

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Berkeley County

Kristi Lea Harrington, Circuit Court Judge

RECEIVED

JAN 27 2017

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

STEVEN DWAYNE MOSES,

APPELLANT

APPELLATE CASE NO. 2016-000627

\_\_\_\_\_  
ANDERS BRIEF OF APPELLANT  
\_\_\_\_\_

LARA M. CAUDY  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
P.O. Box 11589  
Columbia, SC 29211-1589  
(803) 734-1330

ATTORNEY FOR APPELLANT

STATE OF SOUTH CAROLINA

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**STATEMENT OF ISSUE ON APPEAL**

Did the court err by failing to grant Appellant immunity from prosecution pursuant to the Protection of Persons and Property Act where patrons of the Nowhere Bar and Grill, who had assaulted Appellant and Jason Gourdine moments before inside the bar, rushed at Appellant, who was retreating towards Gourdine's car, in an aggressive manner in an effort to attack the men again, and Gourdine fired at the patrons in self-defense and the defense of others?

## STATEMENT OF THE CASE

A Berkeley County Grand Jury indicted Appellant on November 4, 2014 for criminal conspiracy and three counts of attempted murder. R. 1027-1038. A pretrial hearing was held on January 26, 2016 before the Honorable Perry M. Buckner, III on Appellant's Motion to Dismiss pursuant to the Protection of Persons and Property Act (the Act). R. 1. Judge Buckner ultimately denied the motion at the conclusion of the hearing. R. 133, ll. 20-23.

Appellant's case was called to trial on March 14, 2016 before the Honorable Kristi Lee Harrington, and a jury. R. 137. Appellant was tried jointly with his codefendant, Jason Morris Gourdine. R. 1. Kevin D. Kears represented Appellant and Steve C. Davis represented Gourdine. Bryan A. Alfaro and Wilton H. McNeely were the Assistant Solicitors. R. 1.

On March 17, 2016, the jury found Appellant guilty. R. 983, ll. 13-25. He was sentenced by Judge Harrington to twenty years' imprisonment on each count of attempted murder and five years' imprisonment for criminal conspiracy. The judge ordered the sentences be served concurrently. R. 1020, ll. 13-19.

This appeal follows.

## STATEMENT OF THE FACTS

Appellant and Jason Gourdine went to Nowhere Bar and Grill in Goose Creek during the early morning hours of July 28, 2013 to have a drink and socialize. R. 445, ll. 11-18; R. 495, ll. 14-22. They entered the bar around 1:50 am and sat down at the corner of the bar. R. 447, ll. 18-22; R. 496, l. 20 – 497, l. 3. After being ignored by the bartender for several minutes, Appellant flagged her down and requested a drink. The bartender refused to serve Appellant. She claimed she would not serve him because “last call” had already ended and the bar was about to close. R. 497, ll. 7-12. According to the bartender, Appellant allegedly “said something along the lines of I wouldn’t serve him because he was black.” The bartender was “very offended” by Appellant’s comment because she has “two biracial children.” R. 448, ll. 3-20; R. 497, ll. 14-23. She began shouting at Appellant and drew the attention of the other employees and patrons at the bar. During this commotion, the bartender pointed at a black patron, James Bryant, and said “I’ve served him all night long, he’s black, so it’s not even like that in here.” R. 448, ll. 20-22. A second bartender then yelled at Appellant and Gourdine “to get the F out of the bar.” R. 449, ll. 5-12; R. 498, l. 1.

As Appellant and Gourdine were walking towards the door to leave, a patron named Rick Maron, who was in no way involved in the commotion, approached Appellant and “took a swing” at his face. James Bryant, who was 6’4” and weighed over three hundred pounds, then shoved Gourdine and tried to attack the men. R. 576, ll. 3-20. Several other patrons ran forward and forced Appellant and Gourdine out of the bar. R. 382, l. 23 – 383, l. 7; R. 450, ll. 11-24; R. 498, l. 12 – 499, l. 5; See State’s Exhibit No. 1 (DVD of Security Footage).

About ten minutes later, Rick, Bryant, Stacy Bohannon, her husband, David Bohannon, and several other patrons left the bar. R. 806, l. 17 – 807, l. 7. Appellant approached the group

in the parking lot and inquired about the individual who had swung at him inside the bar. Without addressing his reason for approaching them, Rick and Bryant, who had both assaulted Appellant and Gourdine inside the bar, along with the Bohannans, immediately rushed at Appellant as if they were going to attack or assault him again. Appellant, who was unarmed, retreated towards Gourdine's car. As the group quickly approached Appellant and the vehicle in an aggressive manner, Gourdine got out of his car and fired a shotgun in the direction of the attackers in defense of Appellant. R. 546, l. 9 – 548, l. 25; R. 807, l. 16 – 808, l. 19; See State's Exhibit No. 1 (DVD of Security Footage).

