STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS



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Appeal from Richland County

Honorable Clifton B. Newman, Circuit Court Judge
Honorable Robert E. Hood, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

RICHARD A. CAPELL,

APPELLANT

APPELLATE CASE NO 2016-000475

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# FINAL BRIEF OF APPELLANT

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Whether the trial court erred in ruling that Appellant was not immune from prosecution for pointing and presenting a firearm pursuant to the Protection of Persons and Property Act where the Act provides immunity to a person who is not engaged in unlawful activity and meets force with force when he is attacked in a place where he has a right to be if he reasonably believes it is necessary to prevent death or great bodily injury to himself?

## STATEMENT OF THE CASE

On November 12, 2015, the Richland County Grand Jury true-billed an indictment against Appellant Richard Capell for pointing and presenting a firearm in violation of S.C. CODE ANN. § 16-23-410. R. 280. The charges arose from an incident on February 16, 2015, between Capell and John Bunucci, the manager of the condominium complex where Capell owned a unit and resided.

On January 13, 2016, Capell filed a notice and motion for immunity from prosecution pursuant to S.C. CODE ANN. § 16-11-440(c). R. 1; R. 2. Defense counsel also filed a written memorandum in support of immunity. R. 3.

On January 19, 2016, appeared before the Honorable Clifton B. Newman for a hearing to determine Capell's immunity under the Protection of Persons and Property Act. Capell was represented by Sarah Jurick and Maisie Osteen, and the state was represented by assistant solicitors John Conrad and Joe Berry. R. 11. Judge Newman heard testimony from Capell, Capell's mother Susan Mitchell, and the alleged victim John Bunucci. R. 12. Additionally, Judge Newman reviewed a video of the incident captured by a "body camera" worn by the Capell. R. 28, ll. 1-19; R. 45, l. 15 – 47, l. 10; State's Ex. 1 (on file with this Court). Judge Newman ultimately denied the defense's motion for immunity. R. 77, l. 6 – 78, l. 13

On January 25-26, 2016, Capell appeared for trial before the Honorable Robert E. Hood and a jury. R. 82. The jury returned a verdict of guilty. R. 270, l. 18 – 271, l. 16. On February 19, 2016, Judge Hood sentenced Capell to five years suspended upon the service of three years, followed by five years on probation. R. 277, l. 23 – 278, l. 23.

This appeal follows.

## ARGUMENT

**The trial court erred in ruling that Appellant was not immune from prosecution for pointing and presenting a firearm pursuant to the Protection of Persons and Property Act where the Act provides immunity to a person who is not engaged in unlawful activity and meets force with force when he is attacked in a place where he has a right to be if he reasonably believes it is necessary to prevent death or great bodily injury to himself.**

### Introduction

This case involves the applicability of the Protection of Persons and Property Act (the "Act") to the act of pointing and presenting a firearm. S.C. CODE ANN. § 16-11-410 et al. The Act provides that "[a] person who is not engaged in an unlawful activity and who is attacked in another place where he has a right to be . . . 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 . . . ." S.C. CODE ANN. § 16-11-440(C). Our Courts have determined that, in order to be granted immunity from prosecution under the Act, a defendant must prove all the elements of self-defense, except the duty to retreat, by a preponderance of the evidence. State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011).

Thus, to be entitled to immunity the defense must prove the following elements: (1) the defendant must be without fault in bringing on the difficulty; (2) the defendant must have been in actual imminent danger of losing his life or sustaining serious bodily injury, or he must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; and (3) if his defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief, or if the defendant was actually in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life. State v. Curry, 406 S.C. 364, 752 S.E.2d 263 (2013).

In the present case, Appellant Capell had a verbal dispute with John Bunucci, the manager of the condominium complex where Capell owned a unit and resided. Capell left Bunucci's officer after slamming his hand on the desk, telling Bunucci that he would see him in court and slamming the office door. Bunucci, who was eight inches taller and outweighed Capell by at least one hundred pounds, then swung the office door open, rushed toward Capell, and yelled "Are you threatening me? 'Cause if you're threatening me, I'll fucking have your shit down." Capell did not pull the trigger on his firearm because he was successful in repelling the threat against him by displaying his gun and telling Bunucci to "get the fuck back."

As will be discussed more fully *infra*, Judge Newman erred in ruling that Capell failed to meet his burden of proof that he was entitled to immunity from prosecution. Judge Newman properly found that Capell was not engaged in unlawful activity, but the remainder of his findings were not supported by the evidence or applicable precedent.

## Relevant Facts

The incident arose from a dispute between Capell, a disabled homeowner residing in the Point Arcadia condominium complex, and the condominium complex manager, John Bunucci. In addition to some other problems, Capell had previously requested that his service dog, Bandit, be allowed to accompany him in the swimming pool at the complex. Capell said that Bunucci originally told him that Bandit was not allowed in the pool. Bunucci claimed that he said he did not know if the dog was allowed in the pool but would find out. Capell later received an e-mail from Bunucci telling him that his dog was allowed in the pool but requesting that he only access the pool during "off hours" when others would not be in the pool. R. 13, l. 21 – 24, l. 10; R. 48, l. 17 – 50, l. 5; R. 60, l. 15 – 61, l. 10. On February 16, 2015, Capell donned a makeshift "body

camera" and entered the complex's club house, where Bunucci's office was located. R. 28, ll. 1-29; R. 45, l. 15 – 47, l. 10; State's Ex. 1.

