RECEIVED

JAN 24 2017

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Writ of Certiorari to the South Carolina Court of Appeals
Appeal from Florence County
George C. James, Jr. Circuit Court Judge

Appellate Case No. 2016-000067

THE STATE,

RESPONDENT,

V.

WAYNE ALBEON SCOTT, JR.,

PETITIONER,

BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

J. ROBERT BOLCHOZ
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General
S.C. Bar # 5758

South Carolina Office of Attorney General
P.O. Box 11549
Columbia, SC 29211-1549
(803) 734-3601

E.L. CLEMENTS, III
Solicitor, Twelfth Circuit
Box Q, City-County Complex
Florence, SC 29501
(843) 665-3091

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

PETITIONER'S STATEMENT OF THE ISSUE

I. Whether the Court of Appeals erred in affirming the trial court's refusal to grant Petitioner Scott immunity from prosecution for the murder charge pursuant to S.C. Code Section 16-11-410, the Protection of Persons and Property Act, when Petitioner was at his own home; the victim was on Petitioner's property although he had been asked not to come; Petitioner asked the victim to leave; and the victim continued to advance?

RESPONDENT'S COUNTER STATEMENT OF THE ISSUE ON CERTIORARI

I. Whether the pretrial court erred in denying immunity under the Protection of Persons and Property Act where the trial court found Petitioner did not meet its burden of proof since first, that Petitioner was not being attacked at the time he shot the victim and, second, that Petitioner did not have a reasonable fear of death or great bodily injury when he shot the victim.

RESPONDENT'S STATEMENT OF THE CASE

The Trial Proceedings

A Florence County Grand Jury indicted Petitioner, Wayne Albeon Scott, Jr.,[1] in March 2013 for the murder of Steve B. Springs (Victim) and for possession of a weapon during commission of violent crime. (R. p. 458 – 459).

Petitioner sought immunity under the Protection of Persons and Property Act, S.C. Code Ann. § 16-11-410 *et seq.*, and on September 19, 2013, the Honorable Howard King conducted a pretrial hearing to determine whether Petitioner was entitled to immunity. (R. pp. 1–110). Petitioner was represented by Assistant Public Defender William Grove during the hearing. (R. p. 1). The State was represented by Assistant Solicitor Matthew Ozment. (R. p. 1). After hearing from three witnesses, including Petitioner, and after hearing argument from both sides, Judge King denied the motion. (R. p. 104, line 18–p. 109, line 3).

On October 21, 2013, Petitioner's case was called to trial before the Honorable George C. James. (R. p. 111). Petitioner was represented by Assistant Public Defender Grove during the four-day trial. (R. p. 111). Assistant Solicitor Ozment represented the State. (R. p. 111). On October 24, 2013, the jury returned a verdict of guilty on all counts as charged. (R. p. 441, line 24–p. 442, line 10). Judge James sentenced Petitioner to life imprisonment for murder and to five (5) years incarceration for possession of a weapon, the sentences to run concurrently. (R. p. 456, lines 18–24).

[1] Petitioner also goes by the name "Sunny" and is sometimes referred to as such in the testimony.

The Proceedings before the Court of Appeals

Petitioner served a timely notice of appeal, which he filed with the South Carolina Court of Appeals on November 4, 2013. (R. p. 460 – 461). On November 12, 2015, the South Carolina Court of Appeals affirmed the conviction and sentence. State v. Scott, Op. No. 2015-UP-513 (Ct. App. filed November 15, 2015). App.p. 1-3. Petitioner made a timely petition for rehearing. App.p. 4-11. On December 16, 2015, the Court of Appeals denied the petition for rehearing. App.p. 12.

The Proceedings before the South Carolina Supreme Court

The Petition for Writ of Certiorari was filed on January 14, 2016. In the petition for Writ of Certiorari, the Petitioner raised the following issues:

APPELLANT'S STATEMENT OF ISSUES ON APPEAL

I. Did the circuit court err in not granting Appellant Scott immunity from prosecution for the murder charge pursuant to S.C. Code Section 16-11-410, the Protection of Persons and Property Act, when Appellant was at his own home; the victim was on Appellant's property although he had been asked not to come; Appellant asked the victim to leave; and the victim continued to advance?

II. Did the trial court err in not charging the jury on S.C. Code Section 16-11-410 when standing his ground was a valid defense, which the jury should have been able to consider in their deliberations, in conjunction with self-defense which the trial judge had emphasized was a valid defense?

The Respondent made a Return to the Petition. On November 9, 2016, the Supreme Court granted certiorari on issue one and denied it on issue two. This briefing follows.

RESPONDENT'S STATEMENT OF THE FACTS

Tensions Rise

The victim, Steve Springs, worked as a heating and air repairman for Wayne Scott's wife's company. Prior to June 2012, he would come to Petitioner's house to pick up his check every week from Petitioner's wife, Gloria Scott. (R. p. 245, lines 21–p. 247, line 25). Gloria Scott testified that she learned in April or May of 2012 that Springs and Scott's daughter (Petitioner's stepdaughter) were having an affair. (R. p. 246, lines 11–21). Both Springs and Scott's daughter, Crystal Hanna, were married. (R. p. 244, line 15–p. 246, line 17). The Petitioner disapproved of the relationship, and according to Gloria Scott, Springs knew that she disapproved, and that is why he stopped coming to her house to pick up his check. (R. p. 246, line 18–p. 248, line 3). Instead, Springs would send someone else to pick it up, or he would meet Gloria Scott at one of the properties she managed. (R. p. 248, lines 4–9).

