STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM LAURENS COUNTY
Court of General Sessions

The Honorable Eugene C. Griffith, Circuit Court Judge

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Appellate Case No. 2014-000161

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THE STATE,

RESPONDENT,

v.

KATHY LEONARD REVAN,

APPELLANT.

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# FINAL BRIEF OF APPELLANT

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I.

**The lower court abused its discretion in denying Appellant Motion for Immunity pursuant to the Protection of Persons and Property Act where the testimony and evidence adduced during the hearing on Appellant's claim of immunity pursuant to §16-11-440 clearly established that she was entitled to immunity.**

## STATEMENT OF THE CASE

Appellant, Kathy Leonard Revan, was indicted by the Laurens County Grand Jury grand jury during the October, 2011 term for Murder (2011-GS-30-1625) and Possession of a Weapon During a Violent Crime (2011-GS-30-1626) and Attempted Murder (2011-GS-30-1627). She was represented in the trial court by Kim R. Varner, Esquire, and Evan Bramhall, Esquire. The Appellant proceeded to trial by jury on January 13 - 17, 2014 before the Honorable Eugene C. Griffith, Jr. The State was represented at trial by Lance Sheek, Senior Assistant Solicitor, and Taylor Daniel, Assistant Solicitor. At the conclusion of this trial, the Appellant was found guilty and was convicted of Voluntary Manslaughter (2011-GS-30-1625), Possession of a Weapon During a Violent Crime (2011-GS-30-1626), Attempted Murder (2011-GS-30-1627). ."

Appellant was sentenced on January 17, 2014 to twenty (20) years for Manslaughter/Voluntary Manslaughter (2011-GS-30-1625), five (5) years for Possession of a Weapon During a Violent Crime (2011-GS-30-1626), and twenty years for Attempted Murder (2011-GS-30-1627).

The Appellant served and filed a timely Notice of Appeal from his judgment and sentence. This appeal follows.

## ARGUMENT

### I.

**The lower court abused its discretion in denying Appellant's Motion for Immunity pursuant to the Protection of Persons and Property Act[1] where the testimony and evidence adduced during the hearing on Appellant's claim of immunity pursuant to §16-11-440 clearly established that she was entitled to immunity.**

### SUMMARY OF TESTIMONY, ARGUMENTS AND EVIDENCE PRESENTED DURING IMMUNITY HEARING HELD PURSUANT TO §16-11-440

### ARGUMENT OF GROUNDS FOR MOTION

Prior to the commencement of Appellant's General Sessions trial, she made a Motion for Immunity pursuant to the §16-11-440 of the Protection of Persons and Property Act. Appellant argued that she was entitled to immunity under the act based upon, A) the presumption of reasonable fear and B) her right to stand her ground. In support of this position Trial Counsel argued the following.

- It was undisputed that the incident happened in Appellant's home and that she had a reasonable fear of imminent peril. ROA p. 9, l. 24 - p. 10, l. 1.

- Defendant owns the home in Laurens County. It was her residence. At the time she was living with a gentleman names Lynn Straley[2], who was deceased at the time of trial. Straley had terminal cancer. In June, 2011 his daughter, Tammy, and her female significant other, Shawn, showed up for a visit. They had been traveling around the country staying with various relatives and were ultimately headed to Costa Rica to raise ostriches. What was expected to be a two to three day visit turned into six weeks. Problems began to develop. ROA p. 10, l. 1-24.

- The deceased Shawn confronted Defendant about interfering with her relationship with Tammy; the daughter of Mr. Straley. ROA p. 11, ll. 3-6.

- Following a heated discussion, Tammy and Shawn were instructed to pack up their stuff and leave the residence. ROA p. 11, ll. 7-12.

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[1] Hereafter, the Act.
[2] Hereafter, Straley.

- A physical altercation followed with Shawn initially hitting Defendant and the two ended up on the floor. Tammy was outside when the physical altercation was initiated by Shawn and the strike happened out of Straley's sight as well.

- When Straley's daughter, Tammy came back in the house, the two women, both of whom were about 20 years younger than Defendant, beat her badly. She had two bad black eyes and a broken nose and was bleeding. ROA p. 11, l. 18 - p. 12, l. 2.

- There was a significant weight difference between the Victim[3] and Appellant; approximately 100 pounds difference. ROAp. 11, l. 24.

- Not only was Appellant approximately twenty years younger and double teamed by Shawn and Tammy, she suffers from multiple medical problems. ROA p. 11, ll. 13-18.

- Straley stopped the fight. Defendant went to the bathroom to clean up because she was bleeding. Before coming back out of the bedroom she armed herself. She had been attacked and believed another beating was about to occur.

- Upon exiting her bedroom she found that Tammy and Shawn, who had been told to leave, were still there and Tammy was coming towards her. Appellant fired a shot intended as a warning shot. It hit Shawn in the femoral artery and she died shortly thereafter.

## SUMMARY OF TESTIMONY FROM *IN CAMERA* CASTLE HEARING

### KEITH MCINTOSH

He testified to his position as a Lieutenant with Laurens County Sheriff's Department. He had been with the department for 12 years. He confirmed that on August 11, 2011 he was the investigator on call. He received a dispatch call that there had been a shooting on Revan Road in Mountville. He proceeded there. ROA p. 16, l. 23 – p. 17, l. 4. Lt. McIntosh estimated his arrival time at 35-40 minutes after the shooting. When he arrived, Road Deputies, Appellant, Straley, the deceased and Tammy Jo Morrigan[4] were on the scene, in addition to the EMS personal who had responded to the scene. First spoke with road deputies, Lt. Marty Grain, Sgt. Will. Johnston and had them fill him in on what they found

[3] Hereafter, Shawn.
[4] Hereafter, Tammy.

when they arrived at the scene. ROA p. 17, ll. 7-22.

Lt. McIntosh was not able to recall which principal he interviewed first. ROA p. 17, l. 23 – p. 18, l. 7. Lt. J. D. Shelton, there and he took statements from both Tammy and Straley. ROA p. 18, ll. 8-25 . McIntosh's description of Straley's statement was very simple to say the least. ROA p. 19, ll. 1-3. His description of Straley's statement lacked much of the detail that was in fact in the deposition was ultimately introduced during this proceeding. He basically described Straley as having stated that there was an altercation he heard and went in to attempt to break it up. Left room again heard gun shot and came back into the room. ROA p. 19, ll. 4-10. He did a walk through of the scene, which was a double wide trailer, but did not prepare diagram of the scene. He opined that this "more than likely would have been SLED." ROA p. 19, ll. 11-23.

McIntosh testified that he entered the residence through front door. His description of where Shawn was shot and where Defendant was standing is not very clear and was full of references to what they "determined" and what their "understanding" was without explanations. His testimony is unfortunately full of "I was told' references without any explanation as to who the information came to him from. ROA p. 20, l. 2 – p. 23, l. 19.

McIntosh, summarized his conversation with Tammy saying she reported that she had been out with her father that day. They had bought a weed eater. She was outback for a good while and when she came in Defendant and Shawn, was on the floor with each other. She described them as "partially one on the other" and the Defendant had the Shawn by the hair. This time he describes Tammy having to try hard to get Defendant to let go of Shawn's hair. " She did what she had to do to get Defendant to turn loose." He further stated, "Defendant then got up, went to her room and washed up and came back out with a gun."

ROA p. 23, l. 20 - p. 24, l. 18. Ultimately, McIntosh admits Tammy had actually reported that Shawn was on top of Defendant. He then tried to explain his testimony by saying that was right because "Defendant pulled her down by the hair." McIntosh goes on to say according to *other statements* "she was off to the side somewhat". The record reflects that Tammy, was the sole eye witness to what position these two women were in when Tammy walked back in the house. ROA p. 24, l. 19 - p. 25, l. 7. McIntosh puts Shawn's age at thirty something and "a little bit heavier," than Defendant. Would only concede Shawn was "bigger" than Defendant. ROA p. 25, l. 11-25.

He concedes Defendant was 20 something years older than Shawn, and admitted that Tammy said she hit Defendant several times in the eye with her fist. Then he reported these blows only took place after Defendant kicked Tammy. ROA p. 26, ll. 1-17. McIntosh testified that Tammy was in her thirties about the size of Defendant. ROA p. 26, ll. 18-25.

McIntosh admits being aware that Tammy had military experience. He declined to describe her as muscular. He did described Tammy as 5'6" to 5' 7" tall, 175 to 180 lbs and not fat or obese. ROA p. 27, ll. 1-22.

It is apparent from McIntosh's testimony that he viewed everything from the perspective of believing Tammy's version of the facts. He minimizes Defendant's injuries and says he can't recall her telling him she couldn't even see out of her left eye or her needing medical attention for her eye. ROA p. 27, l. 23 -p. 30, l. 9.

A review of Appellant's photographs from after this beating verifies the severity of the beating she received obvious. These photographs were introduced at the trial that followed the immunity hearing, although it appears the Court had access to them during the hearing. When McIntosh was asked when was the last time he listened to the tape

(Defendant's interview) he indicated that he did not to remember but stated, "we listened to it ---it's been a while, but we listened to it." ROA p. 30, ll. 10-12. McIntosh was questioned about the fact that Tammy claimed to have been attacked with a decorative sword and cut on her arm. McIntosh testified, "She did mention something about a decorative sword, yes." He acknowledged that they did not take any swords into evidence. It was his testimony that he could not remember whether he saw any at the scene. Curiously, he noted, "If they were there, we probably did." He then indicated that SLED took pictures at the scene. ROA p. 32, l. 11 - p. 33, l. 2. **The transcript indicates that during McIntosh's testimony, Part I of Appellant's interview by law enforcement played for judge but not transcribed.**[5] **ROA p. 34, ll. 12-20. The CDs of this interview were later introduced as State's Ex. No. 9 at Appellant's trial. ROA p. 244 marked for ID and ROA p. 478 admitted into evidence. The content of these recordings, although published in open court, were not "taken down" by the Court Reporter and have not been transcribed as a part of the available record of either proceeding.**

McIntosh acknowledges that there were spots all over Defendant's shirt. He says it was blood, but admits it was never tested to see if it matched Defendant or someone else on the scene at the time of this incident. ROA p. 36, ll. 15-23.

McIntosh testified to the presence of blood in the residence where the physical altercation took place. Blood drops in the hall. Acknowledges that they could have asked for testing, but didn't. He stated that "SLED didn't require it." ROA p. 36, l. 24 -p. 37, l. 15.

[5] A subsequent amendment to this transcript by the Court Reporter confirmed that both parts were in fact played for the Court.

**MICHAEL BENJAMIN BLACKMON**

This witness was also an Officer with the Sheriff's Office in Laurens County. He arrived after McIntosh. McIntosh was lead investigator on call that evening. In addition to the individuals mentioned by McIntosh in his testimony, Blackmon says someone from their unit named Lt. Glasgow was at the scene. ROA p. 38, ll. 1-25. This witness spoke with Staley and Tammy and testified that he was told Defendant has some sort of altercation with the "victim" and Defendant had shot her.

When Defense Counsel Varner asks to see the witness's notes, Blackmon hands them over and says the Solicitor's Office was given a copy of case file, but he didn't personally turn it or anything over to Defense Counsel because it wasn't his case. ROA p. 39, ll. 12-14 - p. 40, ll. 10-12. Blackmon says he interviewed Defendant on tape and wrote out her statement for her. He obtained copes of 911 tapes. He never went inside residence. He says McIntosh interviewed Tammy, but he "believes" she wrote her statement herself. He witnessed it. Straley was interviewed and his statement was taken by another officer, Lt. Shelton. ROA p. 40, l. 16 - p. 41, l. 21. When asked what forensic or chemical testing was done or DNA testing, he once again referenced his notes and then said, with written consent, buccal swabs were taken from Defendant and Straley. ROA p. 41, l. 25 -p. 42, l. 11.