James Bryant and David Bohannon were both injured in the arm. R. 668, ll. 1-3; R. 692, ll. 9-12. Stacy Bohannon suffered a wound to the back of her head and had to have pellets removed from her scalp. R. 689, ll. 8-12. None of their injuries were life threatening. R. 683, l. 20 – 684, l. 1; R. 705, l. 21 – 706, l. 6; R. 708, ll. 2-5.

### **Motion to Dismiss**

Appellant filed a pretrial Motion to Dismiss and a Memorandum in Support of Motion to Dismiss pursuant to the Protection of Persons and Property Act. He argued he was entitled to statutory immunity under S.C. Code Ann. § 16-11-440. R. 1023-1026. A pretrial hearing was held on January 26, 2016 before Judge Buckner. R. 1. James Bryant, David Bohannon, and Stacy Bohannon testified at the hearing. Appellant and Gourdine, who likewise argued he was entitled to immunity, also presented a copy of the security footage that captured the events that morning. See State's Exhibit No. 1 (DVD of Security Footage).

Judge Buckner ultimately found Appellant failed to meet his burden of proof by a preponderance of the evidence. Consequently, he ruled Appellant was not entitled to immunity under the Act. R. 133, ll. 20-23.

Appellant ultimately proceeded to trial and the jury found him guilty of conspiracy and attempted murder. R. 983, ll. 13-25. The trial judge sentenced him to twenty years' imprisonment. R. 1020, ll. 13-19.

## ARGUMENT

The court erred by failing to grant Appellant immunity from prosecution pursuant to the Protection of Persons and Property Act where patrons of the Nowhere Bar and Grill, who had assaulted Appellant and Jason Gourdine moments before inside the bar, rushed at Appellant, who was retreating towards Gourdine's car, in an aggressive manner in an effort to attack the men again, and Gourdine fired at the patrons in self-defense and the defense of others.

Appellant was entitled to immunity under the Protection of Persons and Property Act because the evidence presented pretrial established that Gourdine shot James Bryant, Stacy Bohannon, and David Bohannon in self-defense and in the defense of others after the three, along with Rick Maron, rushed at Appellant in an aggressive manner in the parking lot after Rick and Bryant assaulted Appellant and Gourdine in the bar minutes earlier.

“Section 16-11-450(A) of the South Carolina Code provides immunity from criminal prosecution to a person using deadly force as permitted by the Act.” State v. Douglas, 411 S.C. 307, 317, 768 S.E.2d 232, 238 (Ct. App. 2014). The Act expresses the General Assembly's finding “that it is proper for 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.” S.C. Code Ann. § 16-11-420(B). “[T]he legislature intended to create a true immunity, and not simply an affirmative defense.” State v. Duncan, 392 S.C. 404, 410, 709 S.E.2d 662, 665 (2011). “Immunity under the Act is therefore a bar to prosecution and, upon motion of either party, must be decided prior to trial.” Id. “[W]hen a party raises the question of immunity prior to trial, the proper standard for the circuit court to use in determining immunity under the Act is a preponderance of the evidence.” Id. at 411, 709 S.E.2d at 665.

Section 16-11-440 sets forth the circumstances under which the Act allows the use of deadly force. Douglas, 411 S.C. at 317, 768 S.E.2d at 238. The statute states in relevant part:

(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.

...

(C) A person who is not engaged in an unlawful activity and who is attacked in another place where he has the 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.

(D) A person who unlawfully and by force enters or attempts to enter a person's dwelling, residence, or occupied vehicle is presumed to be doing so with the intent to commit an unlawful act involving force or a violent crime as defined in Section 16-1-60.

Our Supreme Court emphasized in State v. Curry, 406 S.C. 364, 752 S.E.2d 263 (2013)

“that immunity under the Act ‘is predicated on an accused demonstrating the elements of self-defense to the satisfaction of the trial court by a preponderance of the evidence,’ save the duty to retreat.” Douglas, 411 S.C. at 318, 768 S.E.2d at 238 (quoting Curry, 406 S.C. at 371-372, 752 S.E.2d at 266-267). “[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. at 318, 768 S.E.2d at 238 (quoting Curry, 406 S.C. at 371, 752 S.E.2d at 266) (alternation in original).

"There are four elements required by law to establish a case of self-defense: 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 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 318, 768 S.E.2d at 238-239 (internal citation omitted). As mentioned, the last element, the duty to retreat, need not be shown when seeking immunity under the Act. Id. at 318, 768 S.E.2d at 239 (citing Curry, 406 S.C. at 371, 752 S.E.2d at 266).