Gloria Scott testified that she and Victim had very heated exchanges about his relationship with Hanna. (R. p. 248, line 10–20). Hanna testified to an exchange that she witnessed on the Thursday before the victim's death, September 20, 2012:

> [H]e was at my house to pick me up and we were leaving. And my mom showed up unannounced and him and her exchanged words. And he went to go walk out the front door to sit in the truck and wait on me to finish getting my stuff and, you know, leave and she pushed him down the steps. He didn't fall, but I mean she just put her hands on him, pushed him down the steps and a police report was made.

(R. p. 303, line 25–p. 304, line 13).

On Saturday, September 22, 2012, Gloria Scott was on an overnight camping trip with her grandson's Cub Scout troop when she learned that one of her properties was having problems with their air conditioning unit. (R. p. 248, line 21–p. 249, line 12).

She tried to call Springs about the issue, but she did not reach him. (R. p. 249, lines 9–16). Scott then called Hanna and told her she was trying to get in touch with Springs. (R. p. 249, lines 16–22). Hanna told Scott to call Springs's son. (R. p. 249, lines 20–22). According to Scott, she tried multiple times to call the victim's son but was unable to reach him. (R. p. 249, line 22–p. 250, line 3). However, Gloria Scott was able to post on Facebook about the camping trip. (R. p. 250, lines 3–10). Sometime later that evening, she received a call from Springs, who was "upset because [Gloria Scott] had gotten on [her] phone and was able to make a post, but [she] wasn't able to get through to his son." (R. p. 250, lines 10–18).

Gloria Scott ended up having to leave the camping trip early, and she posted on Facebook something to the effect of "it is ashame [sic] that my grandson's night got F up by this asshole . . . ." (R. p. 250, line 19–p. 252, line 11). Later in that conversation on Facebook, Scott said "yeah, and the asshole is going to cause me to kill him." (R. p. 251, lines 4–7). At trial Gloria Scott explained, "[M]y sister-in-law asked me what had happened and I told her that I would call her tomorrow and explain that just because I didn't want to put on Facebook that my daughter was messing with a married man." (R. p. 251, lines 7–10). Gloria Scott also posted that "[Petitioner] did nothing yet, but when he finds out . . . ." (R. p. 251, line 13–p. 252, line 3). Gloria Scott affirmed that the "asshole" she was referring to was Springs. (R. p. 251, lines 7–11).

Two days later, on September 24, 2012, Petitioner went hunting with Michael Bruce[2] on Bruce's property in Pamplico. (R. p. 229, line 14–p. 231, line 9). They

[2] Both Larry Michael Bruce and Larry Michael Bruce, II, testified at Petitioner's trial. The senior Bruce goes by Larry Bruce, and the junior Bruce goes by Michael Bruce, and Respondent will refer to them as such in this brief.

finished right before dark. (R. p. 231, lines 10–13). When Michael Bruce came out of the woods, he found Petitioner on the phone arguing and cussing. (R. p. 231, line 21–p. 234, line 8). Michael Bruce drove Petitioner home that night, and according to Bruce's testimony, Petitioner and the man on the phone were arguing for almost the entire fifteen minute drive. (R. p. 234, lines 1–24). Though Michael Bruce could not tell what the two were arguing about, he heard them threaten to "beat each others butt." (R. p. 235, lines 14–20). At some point, Michael Bruce took the phone from Petitioner and ended the call, but the man on the other line called back. (R. p. 235, lines 1–13). Petitioner and Michael Bruce had a couple beers on the way home. (R. p. 236, lines 2–9). By the time Michael Bruce dropped Petitioner off at his house that night, Petitioner had hung up the phone, but Petitioner was locked out of his house because he did not have his keys. (R. p. 236, line 10–p. 237, line 9).

Hanna testified that she was on the phone calls between Petitioner and Springs that Monday. (R. p. 307, line 1–p. 308, line 7). According to Hanna,

> [Victim] called me because he said that he had a really bad feeling about it. Something just didn't sit right with him about [Petitioner] calling him so persistently about the air condition situation. So he wasn't going to go down there and called him back to let him know that and had me on three way when he called [Petitioner] back.

(R. p. 307, lines 19–25). According to Hanna, Petitioner threatened to "beat [Victim's] mother[,]" and Springs responded that he did not want to fight Petitioner. (R. p. 308, lines 8–19). Petitioner told Springs that he could meet him at Petitioner's house if Springs wanted to talk. (R. p. 308, line 8–p. 309, line 1). Springs later called Hanna and told her that he was almost to Petitioner's house and that he would see her when he left. (R. p. 309, lines 15–21).

Petitioner Shoots Victim

Petitioner's neighbor, George Watson, was watching television the night of September 24, 2012, when he heard a gunshot. (R. p. 319, line 10–p. 320, line 21). The gunshot sounded like it was in Watson's backyard, so he grabbed his fiancé's .45 and went outside to see what was going on. (R. p. 320, line 22–p. 321, line 3). Watson saw Petitioner in his backyard talking on a cell phone. (R. p. 321, lines 9–14). Watson heard Petitioner say, "I shot him." (R. p. 321, line 15–16). Once Petitioner was off the phone, Watson called out to Petitioner and asked if that was him shooting a gun. (R. p. 321, lines 17–20). Petitioner responded yes and told Watson that the gun went off, and the bullet jammed in the gun. (R. p. 321, lines 20–22). Petitioner and Watson then walked to Watson's property line and started talking about hunting. (R. p. 322, lines 6–11). Petitioner confessed to Watson that he had shot Springs. (R. p. 322, lines 12–13). Watson did not believe Petitioner because he was acting totally normal. (R. p. 322, line 19–p. 323, line 3). Petitioner then threatened Watson, saying "if you tell anybody, I will shoot you or you gone have to shoot me or I'm going to burn your house down with your kids in it." (R. p. 323, lines 4–9). Watson looked towards Petitioner's house and saw the victim's van there with the door open and the cab light on, and he realized that Petitioner was telling the truth. (R. p. 323, lines 4–22).