*Video of Incident*

The video begins with Capell getting out of his car and going into the club house. State's Ex. 1. 00:00 – 00:45. Capell opened the office door and began asking Bunucci about various problems, including his dog's access to the pool and the failure to provide Capell with a copy of the condo bylaws. Capell told Bunucci he could either "confess" or he would show up with the police. When Bunucci would not admit any wrongdoing, Capell said the desk with is hand and said "You're going to plead the Fifth? Good. I'll see you in Court. Have a good day." **Capell turned around and slammed the office door as he left.** State's Ex. 1. 00:57 – 02:42. As Capell was leaving, Bunucci quickly got up from his desk and said: "Are you threatening me?" Capell responded "no" and continued to walk toward the clubhouse door to leave. **As Bunucci burst through the office doorway and rushed toward Capell, Bunucci yelled: "'Cause if you're threatening me, I'll fucking have your shit down.**" Capell turned around and pointed his gun at Bunucci and said: "Get the fuck back." Bunucci stopped and said: "Did you just pull that off?" Capell responded: "Yes. Get the fuck back." At that point, Bunucci said okay, turned around, and went back into his office. Capell left the clubhouse and returned to his car. State's Ex. 1. 02:40 – 03:29. Though the entire video was three minutes and twenty-nine seconds, only thirteen seconds passed from the time Capell hit is hand on the desk until the time Bunucci turned to go back into his office. State's Ex. 1. 02:37 – 02:50.

*Testimony*

In addition to the video, Judge Newman heard testimony from Capell's mother Susan Mitchell, Capell, and Bunucci. Ms. Mitchell provided the court with information regarding

Capell's physical disabilities. Capell was born a twin with multiple birth defects. His abdomen was exposed in the front and he had severe bilateral club feet, with his toes up against the calves of each leg. Despite a series of procedures to close the abdominal area at age ten, Capell continued to have problems and mesh was used to cover the abdominal wall. Over the years, the mesh began to erode and Capell suffered a series of hernias. R. 14, l. 7 – 15, l. 24; R. 17, ll. 1-7. A few years prior to the hearing, doctors determined that he needed a total abdominal wall reconstruction which had not yet been performed. R. 15, l. 24 – 16, l. 5; R. 19, l. 8 – 20, l. 15. Capell also suffered from lung problems, bone loss, and arthritis. R. 16, l. 8 – 17, l. 7; R. 17, ll. 8-23. **Ms. Mitchell said that Capell had to be very careful about lifting and carrying things or getting in a position where he would have a direct blow to his abdomen.** R. 18, ll. 17-24. Though Capell had volunteered as an emergency medical technician, he was disabled due to his myriad of health problems. R. 21, l. 2 – 22, l. 4.

Capell testified that he was a concealed weapons permit ("CWP") holder prior to and during the incident with Bunucci. R. 94, ll. 7-16. Capell explained that he went to Bunucci's office in the Point Arcadia clubhouse after receiving a call from an Americans with Disabilities Act advocacy group, who told him that Bunucci had been making "inappropriate phones calls to them and to PALS and other places," ostensibly about Capell. He wanted Bunucci to confess to denying pool access to his service dog in violation of S.C. CODE ANN. § 43-33-40.[1] Capell became "perturbed" when Bunucci would not answer his questions, so he slammed his fist on the

[1] S.C. CODE ANN. § 43-33-40 provides: "(A) It is unlawful for a person or his agent to: (1) deny or interfere with admittance to or enjoyment of the public facilities enumerated in Section 43-33-20; or (2) interfere with the rights of a totally or partially blind or disabled person under Section 43-33-20. (B) A person who violates the provisions of this section is guilty of a misdemeanor and, upon conviction, must be fined in the discretion of the court or imprisoned not more than three years, or both."

desk, said "I'll see you in court," turned around and started to leave.[2] R. 23, l. 17 – 24, l. 23; Imm. R. 26, l. 22 – 27, l. 16. Capell admitted that his voice was raised and he was aggravated. While the solicitor described Capell as "exteremely close" to Bunucci, Cappell explained that his close proximity was merely a product of the small footprint of the office space. R. 27, ll. 17-20; R. 28, l. 20 – 29, l. 12.