**TAMMY JO MORRIGAN**

Tammy testified that the deceased, Shawn Faye Morrigan, was married to her. She then clarified that they were not legally married in any state that would recognize their marriage. She didn't take Shawn's last name, they picked a last name and both had their names changed in Atlanta. ROA p. 42, l. 18 - p. 43, l. 17. She had met Shawn on line. They had known each other for a year and a half when Shawn died. Tammy stated that she

had bachelor's degrees in math and computer science and a master's degree in finance. According to her testimony, she was in military for four years, was honorably discharged and was an air traffic controller not a drill sergeant in the Army. ROA p. 43, l. 18 - p. 45, l. 5. She admits in her testimony that she is trained in hand-to-hand combat, but noted that she doesn't do weight lifting because her ankles are fused and do not move. ROA p. 45, ll. 6-23.

Tammy testified that when she and Shawn came to her father's home in June, 2011, it was their original intent to stay just a few days. They had been traveling around the country. They had stayed with her sister for a few days, but said for the most part they had been camping since they left Atlanta, April 1, 2011. They stayed longer because her father, who was in the middle of chemotherapy, asked them to. At the time of the trial, Tammy was 48 years old. Shawn was a nurse and was 37 years old when she died. ROA p. 45, l. 24 - p. 48, l. 21. She stated her belief that Defendant was guilty of murder and other charges. Declared a hostile witness without objection from the State. ROA p. 48, l. 22 - p. 49, l. 10. Tammy denied telling Defendant that she and Shawn had burned up a car, a 2007 Volvo titled in Shawn's name, in order to get "out from under it." Acknowledged that they did file an insurance claim on the car. The loan was apparently in Tammy's name. Her actual testimony was, "I held the loan on it." ROA p. 49, l. 12 - p. 50, l. 23.

Tammy also denied Appellant had arguments over Shawn and her smoking pot. Says pot was in fact procured for her father from Defendant's son. Father was losing weight rapidly and had no appetite due to cancer. She did not, however, deny that she and Shawn were smoking in the house, but said happened very rarely. ROA p. 50, l. 24 - p. 51, l. 16. She claimed that there had been no argument about them staying up all night and disturbing her father. ROA p. 51, ll. 17-22. She also claimed they contributed to the household while they

were there both by buying food and helping her father do work around the farm. ROA p. 51, l. 23 - p. 52, l. 6.

Appellant attempted to question Tammy about her knowledge concerning Shawn stealing medical supplies at the doctor's offices. State objects on grounds of relevance. Judge did not clearly rule, but Defense Counsel moved on. ROA p. 52, l. 7 - p. 53, l. 23.

Tammy testified that the night before Shawn died, Appellant and her father talked to her because of their concerns about her relationship with Shawn. They were afraid all that Shawn was interested in was her money. Tammy testified that this was ridiculous because Shawn had access to all her money and had for a year and a half before then. Significantly, she acknowledged that she told Shawn all about this conversation. The next morning the two of them left the house, before Appellant and her father because they went car shopping. They came back in the late afternoon. ROA p. 53, l. 25 - p. 55, l. 2. Tammy recalled that her father and Appellant came home just before it got completely dark. They had purchased a weed-eater. She and her father went outside, gassed up the weed-eater, and she worked on weeds for about 15-20 minutes. She quit when it got completely dark. When she came in the house, Shawn was in the kitchen and came toward her crying. She testified that Shawn said she just couldn't take "their negativity" any more and wanted them to leave. She stated that she had agreed to leave. ROA p. 55, l. 3 - p. 56, l. 13. Tammy claimed her father tried to get them to stay and sleep on it, but stated that Appellant was screaming for her father to tell them to get out. They were packing up and they had taken a load out to the car. Next she heard Shawn yell that Appellant was throwing their stuff out the door. ROA p. 56, l. 15, - p. 57, l. 2. Tammy said that Shawn took off back into the home. Tammy said she wasn't as fast as Shawn and by the time she got back inside Appellant had Shawn pinned on the

floor with both hands in her hair and she couldn't move. ROA p. 57, ll. 1-6.

Tammy claimed Shawn was on her back. She said Defendant was behind her with Shawn's hair in her hands. She admits she didn't see it, but said it "looked like" Appellant had come up behind her and pulled her down by the hair. Tammy claimed she dropped to her knees, and was trying to get Appellant off Shawn when father came in and screamed for her to get off Appellant. She testified that she put her hands in the air, and when she did, Appellant kicked her. According to her testimony, that is when she punched Defendant three times in the eye. ROA p. 58, l. 12 - p. 60, l. 8. Tammy claimed that she had no idea how Appellant's right eye so badly blackened or how she got a broken nose. She stated that when Appellant let go of Shawn, she was trying to get her up, when Appellant disappeared into the bedroom. Tammy recalled that her father's feeding tube had gotten pulled out. He was at kitchen sink trying to get, she assumed, his bleeding to stop. Tammy's testimony denies that her father broke up the altercation. She testified that her father was a coward and said he had been a coward his whole life. In her hearing testimony she makes the comment that after she took gun away from Defendant she had to yell for father to "come into kitchen and take it." She stated that was after Appellant shot Shawn and tried to shoot her too. ROA p. 60, l. 9 - p. 61, l. 2.

Tammy testified that it took her a couple minutes to get Shawn off the floor. She said that Shawn had a couple herniated disks and was hurting badly from the altercation. "Somebody yelled" and she turned around to see Appellant with a gun. According to her, Appellant pointed it and then moved her hand to the side and pulled the trigger. Next, Appellant brought gun back around toward her face. Tammy testified that she could see Appellant pulling the trigger, so she grabbed the gun and Appellant shot into the ceiling.

ROA p. 62, l. 2 - p. 63, l. 18.

Tammy claimed that as her father was coming in, Appellant grabbed fancy walking stick with long knife in it. She testified Appellant was trying to stab her with it. It was her testimony that her father came and took it away from Appellant. ROA p. 64, l. 20 - p. 65, l. 8. She claimed she got "a couple of small cuts from it. She didn't quite get it all the way out." ROA p. 66, l. 1-6. Admits she didn't tell police about it when she was questioned at the scene. She told police about the knife later when she was giving her statement. ROA p. 66, ll. 7-16. Tammy testified that it took a long time before "they" called 911. She stated that she could hear Appellant and her father in there discussing what they were going to tell the police. Claims to have heard her father tell Appellant "we better get down what we're gonna tell the police." Says police took no pictures of her cuts or stab marks. Tammy testified that police supposedly called ambulance for the concussion from when Defendant kicked her in the head. She claimed EMS told her she should probably go to the hospital, but police said they would rather her give her statement first and then go. She could not, however, remember what police officer said she needed to give a statement before going to the hospital. ROA p. 66, l. 17 - p. 68, l. 13. There was no testimony about her even going to a hospital at a later date or any other basis for the claim of a concussion.

On cross-examination, Tammy testified that she never heard Shawn threaten Appellant. She testified that Shawn didn't believe in violence. She claimed she didn't hit Appellant until after Appellant kicked her. She states that once Appellant let go of her hair, Shawn never hit her again. Tammy testified that they had been living there 6-8 weeks, but had been asked to leave. She asserted that from the time they were asked to go, they were doing everything they could to get out as quickly as they could. She claimed they would

have left if altercation hadn't happened. ROA p. 69, l. 12 - p. 75, l. 10.

Tammy claimed she can walk fine on even surfaces, but can't walk on uneven surfaces and can't run. ROA p. 75, ll. 14- 21.

During hearing an issue was raised concerning Straley's deposition in a wrongful death case brought by Shawn's family against Appellant. The law suit involved Appellant's home owner's insurance. Law suit did not involve Appellant's criminal lawyers who were not involved in the civil litigation. Straley died 6-7 months later after deposition. Defense Counsel found out about it later from civil defense lawyer, Warren Mowery. After a brief recess, the Court allowed deposition in for the hearing; but said would not necessarily allow in trial. Allowed initially for the Castle hearing only. ROA p. 78, l. 25 - p. 85, l. 9.

**KATHY LEONARD REVAN**

Appellant's testimony reveals that she was 58 years old and resided at 315 Revan Drive. She had lived there for around forty years. Appellant revealed that she suffered from numerous medical problems which serious impacted her health. According to her testimony, she has COPD. She indicated that she has ten lesions on her brain, nine of which circle her brain and the other one is on her hypothalamus. She indicated that these lesions could be scar tissue or growths. She indicated that she has word-finding problems. Appellant testified that she is unsteady when she walks and falls a lot. Also has an adrenal gland insufficiency. She is extremely tired, suffers from dizziness and feels like she is "gonna pass out a lot". Says fatigue is caused by her pituitary gland being too small. ROA p. 86, l. 22 - p. 89, l. 14. Appellant testified that she always has steroids on hand to take to keep her blood pressure up if she gets really ill or she has any kind of trauma. If her blood pressure drops it could kill her. She stated that she usually has to take the steroids a couple times a year. ROA p. 89, l.

15 - p. 90, l. 3. Appellant testified that she also has degenerative disk disease. She has had lower back surgery. In 2003 she was in a car wreck and broke her neck. Her left arm has been weaker ever since that accident. Appellant testified she is on pain meds daily. She takes valium for muscle spasms. Her doctor's recommend she not be up more than an hour without being able to lie down. ROA p. 90, ll. 6-20. Appellant testified that she is in constant pain since 1998 when she ruptured a disk in her back. She wears a special brace if she is going to be up for a long time or expects to be lifting anything or stooping. ROA p. 90, l. 13 - p. 91, l. 13. Appellate also testified that she is diabetic. She stated that she is on oral medication for diabetes and takes Novolog insulin; usually about 3 shots a day. ROA p. 91, l. 14 - p. 92, l. 4.

In addition, Applicant testified that she suffers from Dupuytren's Contractures Disease. She testified that both her parents had this condition too. Her described how her feet draw "down flat" at night. She reported that her ring finger on left hand is drawing in a permanently disfigured state. She testified that this disease will eventually draw fingers into a fist. ROA p. 92, l. 5 - p. 93, l. 8. Appellant also has issue with her heart. She has tachycardia, PVC and a leaking mitral valve. She explained that this means that her heart beats too fast and that PVC means her heart is beating an extra beat. ROA p. 93, ll. 13-22. Appellant reported that she also suffers from fibromyalgia, which she indicated makes her feel sore and achy like she has the flu all the time. She testified that "weather changes make you sick, real sick" if you have this condition. ROA p. 93, l. 23 - p. 94, l. 6.

Appellant testified that she worked as a nurse for 15 years until she ruptured disk trying to keep a patient from falling. Her job was terminated and it took her three years to get on disability. Has been on Social Security Disability ever since. ROA p. 96, l. 2 - p. 98,

l. 2.

Appellant testified that she met Straley because he was step-grandfather to her granddaughter. They had known each other 10 years. After he and his wife split up, he started working for her fixing up trailer for her. He was ten years older than her. Sadly, in January, 2010, six or seven months after they got together, they found out he had stage 4 cancer. ROA p. 98, l. 5 - ROA p. 99, l. 24. She described their relationship by testifying that they took care of each other. ROA p. 100, l. 3 - p. 101, l. 5.

In October, 2010, Appellant had gone with him to see his three daughters in Pennsylvania. On that trip they also met woman Tammy was married to at that time, Janet Bond. They had Shawn once before at Appellant's house in Greer in the Spring of 2010. Tammy and Shawn were only there a few hours that trip and didn't stay that time. ROA p. 104, ll. 6-17. They had not seen any of them again June, 2011, when Tammy came with no advance warning. Tammy just called and said they needed directions to farm. Tammy stayed for 6 weeks. While she was there her daughter Amy came for a week and her daughter Kelly came another time for a weekend. In August, 2011 Straley was told he had been told he had a month and a half to live. ROA p. 101, l. 6 - p. 104, l. 25.