Petitioner instructed Watson to put the victim's body in the van and take it down the road, but Watson refused, and Petitioner threatened him again. (R. p. 323, line 23–p. 324, line 4). Petitioner told Watson that he had killed Springs because he was not going to have his grandkids call Springs "Daddy." (R. p. 324, lines 9–14). Watson then testified to the following:

Q. What did you say to that?

A. I said, well, did he have anything in his hand Sunny. He said no. I said, well, you know that's plan [sic] out cold-blooded murder. I said if he didn't come after you with something, it was murder.

Q. What did Sunny say to that?

A. He said that he didn't have nothing in his hand, so that's when he proceeded over to his boat and he got a screwdriver out, a black one red tip about this long whipped it off with his jacket and went around there to put it in his hand. I stayed around back. I never went around towards the front of the house. I stayed around back, that's when he come back and told me that Steve was still alive.

(R. p. 324, line 15–p. 325, line 3). Petitioner told Watson that he was going to shoot the victim again, but instead, he handed his gun to Watson and told him to get rid of it. (R. p. 326, line 8–p. 327, line 1). Petitioner said, "I don't care what you do with it, throw it woods [sic] for all I care." (R. p. 326, line 25–p. 327, line 1). So Watson took the gun and tossed it into the woods across the street. (R. p. 327, lines 15–18).

Shortly thereafter, Gloria Scott called Watson and asked what Petitioner had told him. (R. p. 328, lines 11–18). Gloria Scott then pulled up in her truck, asked where the gun was, and instructed Watson to retrieve it from the woods. (R. p. 328, line 18–p. 329, line 3). Watson testified that he did so and put the gun in the bed of her truck. (R. p. 329, lines 6–12). At that point, the truck was parked at the home of Carl Munn, another neighbor and Watson's brother-in-law. (R. p. 329, lines 2–12). Watson then went in Munn's house. (R. p. 329, lines 14–15). Inside he saw Petitioner on the couch drinking a beer and watching wrestling. (R. p. 329, lines 14–16). Gloria Scott tried to get Petitioner off the couch and told him "you better get your story straight because we got a dead man in the front yard. We got to get our story straight before we call the law." (R. p. 329, lines 14–18). Everyone then went outside, and Gloria Scott told Watson, if he was asked,

to tell the cops that all he heard was arguing and a gunshot. (R. p. 329, line 23–p. 330, line 2).

Watson then went back to his place and waited on the police. (R. p. 330, lines 3–8). Police arrived about twenty minutes later. (R. p. 330, lines 9–11). When the police first talked to Watson, he told them exactly what Gloria Scott had told him to say. (R. p. 330, line–p. 331, line 2). However, after the police took Petitioner away, Watson asked one of the officers to meet him down the road at Waffle House. (R. p. 331, lines 4–11). There, he told Investigator William Hester and another officer what really happened. (R. p. 331, lines 12–17).

Gloria Scott's testimony about the evening of September 24th differed from Watson's testimony. Gloria Scott testified that she had just dropped her grandson off at his home when she received a call from Petitioner that caused her to rush home. (R. p. 253, line 4–p. 254, line 4). She saw Watson at some point and asked him to get the gun for her. (R. p. 255, lines 8–12). She went to Munn's where Petitioner had told her he was headed. (R. p. 254, line 25–p. 255, line 4). While Petitioner was at Munn's house, Watson put the gun in the bed of her truck. (R. p. 255, line 23–p. 256, line 14). Gloria Scott and Petitioner then got in her truck to go home. (R. p. 256, lines 15–21). Gloria Scott testified that she called 9-1-1 as soon as they got in the truck. (R. p. 256, lines 15–18). Gloria Scott testified that she did not remember telling Petitioner to get his story straight and that she did not tell Watson what to tell the police. (R. p. 256, line 22–p. 257, line 11).

When Gloria Scott and Petitioner got home, she took the gun into the house and laid it on her bed. (R. p. 258, lines 1–4). Gloria Scott checked on Springs at the 9-1-1

operator's direction but found no signs of life. (R. p. 258, line 20–p. 259, line 2). She testified that it only took police about three minutes to get there. (R. p. 259, lines 3–5).

Police Arrive

Investigator Rollins Rhodes, the first police officer on the scene, arrived and found the victim laying on the ground near the driver's side doorway of his van. (R. p. 162, lines 5–13). Petitioner was sitting on the porch. (R. p. 162, lines 13–18). Rhodes asked Petitioner who did the shooting, and Petitioner responded, "I did." (R. p. 163, lines 14–20). Rhodes then handcuffed Petitioner. (R. p. 163, line 21).

Once other police officers arrived at the scene, Petitioner was given his *Miranda* warnings, and he made statements to police. (R. p. 167, line 18–p. 173, line 11). Petitioner told Deputy Michael Gifford that Springs had come to his house uninvited and unannounced and that they had a verbal altercation. (R. p. 169, lines 2–6). Gifford testified that Petitioner told him that the victim approached him with something in his hand and that he then shot Springs. (R. p. 169, line 6–p. 170, line 11). Petitioner told Gifford that after he shot the victim, he threw the cartridge casing in a burn pile, put the gun inside, went to a friend's house, and called his wife. (R. p. 171, line 8–p. 172, line 3). Gifford noticed the smell of alcohol on Petitioner's breath but noted that Petitioner did not seem to have any problem answering Gifford's questions. (R. p. 172, line 22–p. 173, line 8).