The trial court erred by failing to grant Appellant immunity from prosecution when the evidence established the men were attacked in a place where they had a right to be and acted in self-defense. Under the Act, Appellant and Gourdine had "no duty to retreat" and had "the right to stand [their] ground and meet force with force, including deadly force." S.C. Code Ann. § 440(C).

Appellant established by a preponderance of the evidence that he was entitled to immunity under S.C. Code Ann. § 16-11-440(C). Appellant and Gourdine were in a place where they had a right to be and were acting in self-defense, with the exception of the duty to retreat

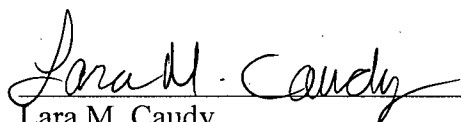
which is not required under the statute, when Gourdine shot James Bryant, Stacy Bohannon, and David Bohannon. First, Appellant and Gourdine were not at fault in bringing on the difficulty. Both men were assaulted inside the bar when they were attempting to leave after the bartender rudely told Appellant she would not serve the men. Minutes later in the parking lot, Rick, Bryant, and the Bohannans rushed at Appellant, who was retreating towards Gourdine's car, in an aggressive manner in an effort to attack the men again. It was only then that Gourdine came to Appellant's defense and shot at the patrons. The security footage clearly shows that the other patrons were the aggressors that morning and that Appellant and Gourdine were not at fault in bringing on the difficulty.

Moreover, Appellant reasonably believed he was in imminent danger of losing his life or sustaining serious bodily injury. Four individuals, two of whom had assaulted Appellant and Gourdine inside the bar minutes before, aggressively charged at Appellant, who was unarmed. The only reasonable interpretation of this conduct was that these individuals intended to attack Appellant anew. One of the attackers was James Bryant who was 6'4" and weighed over three hundred pounds. It was undisputed that Bryant was a very large man who was significantly taller and heavier than Appellant and Gourdine. Consequently, it was reasonable for Appellant and Gourdine to believe they were in imminent danger, which justified Gourdine's actions in protecting the men from further harm. And lastly, Appellant and Gourdine had no duty to retreat under the Act.

Respectfully, this Court should reverse Appellant's convictions and sentence and grant him immunity under the Act.

**CONCLUSION**

Based on the foregoing argument, this Court should reverse Appellant's convictions and sentence and hold he is immune from prosecution under the Protection of Persons and Property Act.



Lara M. Caudy  
Appellate Defender

ATTORNEY FOR APPELLANT

This 27th day of January, 2017.

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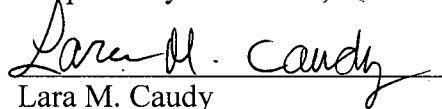
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Steven Dwayne Moses states:

1. She is an appellate defender for the South Carolina Office of Appellate Defense, and was appointed to represent Appellant.
2. She has reviewed the record of Appellant's pretrial immunity hearing before the Honorable Perry M. Buckner, III, which was held on January 26, 2016, and Appellant's trial before the Honorable Kristi Lea Harrington, which was held on March 14-17, 2016, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for Steven Dwayne Moses.

Respectfully Submitted,



Lara M. Caudy  
Appellate Defender

ATTORNEY FOR APPELLANT

This 27th day of January, 2017.

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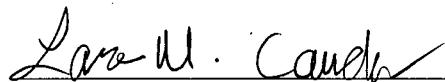
**DESIGNATION OF MATTER TO BE  
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) True-Billed Indictments;
- (2) The Complete January 26, 2016 Pretrial Transcript;
- (3) The Complete March 14, 2016 Pretrial Transcript;
- (4) The Complete March 15-17, 2016 Trial Transcript;
- (5) State's Exhibit No. 1 (DVD of Security Footage at Nowhere Bar);
- (6) Memorandum in Support of Motion to Dismiss filed January 22, 2016.

I certify that this designation contains no matter which is irrelevant to this appeal.

January 27, 2017



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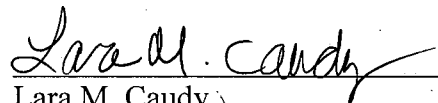
JAN 27 2017

SC Court of Appeals

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

January 27, 2017.



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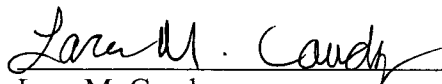
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CERTIFICATE OF SERVICE

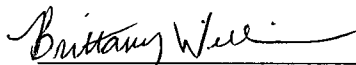
The undersigned hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, S.C. 29201; and a copy of the Anders Brief of Appellant and Designation of Matter has been served upon Steven Dwayne Moses, #367465, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 27th day of January, 2017.



Lara M. Caudy  
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
this 27th day of January, 2017.

 (L.S)

Notary Public for South Carolina

My Commission Expires: November 3, 2026.