With regard to the incident that lead to Shawn's shooting, Appellant testified that after she told Tammy and Shawn to leave and they were taking their stuff out to the car, every time they would come by her they would deliberately hit the leg rest part of her recliner knowing her leg was in bad shape. They hit her chair at least four times, before she got up and decided to help get their stuff out of the house so they could go on and leave. ROA p. 123, l. 19 - p. 124, l. 24. She described Shawn as becoming enraged at her for touching their stuff. She "she took her body and knocked into me and when she did , I lost

my balance and I reached out to grab anything, as it happened, I grabbed her by the hair of the head..." ROA p. 125, ll. 1 - 15. After Shawn slammed into her, Appellant fell to the floor with Shawn on top of her. When they landed, she said she still had hold of Shawn's hair in her left hand. ROA p. 126, ll. 2 - 13. Next Tammy came in and put her right knee in Appellant's left breast, She then straddled Appellant and stepped on her right hand. She described how Tammy then began beating her in the face with her fists; striking her approximately 20 times. Appellant received a gash over her left eye and a broken nose. ROA p. 127, ll. 7 - 25. Appellant went into the bedroom she shared with Straley and splashed water on her face because she had blood flowing into both eyes. She could hear Tammy outside her room cursing at her Daddy. She expressly testified that she was afraid they were going to either, come in her room and jump on her again, or else they were going to jump on Straley. ROA p. 129, l. 3 - p. 130, l. 11. As she went to walk back out, she stopped and retrieved her pistol from under her mattress. ROA p. 130, ll. 12 - 15.

She stated that when she stepped back into the room, Tammy started advancing toward her. Appellant testified that she fired a shot towards the side as a warning shot. ROA p. 137, ll. 4-22. Appellant specifically testified that she fired across her body. Previously in her testimony she stated that her left eye was swollen shut and she only had peripheral vision in right eye. Next, Tammy came at her and tried to get gun, but Straley got it from her. As he was taking the gun away from her it went off a second time and that shot went into the ceiling. ROA p. 132, ll. 4-15; ROA p. 138, l. 13-25.

After Straley took gun away from her he took it to car and locked it up. Appellant says once Straley got the gun from her, he told Tammy to go check on Shawn because she was in bedroom screaming. Appellant said she didn't know Shawn was hit until Tammy

came back and reported it. Straley called 911. Testifies that she was completely truthful in her interview by law enforcement and her statement. Clearly testifies she was in fear for her life at the time of this incident. ROA p. 139, l. 1 - p. 140, l. 23.

Appellant testified that there was no logical reason for Shawn to be over in left corner where she was when she got hit by warning shot. Appellant testified that she believed they were trying to jump her to "finish her off." [6] ROA p. 140, l. 24 - p. 141, l. 22.

Appellant denied ever putting the gun in Tammy's face. She testified that she wouldn't have because she knew Tammy was trained in hand- to -hand combat. ROA p. 141, l. 23 - p. 142, l. 13.

On cross-examination, the State tried to get Appellant to say she wasn't acting in self-defense, because her claim was actually accident. Appellant adhered to her position; she was defending against a violent crime being committed against her. She fired the warning shoot because she believed doing so would stop them from jumping her again. ROA p. 137, l. 19 - p. 138, l. 9; ROA p. 142, l. 21 - p. 145, l. 12. The State tried to get Appellant to identify a walking stick in a crime scene photo of her bedroom. Appellant says she has never seen it before. The State did not introduce the crime scene photo they tried to get Appellant to identify walking stick in. Likewise, no such walking stick, or sword, was introduced into evidence by the prosecution. ROA p. 146, ll. 17-19. A review of that photograph, eventually admitted into evidence at trial as *State's Ex. No. 23*, reveals that it only shows a portion of what appears to be a small brown object. It does not show a sword or walking stick as suggested. ROA p. 145, l. 11 - p. 146, l. 3. During this hearing, Appellant was shown her booking photo. That photograph was admitted as State's Ex. No. 2 for ID only,

[6] Crime scene photographs show damage to the door jam of the bedroom low toward bottom of jam. State's Exhibits No. 14 and 15 from the trial.

without objection. ROA p. 146, l. 4-17.

**EVAN BRAMHALL, ESQUIRE**

WITNESS SWORN TO READ ACCCURATELY TRANSCRIPT OF LYNN STRALEY'S DEPOSIT.

Only a portion of the deposition was published to the Court. The reading began at Page 21, l. 1 of Deposition. ROA p. 248

Straley's sworn deposition confirmed that while Tammy was outside, Shawn was arguing with Appellant. He described argument as completely verbal until Tammy came in from weed eating outside. According to Straley, that is when argument got worse and Appellant told them to get their stuff and leave. Every time they would pass Appellant in her recliner they were knocking her. He stated it was obviously deliberate; especially after doing it multiple times. ROA p. 148, l. 1 - p. 151, l. 11.

Straley recalled Appellant saying she was going to help them because "I can't take this anymore." Shawn was on the way out of bedroom and purposefully bumped Appellant with her hip and threw her off balance. ROA p. 152, l. 3. Straley stated that it was apparent it was deliberate. He described seeing Appellant grab Shawn's hair, which was fairly long, to regain balance and watching them fall to the ground. He stated that Appellant ended up on the bottom on her back, possibly leaning toward one side "a little bit." ROA p. 153, ll. 1-25. Straley said Shawn was on top of Appellant but not facing her. Described Shawn as kind of on her side on top of Appellant. ROA p. 154, ll. 3-11. He further described Shawn scratching at Appellant on her legs, thigh and stomach. He said when Tammy came in she jumped in on it. ROA p. 154, ll. 13-16.

Straley says when Tammy came in , Appellant had her left hand holding Shawn's

hair. Tammy put her left foot on Appellant's right hand and her right knee in Appellant's chest and began beating her with her fist in "her upper head" area. Shawn was screaming "let me go." He stated that Appellant wasn't saying anything because she was "getting the hell beat out of her." ROA p. 154, l. 18 - p. 155, l. 25. Straley said he got Tammy to quit beating Appellant. In the process, his feeding tube got ripped out, he thinks by Shawn, but apparently was not certain. Tammy let Appellant up. Appellant was bleeding out of her nose and mouth. "Her eye is swelled up." He took Appellant to bathroom and handed her a washcloth from somewhere, either towel bar or sink. He walked out of bedroom into kitchen three feet away. ROA p. 157, l. 13 - p. 158, l. 17. He described Appellant's eye as in "not too good a shape." ROA p. 158, l. 8. Straley said he had gone in the kitchen getting ice in zip lock for Appellant's eye. Says Tammy and Shawn had gone back into the bedroom. Says he didn't know it, but Appellant must have come out right behind him. ROA p. 158, l. 8 - ROA p. 159, l. 3

Straley recalled hearing his daughter, Tammy say "are you crazy". Appellant was standing in doorway, between dining area and kitchen, with gun in her right hand. He made a dive for Appellant to grab the gun, Tammy made a dive for it at the same time. The gun was in Appellant's right hand pointed across her body pointed towards the floor in area where their bedroom came into living room. Shawn was coming out of bedroom into living room. He and Tammy were both about 4 feet away and grabbed at Appellant from different directions. He believed the gun "didn't go off until after we got to her." ROA p. 159, l. 1 - p. 162, l. 6. He was trying to grab her right arm. Didn't get to her arm until after first shot. Then he and Tammy had her right arm and gun went off a second time into dining room ceiling. Straley then took gun from her. He clearly stated that the gun was pointed at the

floor when he first saw Appellant with it. Straley said he didn't know whether he had hold of Appellant before first shot fired. "I thought it was at the time down." At first he didn't know Shawn was hit. ROA p. 162, l. 3 - p. 163, l. 23.

He says he took gun and hid it under a cushion in a chair. ROA p. 164, ll. 4-7. Says he wrenched gun out of her hand. Says "she must have let go of it" after the shot into the ceiling.[7] ROA p. 164, l. 8-19. Straley recalled that Shawn was the first to say anything; said "she shot me." Tammy yelled to call 911, and he did while Tammy to help Shawn in the bedroom. ROA p. 165, ll. 1-10.

In a portion of this deposition testimony Straley says something about while he was on phone with 911 they said something about not being able to "find us". He stated that Tammy was pressing towels on Shawn's leg. Appellant was in bedroom had medication she was supposed to take in the event of trauma. A policeman finally got there and Straley told him "you've got to get an ambulance here now." ROA p. 165, l. 19 - p. 168, l. 17.

The hearing Judge had the entire deposition marked as Court's Exhibit No. 1. Defense Counsel moved it into evidence, but Court says only portion read into record will be in evidence. They had started on page 21. State asks that previous page be read in as well. Previous page, which would be pg. 20, read into record beginning at line 11.
ROA p. 168, l. 20 - p. 170, l. 5.[8]

**LYNN STRALEY'S WRITTEN STATEMENT TO POLICE.**

When the subject of Straley written statement to law enforcement comes up, the Court says "why can't you just read it? If y'all stipulate it's coming in. ROA p. 171, ll. 1-2.

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[7] Earlier testimony indicated that he said he took the gun and locked it in the car.

[8] Entire deposition marked as Court's Ex. 1 No portion of it marked and introduced as Defendant's. Ex. See Index No objection on the record despite fact that Defense Counsel had asked for it to be a Defense Exhibit.

State's Ex. No. 3 for ID. The State says, "That's fine with me, judge, *instead* of having somebody read it." ROA p. 171, ll. 3-4. Next, Defense Counsel indicates no objection stating "that's fine, Your Honor." ROA p. 171, l. 5. Inexplicably, the statement is then marked State's Ex. No. 3 for ID and no one reads it into record. ROA p. 171, ll. 6-12.

McIntosh had previously summarized from memory, what Straley said that night. That Summary was only six lines long. That summary could not have covered everything in the statement. ROA p. 19, ll. 4-10.

**STATE'S REBUTTAL TO IMMUNITY ARGUMENTS.**

State cites to *State v. James Curry,* , 406 S.C.364, 752 S.E.2d 263 (2013), for the proposition that the presumption of fear doesn't apply when Victim is an invitee with equal right to be there. ROA p. 180, l. 24 - p. 184, l.10.

**DISCUSSION**

The review of a claim of immunity under the Act requires a pre-trial determination applying a preponderance of the evidence standard. On appeal such rulings are reviewed under and abuse of discretion standard of review. *State v. Duncan*, 392 S.C. 404, 709 S.E.2d 662 (2011). Our Supreme Court has found that, "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 defendant's entitlement to the Act's immunity. This includes all the elements of self-defense, save the duty to retreat." *State v. Curry*, 406 S.C.364, 371, 752 S.E.2d 263, 266 (2013). In *State v. Grantham*, 224 S.C. 41, 45, 77 S.E.2d 291, 292 (1953), our Supreme Court found that the Castle Doctrine is "predicated on the absence of aggression or fault on the defendant's part in bringing on the difficulty..." The immunity provided by the Act, "is predicated on an accused demonstrating

the elements of self-defense to the satisfaction of the trial court by the preponderance of the evidence." *State v. Curry*, 406 S.C.364, 372, 752 S.E.2d 263, 267 (2013). The State argued *Curry, supra*, for the proposition that Appellant was not entitled to the presumption of reasonable fear of imminent peril of death or great bodily injury found in §16-11-440(A) where Shawn was a person with an equal right to be in the dwelling or residence . S.C. Code Ann. §16-11-440(B). ROA p. 180, l. 24 - p. 184, l. 10. This analysis overlooks the fact that Tammy and Shawn had been told to get out of the residence. Their status as guests had been terminated. By Tammy's own admission she had loaded their bags in the car. While §16-11-440(B) may deprive a homeowner from claiming the benefit of the presumption of reasonable fear, it would not have applied to the facts of this case where both Tammy and Shawn had been told to leave the premise. Furthermore, as emphasized in Curry, under the common law Castle Doctrine, the absence of a duty to retreat "does not extent to a visitor or social guest in the home of another unless 'the attacker in an intruder.' *Curry*, 406 S.C.at 374, 752 S.E2d at 267-268., citing *State v. Brown*, 321 S.C. 184, 467 S.E.2d 922 (1996).

Interestingly, the State also argued that Appellant wasn't really claiming self-defense where she said she fired a warning shot that hit the victim. It was the State's position that Appellant was advancing a claim of accident and not self-defense. This argument fails for a very simply reason, Appellant did not claim she accidentally discharged the firearm. She firmly asserted that she deliberately fired a warning shot, not aiming at anyone, with the intent warn her attackers away from either jumping on her again, or jumping on her partner, Straley. She was in her room when she heard Tammy angrily cursing at her father. She stated quite plainly that she was afraid they would either, come in her room and resume beating her, or, attack Straley. The record demonstrated that Straley was in fact gravely ill

and physically vulnerable. Appellant would respectfully argue that it makes no common sense, much less sound legal analysis, to claim that a death or injury inadvertently flowing from a warning shot, would not fall with the protections of the Act, particularly where the victim was in fact one of Appellant's attackers.