Petitioner also gave a statement to Investigator William Hester. (R. p. 191, line 21–p. 203, line 16). Petitioner described the phone calls he had gotten from Springs when he was on his way home from hunting. (R. p. 195, line 15–p. 196, line 19). When Petitioner arrived home, he realized he was locked out of his house, so he decided to sit

on his porch, drink a beer, and wait for his wife to get home. (R. p. 196, line 20–p. 197, line 2). Petitioner told Hester that Springs pulled into his driveway, turned his van headlights off, and opened the door. (R. p. 198, line 20–p. 199, line 2). Petitioner told Springs that he needed to leave, but the victim stepped out from behind the car door. (R. p. 199, lines 2–5). Petitioner told Springs, "Steve if you take one more step, you know, I'm going to shoot you." (R. p. 199, lines 5–7). Springs took another step, and Petitioner shot him. (R. p. 199, lines 7–8). Petitioner told Hester that the victim was holding a screwdriver in his hand at the time. (R. p. 199, line 21–p. 200, line 4). Petitioner told Hester that he heard the victim "say help me[,]" but Petitioner did not go to help Springs. (R. p. 201, lines 15–20). Petitioner told Hester that after he shot the victim, he put the gun inside his home, after ejecting the shell casing out of the gun. Petitioner said he dropped the casing in the burn pile behind his residence.[3] He stated he went to Carl Munn's house and drank a few beers there before calling his wife. (R. p. 201, line 2–p. 202, line 13).

Larry Bruce testified that on the night of September 24, 2012, he got a couple of calls from Petitioner asking him to come over to beat up the victim. (R. p. 266, line 18–p. 270, line 4). Larry Bruce refused. (R. p. 270, lines 4–7). The next day, Larry Bruce found out through Gloria Scott that Petitioner had shot Springs. (R. p. 270, lines 8–12). Gloria Scott also told Larry Bruce that she was in "trouble" because she had "put a knife in his hand and [she was] worried about the DNA coming back matching [her]." (R. p.

[3] A search of the burn pile did not locate the shell casing. R. p. 202.

270, lines 14–21). Gloria Scott told Larry Bruce that there was a screwdriver in Victim's hand, and she replaced it with a knife.[4] (R. p. 270, line 24–p. 271, line 3).

Police collected a red and black screwdriver five to seven feet from Victim's body and a silver lock-back hinge knife about a foot from Victim's hand. (R. p. 184, line 8–p. 187, line 15; R. p. 204, lines 6–23). Victim's body was located approximately seventeen feet from the porch. (R. p. 189, line 17–p. 190, line 4). Though officers searched the burn pile, they were not able to locate the shell casing. (R. p. 188, lines 2–21).

[4] Scott denied telling Larry Bruce such things. (R. p. 259, line 15–p. 261, line 6).

ARGUMENT

I. The Court of Appeals summarily found the pretrial court did not err in denying Petitioner's motion for immunity under the Protection of Persons and Property Act because the court found Petitioner did not meet his burden of proof where first, that Petitioner was not being attacked at the time he shot the victim and, second, that Petitioner did not have a reasonable fear of death or great bodily injury when he shot the victim.

Introduction

The statutory scheme under which Petitioner sought pretrial immunity is the Protection of Persons and Property Act (the Act or Stand Your Ground), S.C. Code Ann. § 16-11-410 (2006) *et seq.* The Act provides, "It is the intent of the General Assembly to codify the common law Castle Doctrine which recognizes that a person's home is his castle . . . ." S.C. Code Ann. § 16-11-420(A) (2006). The South Carolina Supreme Court has concluded "that the legislature intended defendants be shielded from trial if they use deadly force as outlined under the Act. Immunity under the Act is therefore a bar to prosecution and, upon motion of either party, must be decided prior to trial." *State v. Duncan*, 392 S.C. 404, 410, 709 S.E.2d 662, 665 (2011). In this case, the pretrial court did not abuse its discretion in denying Petitioner's request for immunity because the denial was based on a proper interpretation of the statute and on factual findings, which were supported by the evidence presented. The pretrial court denied immunity based on two separate findings—first, that Petitioner was not being attacked at the time he shot Victim and, second, that Petitioner did not have a reasonable fear of death or great bodily injury when he shot Victim.

How the Issue Was Raised

Three witnesses testified at the pretrial hearing—Michael Bruce, Scott, and Petitioner. (R. pp. 7–85). Michael Bruce testified about the phone calls between Petitioner and the victim the night of the incident. (R. p. 10, line 7–p. 16, line 19). On direct examination Gloria Scott testified about what she did when she found out Victim had been shot. (R. p. 21, line 16–p. 25, line 1). On cross-examination she testified regarding her history with the victim. (R. p. 25, line 8–p. 29, line 13). Gloria Scott also testified that Petitioner told her that he and the victim had gotten into a verbal argument and that he had shot the victim. (R. p. 30, line 10–p. 32, line 8).

