an evidentiary hearing allowing the state to meet its burden though the testimony of law enforcement officers who took the statement. Under the same logic, it was an abuse of discretion by the Trial Court in Manning's case to not allow him an evidentiary hearing to determine if he could meet his burden in proving immunity by a preponderance of the evidence. This is especially true because it is clear from the record that the Trial Judge agreed with the State that immunity was not applicable under an erroneous belief that immunity only applies to home invasion type attacks, which has since been refuted by State v. Douglas and State v. Jones.

IV. The Trial Court Violated Manning's Procedural Due Process Rights by Denying Him a Meaningful Opportunity to be Heard in Determining Immunity

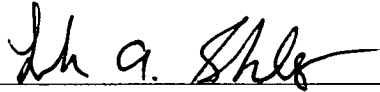
In allowing neither Manning nor his forensic expert witness to testify in an evidentiary hearing concerning immunity, the Trial Court denied him a meaningful opportunity to be heard, violating his fundamental right to procedural due process. In Thompson v. State, 415 S.C. 560, this

Court addressed whether it was error to not hold a hearing for a declaratory judgement on the defendant's sex offender status after a conviction for kidnapping. This Court concluded that Thompson should have been afforded a hearing on the character of the kidnapping offense and whether it was sexual in nature. This Court ruled that, "procedural due process imposes constraints on government decisions which deprive individuals of *liberty* or property interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendments of the United States Constitution...we find that Thompson has been denied a *meaningful opportunity* to be heard on whether his kidnapping offenses were sexual in nature." (emphasis added) *Id.* at 566. The question of whether a defendant is entitled to immunity certainly involves a liberty interest as the Act was meant to create a "true immunity" from arrest and prosecution. The Legislature intended qualified defendants to be shielded from the full gauntlet of trial. *State v. Duncan* at 410. *See also Ford v. Wainwright*, 477 U.S. 399 (1986) (holding it was a violation of procedural due process to execute a defendant without an evidentiary hearing to determine competency when competency was in question). The Trial Court in Manning's case denied him a meaningful opportunity to be heard, as the Court literally refused him the ability to testify or call his forensic expert witness under subpoena. The Trial Court only heard argument either for or against whether the Act was applicable, without ever making a determination on the merits of the facts in dispute. Accordingly, the Trial Court made its ruling that the Act did not apply to Manning's case under a mistaken understanding of the law per *State v. Jones* and *State v. Douglas*. The Trial Court's refusal to grant a full evidentiary hearing violated Manning's fundamental right to procedural due process rights.

One only needs to look to what transpired in *State v. Jones* to understand the dangers posed by the Majority Court's "case by case" approach adopted from *State v. Wessinger*. A review of the publicly available record on appeal reveals that Judge Nicholson granted a full evidentiary hearing

in that case to determine immunity saying, "I'm going to let you call whoever you want to call. Do you want to call those witnesses? You've got the burden. You've got to prove preponderance of the evidence; your burden, so call whoever you want to call." Jones, Record on Appeal II 4-7. As a trial judge, Judge Nicholson understood that for a defendant to meet his burden by a preponderance of the evidence, he had to grant an evidentiary hearing and a meaningful opportunity to be heard. Although Jones did not testify, Judge Nicholson heard evidence in the form of witness testimony from both sides, photos, audio recordings, in car video, and written statements. Judge Nicholson determined that Ms. Jones met her burden and proved immunity under the Act. This ruling was recently affirmed by this Court. In affirming Judge Nicholson's determination, the Court expressly allowed for Section 16-11-440(C) immunity claims in the home in domestic situations even though the alleged victim has a right to be there as well. In doing so it affirmed the rationale of Judge Nicholson that to allow for immunity outside the home by a domestic partner, but not inside the home, would create a "nonsensical result." Jones at 295. Respectfully, another nonsensical result would be to make pretrial determinations on immunity without holding full evidentiary hearings. The harsh reality is that Whitlee Jones would have likely received a very different pretrial immunity determination under the Majority Court's "case by case" approach. Like in Manning's case, Jones' written statement to law enforcement described how during a domestic argument she fatally wounded her unarmed lover. Like in Manning's case, the State argued that the Act was inapplicable and that she should be denied an evidentiary hearing. In a world post the Majority Court's opinion in Manning, a defendant like Ms. Jones, without the benefit of being able to present evidence to corroborate her claim, would very likely be denied immunity and forced to face the full gauntlet of trial.

Respectfully submitted,



Luke A. Shealey, The Shealey Law Firm
E. Fielding Pringle, Chief Public Defender
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Date: 9/21/16

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SEP 21 2016

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Richland County

G. Thomas Cooper, Jr., Circuit Court Judge

THE STATE,

PETITIONER,

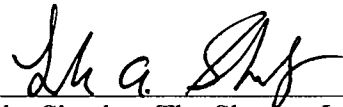
V.

THEODORE MANNING,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon William Blich, Esquire, this 21st day of September, 2016.



Luke Shealey, The Shealey Law Firm
E. Fielding Pringle, Chief Public Defender
for Richland County

ATTORNEYS FOR RESPONDENT

SWORN TO BEFORE ME this 21st day
Of September, 2016.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: April 4, 2024