Fortunately for Appellant, the trial judge did not deny immunity on the ground that Appellant was asserting accident instead of self-defense. The express ruling of the Court is limited to the finding that Appellant was no longer in imminent danger once the physical altercation had been broken up. Appellant most respectfully submits that this finding constituted an abuse of discretion. First, Appellant would respectfully note that the operative question is whether a reasonably prudent person, of ordinary firmness and courage would have entertained the belief that they were in imminent danger, not whether she actually was. *State v. Davis*, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984). The trial court did not ever expressly find that Appellant was not entitled to the presumption of reasonable fear found in §16-11-440(A) due to the fact that Tammy and Shawn had been guests before this incident. As previously argued, Appellant believes that where everyone, including Tammy, acknowledged that they had been told to get out of the residence well before the shooting, §16-11-440(B) would not apply. Assuming, arguendo, that Appellant was not entitled to the presumption of reasonable fear, Appellant asserts that the evidence and testimony from this immunity hearing establishes by the preponderance of the evidence that she had a reasonable fear that either she, or her companion Straley, were in peril of grave bodily injury or death. Appellant heard Tammy screaming and cursing at him. Appellant's fear that Tammy, or Shawn, or both women might come after her in the bedroom was not irrational on the facts of this case. Straley was greatly debilitated with stage 4 cancer.

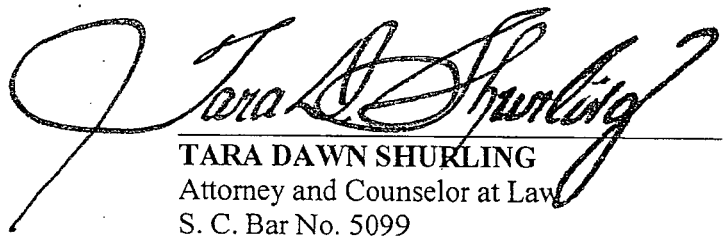
Tammy had just inflicted a serious beating on Appellant and she had every reason to fear that Tammy might lash out at Straley next, particularly since he had by that point backed Appellant's wishes up and told them they needed to get out of Appellant's home. Appellant had no duty to retreat from her own home, nor should she have been expected to remain in her room in fear when she had a reasonable fear that Straley was also in danger. To summarize, Appellant bore no fault in bringing about the incident that lead to Shawn's death. Angry and resentful about being asked to leave Appellant's home, Shawn and Tammy had been physically assaulting Appellant at first by hitting the foot rest to her chair and deliberately causing her pain, and subsequently, when Shawn body slammed Appellant causing her to lose her balance. There was no evidence that Appellant laid a hand on Shawn until after she slammed into her and caused her to lose her balance. It is Appellant's position that she grabbed Shawn's hair in a bid to grab hold of something to regain her balance. In actuality, even if she had grabbed her hair on purpose, it certainly would not have justified the beating Tammy inflicted on Appellant; a women two decades her junior with a long list of medical problems. The unprovoked attack on Appellant physically by Shawn, and the ferocity of the beating Appellant subsequently received from Tammy, more than gave rise to a reasonable fear of peril. Likewise, given Tammy's hot headed and violent actions toward Appellant, and her aggressive verbal attack on her father, Appellant had every reason to believe Straley was in peril as well. After all, father and daughter did not have a long history of closeness, having only recently reconnected after years of estrangement, and Straley was near death from stage 4 cancer. Appellant had already seen Straley's feeding tube ripped out while he was attempting to rescue her from Tammy. The trial court erred in failing to grant Appellant immunity from prosecution where she demonstrated that she met the elements of

self defense by the preponderance of the evidence.

## CONCLUSION

Based upon all the forgoing reasons and authorities Appellant asserts that the trial court abused its discretion in failing to find that she was entitled to immunity under the Act. Appellant seeks the ruling of this Court that immunity should have been granted on the facts of this case. Had Appellant been granted immunity under the Act, she could not have been prosecuted for the crimes for which she went to trial. Therefore, Appellant asks that her convictions and sentences be vacated.

Respectfully submitted,



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ATTORNEY FOR APPELLANT

This 20th day of July, 2016.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM LAURENS COUNTY
Court of General Sessions

The Honorable Eugene C. Griffith, Circuit Court Judge

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Appellate Case No. 2014-000161

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THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

KATHY LEONARD REVAN,

APPELLANT.

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## CERTIFICATE OF COUNSEL

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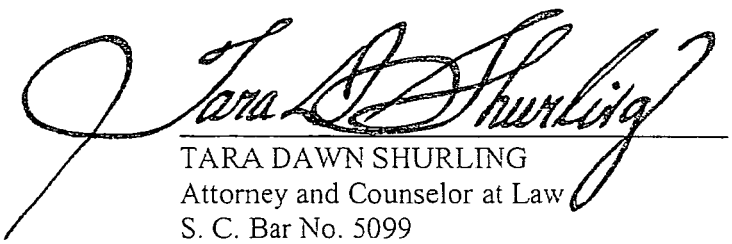
The undersigned attorney hereby certifies that certificate that this Final Brief of Appellant complies with Rule 211(b), SCACR. The undersigned also certifies that this Final Brief is in compliance with the August 13, 2007 Order of the Supreme Court of South Carolina relating to the inclusion of personal data identifiers and other sensitive information in documents.



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM LAURENS COUNTY
Court of General Sessions

The Honorable Eugene C. Griffith, Circuit Court Judge

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Appellate Case No. 2014-000161

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THE STATE OF SOUTH CAROLINA, RESPONDENT,

v.

KATHY LEONARD REVAN, APPELLANT.

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**CERTIFICATE OF SERVICE**

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The undersigned attorney hereby certifies that a copy of the Final Brief in the above-entitled case has been served upon opposing counsel by depositing in the U.S. Mail, postage prepaid, this 20th day of July, 2016, addressed as follows:

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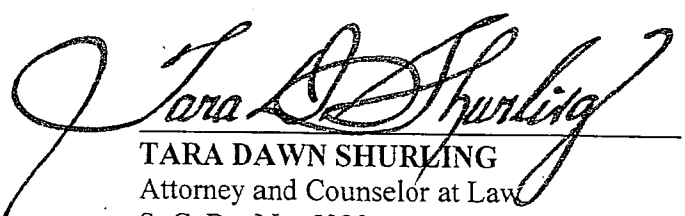

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SWORN TO BEFORE me this 20th day
of July, 2016.
Sharon H. McAllister (L.S.)
Notary Public for South Carolina
My Commission Expires: Jan. 16, 2017

STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM LAURENS COUNTY
Eugene C. Griffith, Circuit Court Judge

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THE STATE, .....RESPONDENT

v.

KATHY LEONARD REVAN,.....APPELLANT.

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# FINAL BRIEF OF RESPONDENT

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## RESPONDENT'S STATEMENT OF ISSUE ON APPEAL

1. Whether the trial court properly found Appellant failed to carry her burden of proving by a preponderance of the evidence that she was entitled to immunity from criminal prosecution under the Protection of Persons and Property Act.

## STATEMENT OF THE CASE

Kathy Leonard Revan (Appellant) was indicted at the October 2011 term of the grand jury for Laurens County for murder (2011-GS-30-1625), possession of a weapon during a violent crime (2011-GS-30-1626), and attempted murder (2011-GS-30-1627). She was represented by Kim R. Varner, Esquire, and Evan Bramhall, Esquire, and Respondent (the State) was represented by solicitors Lance Sheek and Taylor Daniel of the Fourteenth Circuit Solicitor's Office. On January 13, 2014, the case was called for trial at the Laurens County Courthouse before the Honorable Eugene C. Griffith, Jr. (R.p.1). Prior to the jury being sworn, Appellant made a motion to dismiss the charges pursuant to the Protection of Persons and Property Act (S.C. Code Ann. §§ 16-11-410 to -450) (Supp. 2010) (the Act) and the procedures set forth in State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011). The trial court conducted a pretrial immunity hearing. At the close of that hearing, after taking testimony, observing evidence, and hearing arguments from both sides, the trial court found that Appellant had failed to establish she was entitled to immunity under the Act and denied her motion to dismiss. The case proceeded to trial. (R.p.7-p.185). After hearing the evidence and the trial court's charge on the law—which included a charge on self-defense and the absence of the duty to retreat because Appellant was on her own premises—the jury found Appellant guilty of voluntary manslaughter, attempted murder, and possession of a weapon during a violent crime. (R.p.186-p.216; p.217-p.218). The trial court sentenced Appellant to twenty (20) years' imprisonment for voluntary manslaughter, twenty (20) years' concurrent imprisonment for attempted murder, and five (5) years' concurrent imprisonment for possession of a weapon during a violent crime. Appellant filed a notice of intent to

appeal the denial of her motion for immunity and Tara D. Shurling, Esquire, subsequently filed a brief in support of Appellant's appeal. This Brief of Respondent follows.

## STATEMENT OF FACTS

On August 11, 2011, following a physical altercation, Appellant shot and killed Shawn Faye Morrigan (Victim) inside their shared residence. See S.C. Code Ann. § 16-11-430(3) (Supp. 2010) (defining "residence" as a dwelling in which a person resides either temporarily or permanently or is visiting as an invited guest). (R.p.143). Victim and her partner, Tammy Jo Morrigan (Morrigan), had been temporarily residing at Appellant's home for several weeks before the incident, with Appellant's permission. (R.p.105). The purpose of the visit was to allow Morrigan to spend as much time as possible with her father, Lynn Straley (Straley), who was also a resident of the dwelling on Revan Road. Straley died from cancer shortly after Appellant shot and killed Victim and thus was not available to testify at the time of the immunity hearing; however, his deposition testimony about the incident (taken for the purposes of a civil case arising out of this shooting) was read into the record (R.p.147-p.169).

After a heated discussion and immediately before the physical altercation which preceded the shooting, Victim and Morrigan were packing their luggage and preparing to leave the residence by taking their belongings out to the car. (R.p.123). At some point during the process, Appellant got up from her chair and pulled Victim to the floor by her hair. The two women were lying on the floor struggling as Morrigan came back into the residence to see Appellant clutching Victim's hair in both of her hands. Morrigan intervened and punched Appellant in the face several times until she released Victim. Appellant then went to her bedroom, retrieved a gun from under her mattress, returned to the living room and shot Victim in the leg. The gunshot severed Victim's femoral artery and she died from wound. (R.p.125-p.127; State's Exhibit No. 1(R.p.298): Photograph; State's Exhibit No. 2: Mugshot (R.p.299).

When the case was called for trial, prior to the jury being sworn, the solicitor advised the court that Appellant wished to raise an issue under section 16-11-440 of the Code. Appellant then made a "brief opening statement." She said this was a case of what is commonly referred to as the Castle Doctrine and that she would be raising a statutory "stand your ground" defense as well as self-defense under the common law. Appellant then summarized the provisions of the Act as well as the facts she intended to elicit during the immunity hearing before arguing:

> It will be [Appellant's] position that she was then attacked or another beating was going to occur, that - - that [Morrigan] at least was coming at her, she was blind out of her left side. She put the gun across her, fired a shot to the left, possibly as a warning shot, but certainly to stop the situation. Unfortunately, that bullet hit [Victim] in the femoral artery in the leg of which she shortly died thereafter, Your Honor.

(R.p.12, lines 11-19). Appellant did not offer any more specific argument as to why she believed she was entitled to immunity, or under what particular language from the Act. (R.p.7-p.12).

The solicitor responded by describing the State's version of the facts and arguing that because Victim and Morrigan were both residents of the home, subsections (A) and (B) of section 16-11-440 were inapplicable. The State contended subsection (C) was the only provision that could possibly apply but argued that pursuant to State v. Curry[1] Appellant would still not be entitled to immunity under the facts of the case. The solicitor went on to argue that none of the provisions of the Act should apply because Appellant could not have been attempting to stand her ground if, as she claims, she accidentally shot Victim. (R.p.12-p.15).

[1] State v. Curry, 406 S.C. 364, 752 S.E.2d 263 (2013).