Petitioner testified at the pretrial hearing about the events of September 24, 2012. Petitioner testified that on the phone that night the victim threatened to beat him. (R. p. 56, line 17–p. 57, line 13). Petitioner testified that he was waiting on his porch for his wife to get home when he saw Spring's white van come down the road. (R. p. 58, line 13–p. 59, line 25). According to Petitioner, the victim pulled in Petitioner's yard—only five to eight feet from Petitioner. (R. p. 60, lines 2–11). Petitioner testified to the following:

> He had his headlights on and he jumps out of the van. He cuts the van off and jumps out of the van and goes to cussing me and stuff about what I was going to do and what I was going to tell my wife and all this, and I was like, man, I thought we was friends, you know. Why are you doing this? Oh, this, that and the other and all this here, and I—I was like, man, the best thing for you to do is—and we'll talk about it later, is get back in your van and please leave. Several times I asked him to please leave . . . .
>
> . . . .
>
> Then he got more or less outrageous about it I reckon because I—I didn't want nothing to do with the situation though he was getting mad with me because I told him I didn't care what happened between them, you know. I didn't want nothing to do with the situation that they was having.

. . . .

> He kept getting more irate and irate and irate, and he was standing there with his hand on the door and then eventually he said—I said the best thing for you to do is leave and he said no. He said better than me telling you, he says, I'll show you. And I was like, man—
>
> . . . .
>
> And then like, man, you know, go on and just leave me alone, you know, and he said, no, just because you've got that gun laying in your lap, you think I'm f'ing scared of you. He said I'll take it and wrap it around your f'ing neck. And I said, Steve, you know, we're supposed to be friends. Come on now, you know, it ain't got to go to this, and then he come around the door at—you know, in a—what I would say in a threatening way.
>
> . . . .
>
> I just picked the gun up, pointed it at him, and pulled the trigger.

(R. p. 60, line 13–p. 62, line 16). Petitioner testified that he believed Victim was five feet from him when he fired the shot. (R. p. 62, lines 22–24).

On cross-examination, Petitioner testified that the victim came "around the door in a lunge." (R. p. 72, lines 12–16). Petitioner testified that he did not see a weapon and that it was dark. (R. p. 72, lines 6–11). Petitioner also testified that the victim was not running but was swinging his arms "how people are when they're angry." (R. p. 74, lines 16–23). Petitioner affirmed that he was a convicted felon. (R. p. 80, line 20–p. 82, line 14).

At the conclusion of the testimony, Judge King heard argument from both sides. Defense counsel argued that the Act was applicable. (R. p. 85). Defense counsel indicated that he was specifically seeking immunity under S.C. Code Ann. § 16-11-440(C)—not S.C. Code Ann. § 16-11-440(A). (R. pp. 85–86). When the court

questioned whether Petitioner was attacked, as required by the statute, defense counsel articulated his position "that this defense was done in an effort to prevent a violent crime from occurring." (R. p. 86). Defense counsel further argued that it was not necessary that someone seeking immunity under the Act "be assaulted and to any particular degree before you can defend yourself. If there is a reasonable expectation that a violent crime is about to occur, this statute by my interpretation affords protection to any reasonable force that is extended." (R. p. 87).

In response, the State first pointed out that Petitioner was a convicted felon, and therefore, it was unlawful for him to possess a firearm, and thus, he was not engaged in lawful activity when he shot Victim. (R. pp. 87–88).[5] In particular, the State urged that Scott was a convicted felon and that his possession of a weapon was in violation of 18 U.S.C. 921, 922. ROA 88. The State urged that therefore the Act did not apply since he was engaged in an unlawful act at the time. Section 16-11-410(C) requires as a condition precedent that it only applies when "a person is not engaged in an unlawful activity." ROA 87-88.[6]

---

[5] Note: In *Dorsey v. State*, 74 So. 3d 521 (Fla. 4th DCA 2011), the court held that where a "stand your ground" statute provided that the "no duty to retreat" rule applied only where a person was not engaged in an unlawful activity (Fla. Stat. Ann. § 776.013(3)), the possession of a firearm by a convicted felon qualified as such an "unlawful activity."cf. *McGriff v. State*, 160 So. 3d 167 (Fla. Dist. Ct. App. 2015)(defendant's status as a convicted felon was irrelevant to his claim of self-defense, since different stand your ground law on which defendant based his defense did not impose a duty to retreat if defendant was engaged in unlawful activity).

[6] It is undisputed that Scott was a convicted felon under federal law and not entitled to be in lawful possession of a weapon. ROA 88. 18 U.S.C. §921, 922. He was in possession of both the firearm and ammunition in violation of federal law. The record shows that Scoot was convicted of simple possession in 1884, driving while under the influence in 1989, possession of an unlawful weapon in 2000, manufacturing marijuana in 2002, breach of peace in 2009 and simple assault in 2012. ROA 443. It is undisputed

As to the issue of whether Petitioner was being attacked when he shot Victim, the State noted,

> Mr. Scott said he came at him. He said he didn't see any weapons. He said he didn't—well, he said he couldn't tell, but he certainly didn't affirmatively see any weapons. He said that Mr. Springs was standing back from him and was coming towards him, but he said he wasn't running. He just said he was moving quickly. He said he was flinging his arms, but certainly the right to meet force with force, no force had been exerted at this point and certainly deadly force was then exerted by Mr. Scott. So that would be the State's position on the application of subsection (c).

(R. pp. 88–89).

Defense counsel disagreed that Petitioner was in unlawful possession of a weapon, arguing that someone can be acting lawfully even if in unlawful possession of a weapon because he can arm himself in self-defense under state law. (R. pp. 89–91). Defense counsel also again argued that the legislature intended "attack" to encompass assault and did not necessarily require a battery. (R. pp. 91–94).

The State again argued that Petitioner was in unlawful possession of the weapon and that the victim's actions that night did not constitute an attack. (R. pp. 94–96). He then summarized the State's position, stating,

> I would argue that kind of three points, the first being unlawful activity; next, that he was not attacked; and lastly, that even if you somehow say he

---

that Scott was considered a convicted felon under federal law and not entitled to possess the weapon. App. 443. The "manufacturing marijuana" conviction qualified as a qualified offense under federal law to preclude the lawful possession of the weapon. S.C. Code Ann. §44-53-370 (b)(1) (for a first offense not more than 15 years). 18 U.S.C.A. § 922 (g) states in pertinent part that: "[I]t shall be unlawful for any person--(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year; ... to ship or transport in interstate or foreign commerce, **or possess** in or affecting commerce, any firearm or ammunition; or to receive **any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.**" There has been no assertion his right to possess a weapon had been restored prior to this incident.

was attacked, he was not in—he, by his own testimony, was not in fear of death or great bodily injury. He was merely in fear that he was about to be attacked by a man who had no weapons.

(R. pp. 96–97).

What the Trial Judge Ruled.

After taking some time to review the cases that both sides had handed up during argument, the trial court ruled as follows:

> Scott had already through his attorney already indicated that he is not relying on subsection (a) granting him a presumption of reasonable fear or imminent peril or death entitling him to use deadly force because there's no evidence that there was anyone in the process of unlawfully or forcefully entering a dwelling or a residence. And so subparagraph (a) of the statute does not apply.
>
> Rather, according to Scott's own argument, he is relying on section—subsection (c), which states as follows: a person who is not engaged in unlawful activity or 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.
>
> That being the case and relying on that statute, there are three things that I think that the person asserting the right to the immunity must prove by the greater weight or preponderance of the evidence. First, that a—he's not a person who is engaged in an unlawful activity; second, who is attacked in another place where he has a right to be; and third, reasonably believes it necessary to prevent death or bodily injury to himself or another.
>
> The State contends that he was engaged in an unlawful activity, i.e. the possession of a weapon because he was a convicted felon, and relies upon the federal law which prohibits a convicted felon from being in possession of any kind of a firearm. The defendant contends unconvincingly that that is federal law and not what the statute meant to apply or not meant that that statute should not apply. I disagree with that. I think if it's an unlawful activity, it's an unlawful activity, whether it's a violation of a state statute or a federal law.

But it is not necessary for this Court to reach a decision on whether the unlawful activity in this case, that is the possession of the violent—of the weapon, precludes the defendant from asserting the immunity under the Stand Your Ground law. I've reviewed *Slater*[7] and *Burris*[8], and I'm making no finding with regard as to whether the unlawful activity, i.e. the possession of the weapon, precludes him from raising the unlawful—or raising the immunity granted by the Stand Your Ground Act or any other defenses that he might have in this case.

In my view, the defendant does not meet the second prong of - of subparagraph (C), that he be attacked. Had the legislature meant a threat of attack or an assault, accompanied or unaccompanied by a battery, it very clearly could have said so.

It is the duty of this Court to give to the acts passed by the General Assembly their plain and unequivocal meaning and to me attacked means a physical contact attack. As I said, the legislature could have used the term assault and battery. It could have used the term a threat of assault, but it did not, or threat of attack. It did not. It used the word who is attacked. And in my view, the defendant has not met that prong of the requirement of subparagraph (c).

Furthermore, Scott has not proven by the greater weight or a preponderance of the evidence that he could reasonably believe that he was in fear of death or great bodily injury. The testimony is clearly—the only testimony in the record is that the victim in this case was unarmed, that he came—he was behind the door of the vehicle originally. He came no closer than four or five feet to an armed man who was sitting there with a weapon in his lap at least. In my view, the testimony of reasonable fear is simply not credible.

For those reasons, the Court denies the motion under the Stand Your Ground Act and finds that the defendant is not entitled to immunity granted by that Act.

(R. p. 106, line 8–p. 109, line 3).

---

[7] *State v. Slater*, 373 S.C. 66, 644 S.E.2d 50 (2007) (the unlawful possession of a firearm can, under some circumstances, constitute an unlawful activity so as to preclude an accident defense or self-defense if the weapon is the proximate cause of the killing.

[8] *State v. Burriss*, 334 S.C. 256, 513 S.E.2d 104 (1999) (where the defendant's unlawful possession of a weapon is merely incidental to the defendant's lawful act of arming himself in self-defense, the unlawful possession of the weapon will not prevent the use of an accident defense).

What the Court of Appeals Ruled

In summarily denying relief, the Court of Appeals found:

> 1. As to whether the trial court erred in failing to grant immunity under the Act: *State v. Curry*, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013) ("A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard, which [the appellate] court reviews under an abuse of discretion standard of review."); *State v. Douglas*, 411 S.C. 307, 316, 768 S.E.2d 232, 238 (Ct.App.2014) ("[T]he abuse of discretion standard of review does not allow this court to reweigh the evidence or second-guess the trial court's assessment of witness credibility."); *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006) ("An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law."); *Curry*, 406 S.C. at 371, 752 S.E.2d at 266 ("Consistent with the Castle Doctrine and the text of the Act, a valid case of self-defense must exist, and the trial court must necessarily consider the elements of self-defense in determining a defendant's entitlement to the Act's immunity."); id. ("This includes all elements of self-defense, save the duty to retreat."); id. at 372, 752 S.E.2d at 267 ("[I]mmunity is predicated on an accused demonstrating the elements of self-defense to the satisfaction of the trial court by the preponderance of the evidence.").

App.p. 2.

STANDARD OF REVIEW

"A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard, which [an appellate court] reviews under an abuse of discretion standard of review." *State v. Curry*, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013) (citing *Duncan*, 392 S.C. 404, 709 S.E.2d 662). An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support. *State v. Pittman*, 373 S.C. 527, 570, 647 S.E.2d 144, 166–67 (2008) (citing *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000)).