Next, pursuant to the procedures set forth in State v. Duncan,[2] Appellant presented testimony and evidence to the trial court in an effort to persuade the judge she should be granted immunity under the Act. First, Appellant called Lieutenant Keith McIntosh of the Laurens County Sheriff's Department to the stand. McIntosh investigated the scene and took statements from Appellant and the two other individuals who survived the incident, Straley and Morrigan. (R.p.17-p.18). He testified that based upon the information gathered from Morrigan, he understood that Appellant pulled Victim down by her hair and would not let go. (R.p.24). McIntosh recorded a full statement from Appellant the night she shot and killed Victim and that recorded statement was played for the court. (R.p.34; State's Ex. Nos. 9 & 10). McIntosh testified he determined Appellant was the owner of the property based on her statement. (R.p.37). The State did not cross-examine McIntosh. Next, Lieutenant Michael Benjamin Blackmon testified that he arrived at the scene after McIntosh. (R.p.38). Blackmon took notes to document his conversations with Straley and Morrigan. (R.p.39). Based on those conversations, Blackmon determined Appellant had an altercation with Victim and Appellant ultimately shot Victim inside the residence. (R.p.39).

Appellant then called Morrigan to the stand. She was the first eyewitness to testify during the pretrial immunity hearing. Morrigan explained she was Victim's female partner and that she legally assumed Victim's last name but they were not formally married. (R.p.42). She testified to her educational background, which includes undergraduate degrees in mathematics and computer science and a master's degree in finance. (R.p.44). She also described her military experience in the Army. Morrigan explained that because her "ankles are fused," she cannot do weightlifting or anything of

[2] State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011).

that nature. (R.p.45). Prior to visiting her father's home in Laurens County, where the shooting occurred, Morrigan had been living in Atlanta. (R.p.45-p.46). The purpose of her visit was to see her father. (R.p.46). At the time of the visit, Straley was undergoing chemotherapy for terminal cancer. (R.p.47). Morrigan testified that while living in the residence, she and Victim helped support the household by purchasing food and working around the house. (R.p.52).

Morrigan testified that Straley and Appellant had spoken to her the night before the incident and expressed their concern that Victim was only interested in Morrigan's money. Following that discussion, Morrigan and Victim made the decision they would leave the residence that next morning. They began packing and loading their vehicle. (R.p.56). Morrigan and Victim were maneuvering through a tight area of the dwelling to bring their luggage out to the car. (R.p.58). At some point when Morrigan was coming back in from outside, she observed Appellant holding on to Victim by the hair while the two women were lying on the floor. Morrigan attempted to get Appellant to let go of Victim's hair when Appellant kicked Morrigan in the face. (R.p.59). After being kicked, Morrigan punched Appellant three times in the eye. (R.p.59). Following the initial altercation, Appellant disappeared into the bathroom. (R.p 61). Meanwhile, Morrigan was helping Victim get up, but it took a couple of minutes to get her off the floor. (R.p.62). After Morrigan got Victim back to her feet, Morrigan saw Appellant appear in the doorway with a gun. (R.p.63). Appellant pointed the gun to the side and pulled the trigger. (R.p.63). Appellant then turned the gun on Morrigan, who grabbed it and forced the second shot into the ceiling. (R.p.63). Morrigan heard Victim scream and realized

that she had been shot. (R.p.65). After Victim crawled into the bedroom, Morrigan tried to help her stop the bleeding from the leg wound. (R.p.65).

Next, Appellant took the stand to offer her own version of events. She testified that she resided at the house where the incident took place, in Mountville, South Carolina. (R.p.87). She explained that she began a relationship with Straley before learning of his cancer. (R.p.99). Appellant said Victim and Morrigan called one night and said they needed directions to the farm without any advance notice of their trip. (R.p.103). Straley provided directions to the residence. (R.p.104). Appellant testified she gave permission for Morrigan and Victim to stay at her house to visit Straley as long as possible before he died. (R.p.105).

The day before the deadly incident, Appellant and Straley had a conversation with Morrigan and voiced their concerns regarding the relationship between Morrigan and Victim. (R.p.113). Appellant testified that while Morrigan and Straley were outside, she and Victim started to argue. (R.p.118-p.119). Appellant claimed Victim berated and belittled her, and Appellant responded by saying that Victim was being childish. (R.p.119). Appellant told Victim it was "time for [Victim] to get her shit and get out of [Appellant's] damn house." (R.p.122). Victim and Morrigan then went into the back bedroom and began packing. (R.p.122). Appellant testified Morrigan and Victim repeatedly came out with bags and hit the bottom of the leg rest of the recliner, knowing that Appellant's knee was throbbing. (R.p.123). She estimated that her recliner was bumped at least four times. (R.p.123). Appellant claimed the only reason her chair could be bumped was if they did it intentionally. (R.p.124). After the fourth bump, Appellant told Straley, "[T]he hell with this, I'm gonna help them carry it out." (R.p.124).

Appellant said Victim then came through the living room, "took her body, and knocked into" her. When she did, Appellant lost her balance and reached out and grabbed Victim's hair. (R.p.125).

Appellant testified that Morrigan came into the house, screamed for her to let go of Victim, stepped on Appellant's hand, and began beating Appellant in the face. (R.p.127). Appellant testified she was hit about twenty times. (R.p.127). After the beating, she got up, walked to the bathroom, and washed her face off with water. (R.p.129). She stated Morrigan was still in the living room talking with Straley. (R.p.130). Appellant testified she believed Morrigan and Victim were going to come into the bathroom and jump on her again. (R.p.130). She walked out of the bathroom, got her pistol from under the mattress in her bedroom, and went into the dining room area. (R.p.130-p.31). Appellant testified that, at this point, Morrigan and Victim were on the other side of the living room pointing and laughing at her. (R.p.131). Appellant stated that Morrigan started to run at her, and Appellant lifted the gun and pointed toward the left, down toward the floor, and fired. (R.p.137). Appellant stated she believed Morrigan was going to jump on her and "finish her off," so she fired a "warning shot." (R.p.137). On cross-examination, Appellant contended she did not intend to shoot Morrigan or Victim when she fired the shot that hit Victim. She claimed she was purely intending to fire a warning shot and insisted she did not mean to shoot anybody. (R.p.142-p.145).

Finally, Appellant presented the deposition testimony of Straley by reading it into the record. Straley described the argument that led to Appellant asking Victim and Morrigan to leave the house and their efforts to pack up and move their belongings out the door. He admitted the pathway through the living room was tight but said Victim and

Morrigan appeared to be bumping into Appellant's chair on purpose each time they walked past. Straley said Appellant eventually got up to help them move when Victim bumped into her hip and knocked Appellant off balance. He said Appellant then grabbed Victim's hair and they both fell to the floor. Appellant and Victim were struggling on the floor when Morrigan walked into the room and entered the fray. Straley said Morrigan stepped on Appellant's right hand, put her knee in Appellant's chest, and began beating Appellant in the head with her fist while Victim was screaming for Appellant to let go of her hair. He said he was able to get Morrigan to stop hitting Appellant, but Appellant was bleeding out of her nose and mouth and her eye was swelling up, so he helped her to the bathroom to get washed up. Straley then went to the kitchen to get a bag of ice and heard Morrigan say: "[A]re you crazy?" He looked back and saw Appellant with a gun in her hand so he made a dive to grab the gun. Straley said Morrigan made a dive for Appellant at the same time and that either just before or as he reached Appellant, the gun went off and Victim was shot in the leg. He said he got the gun from Appellant after a second shot went into the ceiling. (R.p.147-p.170).

At the conclusion of the pretrial immunity hearing, the trial court heard arguments from Appellant as to why she believed she was immune from prosecution under the Act. First Appellant commented that because the incident happened in her residence, the duty to retreat does not apply. She then described the differing physical characteristics between herself and the two younger women, as well as her various medical conditions. Appellant recounted her version of the initial confrontation with Victim and argued the court could review the subsequent shooting as a case where Appellant was trying to eject trespassers from her property while they continued to aggravate an already tense

situation. She claimed the trial court should accept her version of the initial confrontation as the truth because she is the only person still alive who saw it, and because it was the only version that is logical and consistent with the facts. Appellant argued she got the gun from the bedroom because she believed she could not take another beating from Morrigan and Victim, and that the two women would kill her. She claimed her discharge of the gun was an act of self-defense as Morrigan was yelling and coming at her. Appellant insisted she fired the gun to stop the attack and that though she did not mean to shoot Victim, it was not an accidental discharge. She argued her version of the shooting itself was more credible that Morrigan's version and suggested Victim and Morrigan should have retreated when she returned to the living room with the gun. Appellant contended that instead, Victim and Morrigan employed a military tactic of separating and coming toward her from different angles. She argued firing the gun was justified and met the criteria of the Castle Doctrine, self-defense, and the legislative intent of "stand your ground." Appellant never claimed she was entitled to the presumption of "reasonable fear of imminent peril or death or great bodily injury to himself or another person" described in subsection (A). (R.p.171-p.180).

In response, the State repeated the arguments raised at the beginning of the hearing: that the claim of accident put Appellant outside the realm of the Act, that because Victim was also a resident of the house the incident did not implicate subsection (A) of section 16-11-440, and that under subsection (C) of section 16-11-440 Appellant could not satisfy the three remaining elements of self-defense to make a valid claim of immunity under the Act. Specifically, the solicitor argued Appellant was not without fault in bringing on the difficulty because she was the one who introduced a deadly

weapon into the altercation. He referenced Appellant's recorded statement to the police wherein she claimed she went and got the gun to show Morrigan and Victim: "I mean business." (R.p.180-p.184).

At the conclusion of the immunity hearing, the trial court ruled as follows:

> I've read the statute very, very carefully this morning three times and I've read several cases that we've been referencing also this morning. I mean, where I have a problem with the testimony as far as what started what is once the fight breaks up, everybody goes back to each end of the house and then they come back, depending on who you hear, they come back in different orders, but understanding how the statute's written, I'm - - I'm gonna respectfully deny your motion for immunity. I - - I just don't believe that there was an imminent danger when they departed. Once they departed, they departed, and had it been an on-going thing, but I - - but there is conflicting testimony both ways as to what happened next, who came back in the room first. No question where the gun came from, but I do not believe that it's met the parameters outlined in the statute of, what, 16-11-440 and 430, 420. So, respectfully, your motion is denied on the immunity request. Certainly it's gonna be a difficult thing for a jury to try to sort out, but anyway that's my ruling.

(R.p.184, line 11-p.185, line 6) (emphasis added). In denying immunity, the trial court acknowledged there was conflicting testimony as to exactly what happened after the initial altercation; however, upon considering that testimony, which necessarily involved assessing the credibility of the witnesses, the court concluded Appellant was not in imminent danger when she fired the fatal shot and she had not carried her burden of proving "the parameters outlined in the statute" by a preponderance of the evidence.

## ARGUMENT

I.

**The trial court properly found Appellant failed to carry her burden of proving by a preponderance of the evidence that she is entitled to immunity from criminal prosecution under the Protection of Persons and Property Act,.**

Appellant argues the trial court erred in failing to find she was immune from prosecution under the Act, S.C. Code Ann. §§ 16-11-410 to -450, because she was in her residence, standing her ground against an attack while under a reasonable fear of imminent peril of great bodily injury or death. She claims the trial court abused its discretion in finding she was no longer in imminent danger once the initial physical altercation between her and Victim had been broken up. The State disagrees and submits Appellant's argument is entirely without merit. The trial court followed the appropriate procedure under rulings from this Court and our supreme court—holding a pretrial hearing, evaluating the credibility of the witnesses and weighing the evidence, and ultimately finding Appellant did not carry her burden of proving she was entitled to immunity under the Act. Appellant's argument cannot prevail under this Court's standard of review. As in State v. Curry, 406 S.C. 364, 752 S.E.2d 263 (2013), Appellant's claim of self-defense presented a quintessential jury question, which is not a situation warranting immunity from prosecution. The trial court's finding that Appellant failed to carry her burden of proving she was in imminent peril at the time the fatal shot was fired has evidentiary support and is not controlled by an error of law; therefore, it must be affirmed.