ANALYSIS

In *State v. Curry*, this Court clarified that the Act does not require a trial court to accept a defendant's version of the underlying facts. 406 S.C. at 371, 752 S.E.2d at 266. Rather, "[c]onsistent with the Castle Doctrine and the text of the Act, a valid case of self-defense must exist, and the trial court must necessarily consider the elements of self-defense in determining a defendant's entitlement to the Act's immunity. This includes all elements of self-defense, save the duty to retreat." *Id.* The four elements required by law to establish self-defense are as follows:

> First, the defendant must be without fault in bringing on the difficulty. Second, the defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger. Third, if his defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief. If the defendant actually was in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life. Fourth, the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance.

Id. at 371 n.4, 752 S.E.2d at 266 n.4.

The pretrial court did not have the benefit of the Supreme Court's decision in *Curry* at the time it denied Petitioner's motion for immunity as *Curry* was decided a few months after the pretrial hearing. Nevertheless, the trial court's analysis is consistent with the procedure our Supreme Court set forth both in *Curry* and in previous cases dealing with the Act. The pretrial court denied Petitioner's immunity for two separate reasons—first, because Petitioner was not being attacked at the time he shot Victim, and second, because Petitioner's testimony regarding his "reasonable fear" was not credible.

The defendant is not allowed to the benefits of the Act is he is engaged in unlawful activity at the time of the incident. The presumption set forth in Section 16-11-440(A)[9] does not apply if

> B) The presumption provided in subsection (A) does not apply if the person:
>
> > (3) who uses deadly force is **engaged in an unlawful activity** or is using the dwelling, residence, or occupied vehicle to further an unlawful activity; or

Similarly, the statute provides:

> (C) 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.

S.C. Code Ann. § 16-11-440. Under S.C. Code Ann. § 16-11-450, a person would not be permitted to immunity under the Act based upon Section 440(A) or (C) if engaged in an unlawful activity.

---

[9] S.C. Code Ann. § 16-11- 440 (A) provides:

> (A) A person is presumed to have a reasonable fear of imminent peril of death or great bodily injury to himself or another person when using deadly force that is intended or likely to cause death or great bodily injury to another person if the person:
>
> (1) against whom the deadly force is used is in the process of unlawfully and forcefully entering, or has unlawfully and forcibly entered a dwelling, residence, or occupied vehicle, or if he removes or is attempting to remove another person against his will from the dwelling, residence, or occupied vehicle; and
>
> (2) who uses deadly force knows or has reason to believe that an unlawful and forcible entry or unlawful and forcible act is occurring or has occurred.

Petitioner Was Not Being Attacked

The pretrial court interpreted the word "attack" in the Act to require some sort of physical contact, rejecting the idea that the term encompassed a mere assault or threat of an attack. "Unless there is something in the statute requiring a different interpretation, the words used in a statute must be given their ordinary meaning." *Duncan*, 392 S.C. at 408, 709 S.E.2d at 664 (citing *Mid-State Auto Auction of Lexington, Inc. v. Altman*, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996)). The verb "attack" means "to act violently against (someone or something): to try to hurt, injure, or destroy (something or someone)" according to Merriam-Webster's definition. *Attack Definition*, Merriam-Webster, http://merriam-webster.com/dictionary/attack (last visited Mar. 6, 2015). The pretrial court's interpretation of the word "attack" is consistent with the ordinary meaning of that word. The pretrial court further found that Petitioner's description of the victim's acts prior to the shooting did not constitute an attack based on the pretrial court's understanding of that term. Respondent submits that the pretrial court did not abuse its discretion in denying immunity on that basis because the record supports the pretrial court's findings and because the court's decision was not based on an error of law.

Testimony of "Reasonable Fear" Was Not Credible

However, even if this Court finds that the term "attack" is ambiguous and further determines that the pretrial court abused its discretion in denying immunity on that basis, Petitioner is still not entitled to relief because the pretrial court denied Petitioner's immunity on a separate, alternate ground. In particular, the pretrial court concluded that Petitioner had not met his burden of showing by a preponderance of the evidence that he

was reasonably in fear of death or great bodily injury when he shot Victim. R.p. 108, l. 17-25.

As outlined above, this is clearly a relevant inquiry as established by *Curry*. And the record supports the pretrial court's determination. The pretrial court noted that the testimony was that Victim was unarmed (and that Petitioner did not see any weapons in Victim's hands though he noticed the victim's hands were "swinging . . . . how people are when they're angry[,]" (R. p. 74, lines 11–24)) and that the victim came toward Petitioner, who was armed with a rifle, and got no closer than four or five feet from Petitioner before Petitioner shot him. (R. p. 108, lines 17–25).

The pretrial court further concluded that Petitioner's testimony as to his "reasonable fear" was "not credible." (R. p. 108, lines 24–25). *See State v. Douglas*, 411 S.C. 307,316, 768 S.E.2d 232 (Ct. App. 2014) ("[T]he abuse of discretion standard of review does not allow this court to reweigh the evidence or second-guess the trial court's assessment of witness credibility."), cert. granted November 5, 2015. The pretrial court's ruling could go to either the second or third prong of self-defense depending on how one interprets it—presumably, the pretrial court found that Petitioner's testimony that he was in "fear" was not credible, and thus, the second prong was not satisfied, but the pretrial court's ruling could also mean that the court found that the "fear" Petitioner claimed to have felt when he shot the victim was not reasonable, and thus the third prong was not satisfied.[10] Either way, based on the pretrial court's factual findings, Petitioner was not

[10] Again, the pretrial court did not have the benefit of *Curry* where the Supreme Court clearly announced that a court must necessarily consider the prongs of self-defense in an immunity determination.

entitled to immunity. Furthermore, those factual findings were supported by the record. Accordingly, the pretrial court did not abuse its discretion. [11]

---

[11] The trial court did not address whether the possession of the weapon by Scott was an unlawful act as urged by the prosecution at the motion hearing to preclude "stand your ground." relying upon the other bases for the rejection. ROA 106-109. However, Respondent would submit that Scott's unlawful possession of the weapon prior to any threat precludes this defense under the Act and is an ADDITIONAL SUSTAINING GROUND. Petitioner testified that he had the weapon on his lap as the victim came on his property. ROA 60-62. The State urged that Scott was already in an unlawful activity of possession of the weapon by a felon prior to the time of the victim's approach. He did not acquire the weapon for self-defense, he was already in possession of the weapon, albeit illegally. This is an unlawful act by Petitioner. See ROA 87-89 (state argument why possession was illegal). Under *State v. Slater*, 373 S.C. 66, 644 S.E.2d 50 (2007), In *Slater*, the Court, like in the instant case, that the defendant was already in unlawful possession of the weapon which precluded the defense of self-defense under those circumstances. In Salter, as in here, it is evident that the Petitioner's pre-existing possession of the weapon on his lap escalated the confrontation. Like in *Slater*, the Petitioner was in violation of the law Like in *Slater*, Scott's unlawful possession of the weapon was the proximate cause of the homicide. He has not shown otherwise by his own testimony.

Simply put, Scott was not engaged in lawful activity at the time of his possession. See e.g. *Wallace v. State of Alabama*, 2015 Westlaw 9261827 (Ala. Ct. App. 2015) (convicted felon in possession of weapon is not entitled to stand your ground instruction in interpreting "who is not engaged in an unlawful activity" language); *Dawkins v. State*, 252 P.3d 214 (Okla.Crim.App. 2011) (holding that a defendant who was in unlawful possession of a weapon was not entitled to benefit from Oklahoma Stand Your Ground law as an "engaged in an unlawful act); *Dorsey v. State*, 74 So.3d 521 (Fla.4th DCA 2011) (same under Florida statute); *Beal v. State*, 2016 Westlaw 3907083, ¶21 (Miss. Ct.App 2016) (unlawful possession of handgun was an unlawful activity by defendant precluding application of Mississippi statutory "castle doctrine" as "engaged in unlawful activity" and therefore not entitled to the presumption); *People v. Hinds*, 2016 Westlaw 3317411 (Mich.Ct.App. 2016) (illegal possession of weapon by defendant preclude stand your ground application as "engaged in the commission of a crime at the time deadly force is used" but does not preclude self-defense). We certainly do not believe the General Assembly of South Carolina intended to avail violent armed felons of it "stand your ground" law.

CONCLUSION

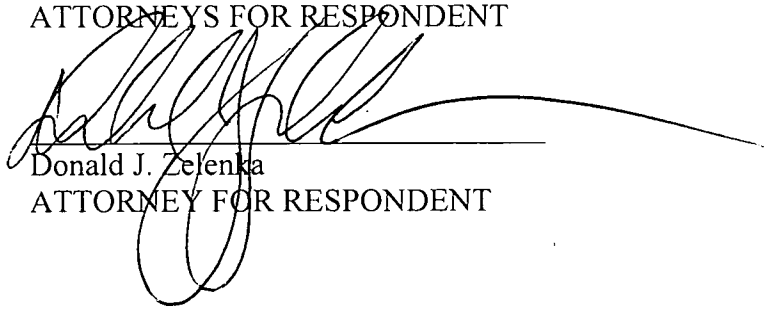
For all the foregoing reasons, Respondent respectfully asserts that the appeal should be dismissed and judgment of conviction affirmed.

Respectfully Submitted,

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General
S.C. Bar No. 5758

South Carolina Office of Attorney General
P.O. Box 11549
Columbia, SC 29211-1549
(803) 734-0265

ATTORNEYS FOR RESPONDENT



Donald J. Zelenka
ATTORNEY FOR RESPONDENT

January 24, 2017
Columbia, South Carolina

RECEIVED
JAN 24 2017
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Florence County

George C. James, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

WAYNE ALBEON SCOTT, JR.,

PETITIONER,

Appellate Case No. 2016-000067

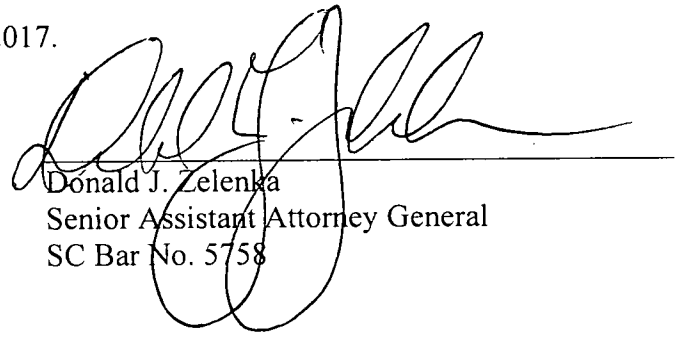
PROOF OF SERVICE

I, Donald J. Zelenka, counsel for Respondent, certify that I have served the within Brief of Respondent on Petitioner by depositing two (2) copies of the same in the United States mail, first class, postage prepaid, addressed to his attorney of record at:

LaNelle Cantey Durant
Appellate Defender
SCCID/Division of Appellate Defense
P.O. Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.

This 24th day of January, 2017.



Donald J. Zelenka
Senior Assistant Attorney General
SC Bar No. 5758