## Standard of Review

This Court reviews the trial court's pretrial determination of immunity for an abuse of discretion. State v. Curry, 406 S.C. at 370, 752 S.E.2d at 266. In criminal cases, the appellate court sits to review errors of law only. State v. Black, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012); State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). The appellate court does not re-evaluate the facts based on its own view of the preponderance of the evidence but, instead, simply determines whether the trial judge's ruling is supported by any evidence. Wilson, 345 S.C. at 6, 545 S.E.2d at 829 (emphasis added); see also State v. Gracely, 399 S.C. 363, 371, 731 S.E.2d 880, 885 (2012) ("The trial court will only be reversed when there is no evidence to support the ruling below."). "[T]he trial court's ruling will not be disturbed absent a prejudicial abuse of discretion amounting to an error of law." State v. Sheldon, 344 S.C. 340, 342, 543 S.E.2d 585, 585-586 (Ct. App. 2001). An abuse of discretion occurs only when the trial court's conclusions lack evidentiary support or are controlled by an error of law. State v. Elders, 386 S.C. 474, 480, 688 S.E.2d 857, 861 (Ct. App. 2010); see also Reed v. Becka, 333 S.C. 676, 684, 511 S.E.2d 396, 400 (Ct. App. 1999) ("In appeals of pretrial rulings, this Court is 'bound by fact findings in response to motions preliminary to trial when the findings are supported by the evidence and not clearly wrong or controlled by error of law.'" (quoting State v. Amerson, 311 S.C. 316, 320, 428 S.E.2d 871, 873 (1993))).

## The Protection of Persons and Property Act

The subsection in the Act which creates immunity provides:

> A person who uses deadly force as permitted by the provisions of this article or another applicable provision of law is justified in using deadly force and is immune from criminal prosecution and civil action for the use

> of deadly force, unless the person against whom deadly force was used is a law enforcement officer . . . .

S.C. Code Ann. § 16-11-450 (Supp. 2010). A claim of immunity under the Act must be determined pretrial and the defendant has the burden of proving entitlement to immunity by a preponderance of the evidence. State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011). 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. Curry, 406 S.C. at 371, 752 S.E.2d at 266. This includes each element of self-defense, save the duty to retreat. Id. at 372, 752 S.E.2d at 266-67 ("[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.")

Section 16-11-440 of the article, which is the central provision of the Act by which a person is permitted to use deadly force, states:

> (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.
>
> (B) The presumption provided in subsection (A) does not apply if the person:

> (1) against whom the deadly force is used has the right to be in or is a lawful resident of the dwelling, residence, or occupied vehicle including, but not limited to, an owner, lessee, or titleholder; or
>
> . . . .
>
> (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 (Supp. 2010) (emphasis added).

**Discussion / Analysis**

Ample evidence supports the trial court's denial of immunity under the Act. Indeed, the trial court's finding that Appellant did not meet her burden of proving "the parameters outlined in the statute" by a preponderance of the evidence is supported by evidence from the immunity hearing, both in regard to the trial court's specific finding of Appellant was not in imminent danger, as well as several alternative grounds on which immunity was properly denied. The trial court carefully considered the conflicting testimony from Morrigan and Appellant, necessarily assessed their credibility, and concluded Appellant was not in imminent danger when she fired the fatal shot. Therefore, the trial court's denial of immunity under the Act was not an error of law. The case was properly submitted to the jury, with the claim of self-defense being fully presented, and the State having to disprove at least one element of self-defense beyond a reasonable doubt. The trial judge's pretrial immunity ruling must be affirmed.

In her brief on appeal, Appellant first argues the trial court should have presumed she had a reasonable fear of imminent peril under subsection (A) of the Act. (Brief of Appellant, p.25). However, this argument is not preserved for appellate review because it

was not specifically raised to and ruled upon by the trial court. State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003). If an error is not presented to and ruled upon by the trial court, it cannot be raised for the first time to the appellate court. State v. Freiburger, 366 S.C. 125, 135, 620 S.E.2d 737, 742 (2005). Indeed, the appellate court will not consider any issues that were not presented to or passed upon by the trial court. State v. Fleming, 254 S.C. 415, 421, 175 S.E.2d 624, 627 (1970). Here, although Appellant summarized the provisions of the Act (R.p.7-p.12), and later argued the court could review the shooting as a case where Appellant was trying to eject trespassers from her property, Appellant never actually claimed or argued she was entitled to the presumption of "reasonable fear of imminent peril or death or great bodily injury to himself or another person" described in subsection (A). (R.p.171-p.180). Similarly, when denying immunity the trial court did not expressly find Appellant was not entitled to the presumption of reasonable fear found in subsection (A). (R.p.184, line 11-p.185, line 6). Appellant acknowledges the absence of such a ruling in her brief. (Brief of Appellant, p.26). Because the statutory presumption was neither raised to nor ruled upon the trial court, it is not a proper subject of appellate review.

Nevertheless, even if preserved, this argument fails on its merits for two reasons. First, subsection (B) specifically provides the presumption in subsection (A) does not apply if the person against whom the deadly force is used had a right to be in or is a lawful resident of the dwelling or residence. S.C. Code Ann. § 16-11-440(B) (Supp. 2010). "Residence" is defined in the Act as "a dwelling in which a person resides either temporarily or permanently or is visiting as an invited guest." S.C. Code Ann. § 16-11-430 (Supp. 2010). The evidence in the record clearly demonstrates Victim was

temporarily residing in the house with Appellant and Straley. Morrigan testified they had been living there for several weeks before the incident and helped support the household by purchasing food and working around the house. (R.p.52). Appellant herself acknowledged she gave permission for Morrigan and Victim to stay at her house to visit Straley as long as possible before he died. (R.p.105). Because Victim was a resident of the dwelling, Appellant was simply not entitled to the presumption of reasonable fear in subsection (A).

Appellant claims this analysis overlooks the fact that Victim and Morrigan had been told to get out of the residence and argues "their status as guests had been terminated" and, therefore, the presumption should still apply. (Brief of Appellant, p.25). The State disagrees. Even though the definition of "residence" encompasses invited guests, Victim and Morrigan were more than invited guests. By contributing to the household and living there for an extended period of time, they were temporary residents, and Appellant's attempt to downgrade their status to mere guests should be disregarded. In any event, the State submits a person's status as a resident cannot be terminated instantaneously. Here, Victim and Morrigan were in the process of moving their belongings to the car in order to comply with Appellant's request that they leave. Appellant admitted she got up from her chair to help them carry things out, not to eject them. (R.p.124). Victim's status as a resident was still in effect when the shooting took place; therefore, Appellant was not entitled to the statutory presumption.

Second, and more importantly, the presumption in subsection (A) only applies if the person 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 is removing or attempting to remove another person against his will from the dwelling, residence, or occupied vehicle. S.C. Code Ann. § 16-11-440 (A)(1) (Supp. 2010). Absolutely no evidence was presented during the immunity hearing to suggest this was what was happening. Appellant never alleged Victim was unlawfully and forcefully entering the house; rather, everyone agreed Victim was already in the house when the initial altercation and the subsequent shooting occurred. Appellant also never alleged Victim was trying to remove another person from the house against his or her will. Therefore, even if this Court determines Victim's status as a guest was terminated the moment Appellant asked her to leave the residence, Appellant was still not entitled to the statutory presumption.

Also in her brief, Appellant challenges the State's argument at trial that she was not entitled to a claim of immunity because she was advancing a defense of accident rather than self-defense. She insists she was indeed pursuing a claim of self-defense and could seek immunity under the Act because she never claimed to have accidentally discharged the firearm, and instead claimed she intended to fire a warning shot, not aiming at anyone, with the intent to warn her attackers away. Appellant argues it makes no common sense to claim that a death or injury inadvertently flowing from a warning shot would not fall under the protections of the Act. (Brief of Appellant, p.25-p.26). As with her argument about the statutory presumption in subsection (A), this argument is also not preserved for appellate review because it was never ruled upon by the trial court. State v. Dunbar, 356 S.C. at 142, 587 S.E.2d at 693-94 (2003). Although both parties made arguments to the trial court about the State's contention that the Act should not apply where Appellant did not intend to shoot anybody, the trial court's ruling never

addressed this argument, and instead applied the terms of the Act and found Appellant had not proven she was not entitled to immunity. (R.p.184, line 11-p.185, line 6). Thus, this issue is not preserved for appellate review.

If this Court finds the issue is preserved, the State maintains the factual scenario set forth by Appellant nevertheless precludes a finding of immunity under the Act. There is quite a difference between someone who: (1) intentionally attempts to shoot an attacker but accidentally shoots another person instead and (2) someone who fires a warning shot with no intent to shoot an attacker, and that warning shot hits another person. Both scenarios could be described as accidental; however, the intent behind the shot is critical in the context of a person who "has the right to stand his ground and meet force with force, including deadly force." S.C. Code Ann. § 16-11-440(C) (Supp. 2010). The immunity provision itself grants immunity to "[a] person who uses deadly force as permitted by the provisions of this article . . . ." A person firing a warning shot has no intent to use deadly force against an attacker. Indeed, they have the opposite intent—trying to **not** use deadly force. Thus, a person who intentionally fires a warning shot should never qualify for immunity under the Act, and the trial court properly denied Appellant's request.

Finally, Appellant challenges the trial court's ruling that she was not in imminent danger when the fatal shot was fired. (Brief of Appellant, p.26-p.28). Appellant first contends it was "undisputed" that she had a reasonable fear of imminent peril. (Brief of Appellant, p.6). However, her actions following the initial altercation and her statement to the police suggest otherwise. According to Morrigan, a minute or two after the initial fight, as she was helping Victim up from the floor, Appellant appeared in the doorway

with a gun, pointed the gun to the side and pulled the trigger. (R.p.63). Appellant then turned the gun on Morrigan, who grabbed it and forced the second shot into the ceiling. (R.p.63). Later that night, when Appellant was giving a statement to police, she said she retrieved the gun from her bedroom before shooting Victim so she could "show them I mean business." (State's Exhibit #9: DVD Statement, Part 1). Thus, rather than being undisputed, this evidence contradicts Appellant's self-serving testimony that she was in fear of imminent peril from Victim and Morrigan.

In any event, even if Appellant's assertion was accurate, Appellant's emphasis on the lack of directly contradictory evidence improperly discounts Appellant's burden of proof and the trial court's broad discretion in determining matters of credibility. Here, Appellant appears to argue that the Act should be construed to require that a trial court accept the accused's version of the underlying facts. As our Supreme Court stated in Curry, if it adopted Appellant's approach, the trial court would only be able to determine if the accused is not engaged in an unlawful activity and is in a place she has a right to be. 406 S.C. at 371, 752 S.E.2d at 266. The Court expressly found that the General Assembly did not intend such an application. Id. Moreover, undisputed testimony is of no value if that testimony is not credible, and a lack of contradictory evidence does nothing to carry a proponent's burden of proof. Here, although the trial court did not make a specific finding that Appellant was not credible, that finding was necessarily implied in the conclusion that there was no imminent danger at the time of the shooting.

While the Act may be considered "offensive" in the sense that the immunity operates as a bar to prosecution, such immunity is predicated on an accused demonstrating the elements of self-defense to the satisfaction of the trial court by the

preponderance of the evidence, save the duty to retreat. Curry, 406 S.C. at 371-72, 752 S.E.2d at 266-67. Four elements are required by law to establish a case of self-defense. Only the last element, i.e., the duty to retreat, need not be shown when seeking immunity under the Act. Id. at 371, 752 S.E.2d at 266. First, the defendant must be without fault in bringing on the difficulty. Second, the defendant must have actually believed she was in imminent danger of losing her life or sustaining serious bodily injury, or she actually was in such imminent danger. Third, if her defense is based on her belief of imminent danger, a reasonably prudent person 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 person of ordinary prudence, firmness, and courage to strike the fatal blow in order to save herself from serious bodily harm or losing her own life. Id. at 371 n.4, 752 S.E.2d at 266 n.4 (citation omitted).

Because "[a]ny act of the accused in violation of the law and reasonably calculated to produce the occasion amounts to bringing on the difficulty and bars the right to assert self-defense," State v. Douglas, 411 S.C. 307, 321, 768 S.E.2d 232, 240 (Ct. App. 2014), reh'g denied (Feb. 19, 2015) (quoting State v. Bryant, 336 S.C. 340, 345, 520 S.E.2d 319, 322 (1999)), Appellant's own brief—in its recitation of Morrigan's testimony—identifies sufficient grounds for affirming the trial court's determination that Appellant did not deserve immunity under the Act. Morrigan testified she did not hit Appellant until after Appellant kicked her. (Brief of Appellant, p.15). Additionally, Morrigan testified she never heard Victim threaten Appellant. Once Appellant let go of Victim's hair, Victim did not hit Appellant again. (Brief of Appellant, p.15). Also, as noted by the solicitor during the immunity hearing, Appellant retrieved the gun from

another room after she and Victim were separated following the initial altercation, and then returned to show Victim "I mean business." Although not specifically found by the trial court, the evidence demonstrates Appellant was not without fault in brining on the difficulty. Consequently, she failed to carry her burden of proof by a preponderance of the evidence and statutory immunity was properly denied.

Appellant's account of the events immediately leading to the altercation and the deadly shooting of Victim differs factually from Morrigan's testimony. Morrigan testified that she and Victim were packing their things to leave the house and neither she nor Victim made any intentional contact with Appellant; neither she nor Victim bumped Appellant's chair. (R.p.58). Even if her chair was bumped, however, any possible contact with Appellant's recliner would have been unintentional because there was not a lot of room to maneuver with luggage. (R.p.58). By contrast, Appellant testified that while Victim and Morrigan were packing and preparing to leave the residence, "they would come out with a bag and hit the bottom of the leg rest part on [the] recliner . . . knowing that [Appellant] would have to bend that knee again that was already throbbing from . . . the running around . . . earlier that day." (R. 123). Appellant estimated that her chair had been "bumped" at least four times. (R. 123). Confronted with the evidence that the space inside the residence near the recliner was a "tight area," Appellant testified it would be impossible for Victim and Morrigan to unintentionally bump her chair while walking by; instead, she claimed that someone could have bumped her chair "[o]nly if they did it intentionally," because there was "enough room for them to have gotten through to the door without ever touching [her] chair." (R.p.124). It is precisely this sort of conflicting evidence that is for a fact-finder to sort out. Accordingly, during the

pretrial immunity hearing, the judge evaluated the credibility of the witnesses and, based on his conclusions, necessarily found Appellant to be less credible. Notably, the jury made this same determination in convicting Appellant after the case went to trial. Significantly, portions of Appellant's own testimony during the pretrial immunity hearing support both the trial court's determination that Appellant could not satisfy the elements of immunity under the Act, and the jury's ultimate determination that the State proved beyond a reasonable doubt that Appellant did not act in self-defense.

Lastly, Appellant's appeal largely ignores the standard of review and requests that this Court act as a second trial judge in order to overturn the trial judge's credibility finding in regard to Appellant's testimony and the other evidence presented during the pretrial hearing. However, under South Carolina law, the trial judge is in the best position to make credibility findings, not an appellate court. See State v. Smith, 383 S.C. 159, 167-168, 679 S.E.2d 176, 181 (2009) ("Clearly, the trial judge was in the best position to assess the credibility of the witnesses that testified at the hearing on the motion for a new trial."); State v. Cutro, 332 S.C. 100, 117, 504 S.E.2d 324, 332 (1998) ("The trial judge, not this Court, is in the best position to be arbiter of [the witness'] credibility."); State v. Tutton, 354 S.C. 319, 325, 580 S.E.2d 186, 190 (Ct. App. 2003) ("The determination of a witness's credibility must be left to the trial judge who saw and heard the witness and is therefore in a better position to evaluate his or her veracity.") Taken as a whole, the testimony and evidence presented at the immunity hearing supported the trial judge's factual finding that Appellant failed to carry her burden of proof. Moreover, the trial judge was in the best position to weigh Appellant's credibility and conclude that her version of events was not accurate. Appellant failed to meet her

burden and the trial court did not abuse its discretion in denying immunity. Appellant's pretrial testimony was not wholly uncontradicted, and her testimony was not deemed credible by the trial court. Therefore, this Court must accept the trial judge's factual findings, and must affirm the trial judge's ruling that Appellant was not entitled to immunity under the Act. Black, supra; Gracely, supra, Wilson, supra.

## CONCLUSION

For all of the foregoing reasons, the State respectfully requests that this Court affirm the trial court's ruling that Appellant was not entitled to immunity under the Protection of Persons and Property Act.

Respectfully submitted,

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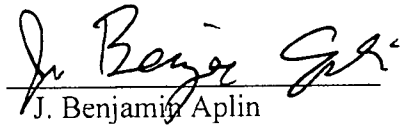
BY: 
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Columbia, South Carolina
July 14, 2016

STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM LAURENS COUNTY
Eugene C. Griffith, Circuit Court Judge

Appellate Case No. 2014-000161

THE STATE,.....RESPONDENT

v.

KATHY LEONARD REVAN,.....APPELLANT.

## CERTIFICATE OF COUNSEL

The undersigned hereby certifies the Final Brief of Respondent complies with Rule 211(b), SCACR.

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Columbia, South Carolina
July 14, 2016

STATE OF SOUTH CAROLINA
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APPEAL FROM LAURENS COUNTY
Court of General Sessions

The Honorable Eugene C. Griffith, Circuit Court Judge

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Appellate Case No. 2014-000161

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THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

KATHY LEONARD REVAN,

APPELLANT.

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# FINAL REPLY BRIEF OF APPELLANT

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### CASES



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## ARGUMENT IN REPLY

## ISSUE PRESERVATION

In Reply to Respondent's Brief , Appellant would submit the following. Respondent argues that Appellant has not preserved the legal assertion that she was entitled to the presumption of *"reasonable fear of imminent peril or death or great bodily injury to himself or another person."* Brief of Respondent, p. 16-17. Appellant notes that she repeatedly testified that she was in fear for her life and that she, having already been badly beaten, was afraid they were going to come back after her. ROA p. 139, l. 1- p. 141, l. 22. She testified that while she was in her bedroom she could hear Tammy cursing at her father. Appellant stated that she was afraid that they were going to either come in her room and jump on her again, or, that they were going to jump on Straley. Because of those fears, she armed herself before going back out of her bedroom. ROA p. 129, l. 3 - p. 130, l. 15.

Appellant would submit that the Court had a duty to apply the appropriate law once she moved for immunity pursuant to the act. Respondent argues that Appellant would not be entitled to the presumption because the facts on her case do not meet the requirements of S. C. Code Ann. § 16-11-440 (Supp. 2010), which Respondent acknowledges is the central provision of the act. Respondent's analysis on the issue is both flawed and incomplete.

Respondent argues first that Petitioner's argument that she was entitled to the presumption that she had a reasonable fear of imminent peril under § 16-11-440 is not preserved for appellate review. Petitioner urges the Court to rule to the contrary. Petitioner moved for immunity pursuant to the act. This was a hearing not a jury trial.

The cases cited by Respondent on the question of issue preservation all dealt with jury trials in General Sessions Court. In *State v. Dunbar*, 356 S.C. 138, 587 S.E.2d 691 (2003), this Honorable Court dealt with a pre-trial Motion to Suppress which was argued at trial purely on the general authority of both State and Federal constitutional provisions. Specifically, this Court found that *Dunbar* had not argued that the search warrant, and its supporting affidavit, failed to comply with *state statutory requirements*. Id, 356 S.C. at 142-143, 587 S.E.2d at 694. In Appellant's case she expressly argued that she was entitled to immunity under the act.

In *State v. Freiburger*, 366 S.C. 125, 620 S.E.2d 737 (2006) this Court found *Freiburger* failed to preserve his objection to the admissibility of a pawn shop receipt and other records that indicated he had purchased a revolver where he failed to enter a timely objection to their admission. In so ruling, this Court found the following,

> Freiburger next contends the trial court erred in admitting certain pawn shop records pursuant to the Ancient Documents rule and the Business Records Exception, claiming *135 they were not properly authenticated by the state. We find this issue is not adequately preserved for review, and the record is, in any event, insufficient to enable this Court to make an intelligent review.
>
> It appears Freiburger primarily objects to admission of the Capital Loan and Pawn receipt and records which indicate Freiburger purchased the H & R revolver on February 28, 1961. However, there is no objection to their admission during the testimony of Ms. Russ, the then 77 year old daughter of the pawn shop owner. In fact, certain exhibits were specifically entered without objection. To the extent that Freiburger did object, the objections came long after the documents had been received into evidence, most of which had been introduced into evidence without objection.

Id, 366 S.C. at 134-135, 620 S.E.2d at 742. Here, Appellant's counsel argued at the outset of her immunity hearing that the presumption of fear of imminent serious bodily injury or death, as provided for in the act, would apply to Appellant.

*State v. Fleming*, 254 S.C. 415, 175 S.E.2d 624 (1970), dealt with a challenge to the trial court's supplemental jury charge, in response to a jury question, in a case involving convictions for rape and assault and battery of a high and aggravated nature. In ruling that the appellate issues argued in *Fleming* were not preserved, this Court found that the errors argued on appeal had not been argued at trial. Specifically, the Court noted that at trial *Fleming* had argued that the trial court erred in recharging only *"on the single element of force"* as opposed to *recharging "the entire charge on the matter of rape and what constitutes rape."* As this Court ultimately found, on appeal *Fleming* argued two entirely different claims; trial court error *" (1) in failing to give a proper definition of force and justifiable fear, and (2) in his definition of force and fear he commented on the facts."* For that reason, the issues argued on appeal in *Fleming* were found not to be *"preserved for consideration here by an appropriate exception ..."*. Id, 254 S.C. at 421, 175 S.E.2d at 627. In the case before the Court, Appellant's lawyer moved for immunity under the act. While his arguments in support of that motion may not have been perfectly articulated, they nevertheless made out a claim for immunity under the act and specifically referenced her right to the presumption of fear of peril set forth in the act.

In this case, Appellant made a Motion for Immunity pursuant to the Castle Doctrine. In arguing for a grant of immunity, Appellant's counsel expressly addressed the ***"presumption of a reasonable fear of imminent peril"*** found in § 16-11-440. ROA

p. 8, l. 6 - p. 9, l. 23. As set forth in detail in the Initial Brief of Appellant, at the time of the shooting in this case, Appellant had been badly beaten, and was facing continued jeopardy at the hands of two much younger women who not only outnumbered her, but also significantly outweighed her. One of these women was known to Appellant to have been trained in hand to hand combat. These women had been asked to leave Appellant's home. As she cleaned herself up after being savagely beaten, she heard Tammy cursing at her father who was dying of stage IV cancer. Appellant testified that she feared these women were either going to *"come into my room and jump on me again or that they were going to jump on Lynn [Straley]."* ROA p. 130, ll. 1-11.[1] Photographs of Appellant introduced during the immunity hearing illustrated her injuries. *See*, Defense Exhibits, No. 1-8. Thus, not only did Appellant's counsel raise the presumption of reasonable fear of imminent peril, but Appellant testified to her ongoing fear and presented evidence of the extent of her injuries prior to this shooting. Appellant submits that this aspect of her argument was clearly preserved below. In addition, Appellant would bring the Court's attention to the fact that Respondent fails to even mention Appellant's assertion that she was afraid not only for herself, but for her gravely ill companion who was dying from stage IV cancer. Thus, Appellant not only asserted self-defense, but defense of others as well.

## MERITS

Respondent argues that even if this issue is deemed preserved, Appellant would not be entitled to the presumption because the Victims had a right to be in the residence as lawful residents of Appellant's home within the meaning of § 16-11-440 (B) (Supp.

[1] State's Exhibits No. 33 and 33 B diagrams of the residence, were introduced during Appellant's trial. Those exhibits document that there was no door to the outside in Appellant's bedroom.

2010). Respondent's Brief, pgs. 17-18. In support of this position, Respondent states that, *"Appellant herself acknowledged she gave permission for [Tammy] Morrigan and Victim to stay at her house to visit Straley as long as possible before he died."* Respondent's Final Brief, p. 1, para. 1, (emphasis added). The testimony referenced by Respondent actually stated, *"it was fine with me that they wanted to visit Lynn and I wanted him to have as much time with his children as he could before he died."* ROA p. 105, ll. 1-5. Thus, Appellant did not extend the kind of open ended invitation argued by Respondent. Likewise, Respondent states that, *"Appellant admitted she got up for her chair to help them carry things out, not to eject them."* Respondent's Final Brief, p. 18, para. 2. The exact testimony of Appellant reflects that Straley's daughter and her girlfriend were taking a long time to pack their belongings and leave, after being told to leave. This prompted Appellant to say, *"the hell with this, I'm going to help them carry it out ..."*. ROA p. 124, l. 1- p. 125, l. 8. While it is accurate that Appellant testified that Straley attempted to get the two women to *"think it over and see how things are in the morning"*, that statement was made after the Victim confronted him and Appellant about the conversation between Appellant, Straley and Tammy during which they told Tammy they had concerns about Victim's motives for being involved with her. The record below reflects two important considerations on this point. The residence was owned by Appellant and she and Straley were not a married couple. Therefore, he had no legal authority to give these women permission to stay. More importantly, Appellant's testimony confirms that *after* the verbal altercation, but *before* she was first physically assaulted, she told Tammy, *"it's time for you to get your s—t and get out of my d—n house."* ROA p. 121, l. 1- p. 122, l. 18. After Appellant heard Straley urge his daughter

to sleep on the decision to leave, Appellant testified that she heard Tammy respond, *"no, they were gonna leave."* ROA p. 123, ll. -10. Appellant therefore initially had reason to believe these two women were going to honor her demand that they leave notwithstanding any effort by Straley to change their minds. It was therefore, unnecessary for her to make an issue out of the fact that it was her residence and that Straley did not have the authority to override her demand for them to leave.

Appellant's testimony reflected that after packing for approximately thirty (30) minutes, Tammy and Victim made multiple trips to their car with bags and that, in the process of doing so, they deliberately bumped the leg rest on her chair *"at least four"* times causing her pain. After Appellant decided to help the women get their belongings to their car, she personally put two bags she found in the room they had been using outside. ROA p. 123, l. 11- p. 125, l. 15. The record therefore, clearly establishes that these guests had been firmly told to leave by the only person with the authority to give them permission to stay and that most, if not all, of their possessions had been packed and removed from the residence before the physical altercation began when the deceased *"took her body and knocked into"* Appellant causing her to lose her balance. ROA p. 125, ll. 1-15. Therefore, Appellant submits that even if these women were entitled to adequate time to remove their belongings, that factor would be far outweighed by the fact that they had already removed most of their property from the residence and by the violent nature of their altercation with Appellant. Appellant submits that their right to pack and remove what little remained of their belongings certainly did not outweigh Appellant's right to safety in her own home.

Next Respondent argues that there was no evidence presented that the person

against whom the deadly force was used was engaged in behavior hat would meet the requirements of § 16-11-440 (A)(1). Respondent's Final Brief , p. 18-19. Respondent however, totally ignores § 16-11-440 (A)(2) which provides for the presumption of fear of imminent peril if the person 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."* (Emphasis added). Appellant would submit that her initial assault by Victim, and her subsequent beating by both women, constituted *"an unlawful and forcible act"* which had occurred before this shooting. She submits that there was ample evidence in this case that Appellant had every reason to fear for her safety and that of Straley, and therefore, that she had the right to stand her ground and not retreat pursuant to S.C. Code Ann. § 16-11-440 (C). As previously noted, Appellant had been seriously injured, her assailants were not leaving her home despite being told to vacate, and one of these women could be heard continuing to scream at her frail, dying companion. On the facts of this case Appellant had every right to retrieve her gun and use it to protect herself and her companion, Straley.

With regard to Respondent's assertion that Appellant was not entitled to the protections of the act because she testified that she didn't *deliberately* shoot Victim, Appellant most respectfully submits that argument borders on being just plain silly. Such an analysis is not only illogical, it would lead to absurd results. Appellant *is not* claiming the first shot was *accidentally fired.* She does assert the shot she fired deliberately as a warning shot accidentally hit Victim. Simply put, if in any situation a person would have the right to use deadly force in self-defense, it is ridiculous to suggest that an individual prudent enough to try and avoid shooting someone by firing a warning shot would not be

eligible for immunity under the act. Likewise, the evidence in this case, when viewed under the preponderance of the evidence standard, indicated that the second shot was not deliberately fired at all, but rather went off accidentally while Appellant and Tammy were tussling for control over the weapon. ROA p. 64, ll. 16-18. Once again, Appellant would submit that she had good cause to defend herself by resisting allowing Tammy to gain control over this pistol. Appellant submits that she was acting in self-defense when both shots were fired and should not be penalized by an interpretation of §16-11-440 would not allow her to try and minimize harm by firing a warning shot.

Respondent additionally argues that Appellant did not meet the element of self-defense which requires that she be without fault in bringing about the difficulty. Respondent's Final Brief, pgs. 22-23. In support of that position, Respondent argues that Appellant admitted the fact that Tammy testified she didn't punch Appellant until after Appellant kicked her, and that she never heard Victim threaten Appellant. Respondent's Final Brief, pg. 22, para. 2. Respondent's analysis ignores key factual issues. Tammy was outside taking luggage to the car when this event escalated into a physical fight after Victim shoved Appellant with her body causing Appellant to lose her balance and begin to fall. Once that happened, Appellant had every right to defend herself, and under the circumstances, to view these two women as acting together and as jointly posing a clear and present danger to her safety and that of Straley as well. Furthermore, Respondent's argues that Appellant further failed to meet this requirement for a valid claim of self-defense because she armed herself after she, Victim and Tammy were separated, and she had gone into her bedroom. Once again, Appellant most respectfully submits that Respondent's argument is flawed. These two women did not leave Appellant's home

after they were all physically separated by Straley, despite have been told to go. The diagrams of the residence introduced by Respondent at trial verify that there was no exit to the outside in Applicant's bedroom. See, State's Exhibits 33 and 33B. Even if Appellant could have crawled out a window, which she had no legal obligation to do, she perceived her companion, Straley, to be in danger. She testified that she could hear Tammy cursing at him in the other room before she made the decision to arm herself. While Appellant could arguably have protected *herself* by staying in her bedroom armed against any effort by the women to come in her bedroom to attack her further, she could not have protected Straley by doing so. Appellant could hear a heated discussion between Tammy and Straley during which he was being cursed at by his daughter. Straley was in a very delicate physical condition due to his advanced cancer.

At some point during the scuffle between Appellant, Tammy and Victim, Straley's feeding tube had been ripped out and he was bleeding. He went to the kitchen to reinsert the tube and when he came back out, Victim and Appellant were on the floor. According to Straley's deposition he thought Victim pulled his feeding tube out. He stated that he actually went in the kitchen to fill a ziplock with ice for Appellant's face. He looked up when he heard Tammy say, "*are you crazy*" and at that point he saw Defendant had a gun in her right hand. ROA 64, ll. 6-15 and ROA 157, l. 19 – p. 159, l. 22. Given the events which had just taken place, Appellant submits that it was not unreasonable for her to believe it necessary to go back out of her bedroom to demand that these women leave her residence. Considering the beating she had already suffered, it was not unreasonable for Appellant to arm herself in self-defense before going back out to demand their departure. Once Tammy lunged at her, Appellant was within her rights

to defend herself with that weapon. She should be no less entitled to immunity because she tried to avoid actually shooting anyone by firing a warning shot. The decision to fire a warning shot when Tammy ran toward her was perfectly understandable since Tammy was her dying companion's daughter.

Lastly, Respondent states that Appellant has largely ignored the standard of review in arguing that the lower court erred in denying her immunity on the facts of this case. Respondent's Final Brief, pgs. 24-25. In making his ruling in this matter, the presiding judge ruled that Appellant was no longer in imminent danger once the physical altercation broke up. Appellant again most respectfully asserts that this ruling supports the conclusion that *the Court, not Appellant*, failed to apply the proper standard. Specifically, the Court ruled as follows:

> I've read the statute very, very carefully this morning three times and I've read several cases that we've been referencing also this morning. I mean, where I have a problem with the testimony as far as what started what is once the fight breaks up, everybody goes back to each end of the house and then they come back, depending on who you hear, they come back in different orders, but understanding how the statute's written, I'm - - I'm gonna respectfully deny your motion for immunity. I - - ***I just don't believe that there was an imminent danger when they departed.*** Once they departed, they departed, and had it been an on-going thing, but I - - but there is conflicting testimony both ways as to what happened next, who came back in the room first. No question where the gun came from, but I do not believe that it's met the parameters outlined in the statute of, what, 16-11-440 and 430, 420. So, respectfully, your motion is denied on the immunity request.

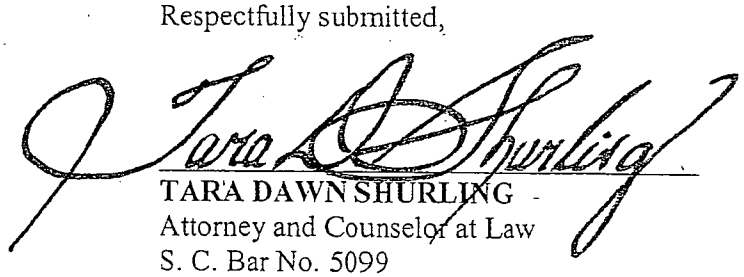
ROA p. 184, l. 11- p. 185, l. 6, (Emphasis added). As argued by Appellant in her Initial Brief of Appellant, *"the operative question is whether a reasonably prudent person, of*

*ordinary firmness and courage would have entertained the belief that they were in imminent danger"*, not whether the Court believed she actually was. *See, State v. Davis*, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984). Applying that standard, Appellant submits the trial court abused its discretion in failing to grant immunity in this case. The question before the Court was not whether the trial judge thought Appellant was till in peril, but rather she believed she was under the reasonable person standard. Victim and Tammy had been told to get out of Appellant's home. They continued to act in an aggressive manner and failed to leave even after the conflict turned violent. Tammy was heard cursing at Straley who was literally a dying man. Appellant acted reasonably in believing Tammy and Victim posed an ongoing threat. Immunity should have been granted.

## CONCLUSION

Based upon all the arguments and authorities addressed herein, as well as those advanced in Appellant's Initial Brief, Appellant asks that her convictions and sentences be reversed and that her case be remanded to the circuit court for entry of an order granting immunity on all charges.

Respectfully submitted,



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ATTORNEY FOR APPELLANT

This 20th day of July, 2016.

STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM LAURENS COUNTY
Court of General Sessions
The Honorable Eugene C. Griffin, Circuit Court Judge

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Case No. 2014-000161

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STATE OF SOUTH CAROLINA,

RESPONDENT.

v.

KATHY LEONARD REVAN,

APPELLANT.

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## CERTIFICATE OF COUNSEL

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The undersigned attorney hereby certifies that certificate that this Final Reply Brief of Appellant complies with Rule 211(b), SCACR. The undersigned also certifies that this Final Brief is in compliance with the August 13, 2007 Order of the Supreme Court of South Carolina relating to the inclusion of personal data identifiers and other sensitive information in documents.

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This 20th day of July, 2016.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM LAURENS COUNTY
Court of General Sessions

The Honorable Eugene C. Griffith, Circuit Court Judge

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Appellate Case No. 2014-000161

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THE STATE OF SOUTH CAROLINA, RESPONDENT,

v.

KATHY LEONARD REVAN, APPELLANT.

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**CERTIFICATE OF SERVICE**

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The undersigned attorney hereby certifies that a copy of the Final Reply Brief in the above-entitled case has been served upon opposing counsel by depositing in the U.S. Mail, postage prepaid, this 20th day of July, 2016, addressed as follows:

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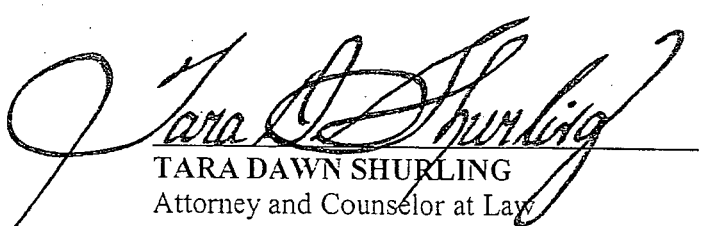

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SWORN TO BEFORE me this 20th day of July, 2016.

Notary Public for South Carolina (L.S.)
My Commission Expires: Jan. 16, 2017