Capell said that before he could get the office door closed, Bunucci was up and out of his desk charging toward him and yelling. Capell slammed the door shut and retreated but he heard the office door open behind him. R. 24, l. 23 – 25, l. 5; R. 29, l. 13 – 30, l. 15. Capell felt threatened because Bunucci had never raised his voice like that to Capell before and because of Bunucci's size. He noted the great disparities in their heights and weights, with **Bunucci standing 6'2" and weighing over one hundred pounds more than Capell's slight 5'6" frame.**[3] R. 30, l. 16 – 31, l. 3; R. 3 (noting that Capell weighed one-hundred fifty pounds). Capell also noted Bunucci's remark that he would take Capell down. R. 33, ll. 4-15; R. 34, ll. 1-10. While Capell did not see Bunucci as he came through the door because his back was turned, he could hear the tone and aggression in his voice and the door opening as he advanced closer to Capell. R. 31, l. 4 – 32, l. 12; R. 38, l. 11 – 39, l. 2. The men were only six to eight steps apart when Bunucci came through the door and took two or three more steps toward Capell. Though Capell did not see any weapon in Bunucci's hand and did not know him to carry a weapon, he noted how quickly the distance between them could have been closed and that one's bare hands can be a weapon. R. 34, ll. 12-14; R. 35, l. 18 – 36, l. 16.

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[2] Though Capell testified that he said "I'll see your ass in court," the video reveals that he actually said "I'll see you in court." Compare R. 24, ll. 19-20, with State's Ex. 1, 02:37 – 02:39.

[3] When the Court reviews the video tape, it will be able to observe Bunucci's large stature.

Capell "engaged the threat" by pulling out his weapon to stop Bunucci. Capell said he was in fear of great bodily harm due to his vulnerability to such an attack but said there was no need to shoot Bunucci once he stopped and stepped back. R. 25, ll. 5-24; R. 32, l. 13 – 33, l. 15; R. 35, ll. 8-15. Capell uploaded the video of the incident to Youtube and sent a copy to the Forest Acres Police Department. R. 39, l. 20 – 40, l. 25.

Bunucci also testified at the immunity hearing. Bunucci agreed that his office was located in the club house and that residents could "absolutely" come there to talk to him. Imm. R. 59, l. 14 – 60, l. 14. Capell came into his office around lunchtime on February 16, 2015, while Bunucci was trying to fix the modem so that he could get materials ready for a meeting that night. R. 44, l. 10 – 45, l. 10. Bunucci expressed his frustration over how Capell talked to him and said: "I don't expect being treated like that by anybody and to get threatened with jail time for something that I had no idea what was going on, was just crazy." R. 47, ll. 14-22. Bunucci was aware that Capell was a CWP holder and recounted previous complaints and interactions with Capell prior to the incident, though none of them turned violent. R. 47, l. 25 – 53, l. 5. On the date in question, Bunucci claimed that Capell was standing over him and "extremely, extremely aggressive" such that he felt threatened. R. 53, ll. 6-15. Though belied by the video, Bunucci claimed that Capell slammed his hands right between Bunucci and the computer on which he was working. R. 53, l. 17 – 54, l. 4; State's Ex 1, 02:35 – 02:40. Bunucci said that when he got up he was thinking "enough is enough" and that Capell was not his boss. R. 53, l. 1 – 55, l. 1.

Bunucci said that Capell "bolted out" of the office so he "got up and opened the door to yell at him." R. 57, ll. 5-9. Bunucci contended that when he said "I'll fucking have your shit down" he meant that he was going to call the cops and that Capell "was going to go down for all

this, all the BS that he's pulling." R. 55, ll. 2-7. He alleged that he was going to press charges against Capell for threatening him or for harassment. R. 55, ll. 8-13; R. 65, ll. 6-16. Bunucci said that he did not have a weapon and claimed that he was not going to hit Capell. R. 55, ll. 18-25. Bunucci said that "it all happened so fast." Though he did not see Capell pull the gun, he believed it was pointed at the door before he even came out of the office. R. 55, l. 14-17; R. 56, ll. 1-17; R. 63, ll. 1-25. Bunucci said that once he saw the gun he was not going to stand there and confront Capell anymore, so he turned around and called the police. R. 56, ll. 18-24. Bunucci claimed that after he returned to his office, Capell "stood there because he was -- I think he was, I think he was upset that I didn't go after him so he was disappointed that he couldn't shoot me 'cause he, he came there with the intent to provoke and to pull his weapon." R. 64, ll. 4-20.

*Arguments of Counsel*

Defense counsel argued that Capell was not engaged in an unlawfully activity, citing his right to air his grievances to the property manager. Though annoying, Capell's actions were not illegal. His only threats were to contact police and to file a civil law suit. R. 66, l. 13 – 67, l. 20. It was undisputed that Capell had a right to be in the clubhouse and office as a condo owner. R. 67, ll. 20-25. While Bunucci did not make any physical contact with Capell, Capell reasonably believed that he was going to be attacked. Defense counsel noted that the gap between the men closed very quickly, Bunucci's heated words when he burst out of the door, Capell's never having heard Bunucci raise his voice and be so angry, and the disparity in the mens' sizes. She also noted Capell's serious disabilities such that one blow to his stomach could cause great bodily injury. R. 68, ll. 1-21. Defense counsel argued that Capell "has to have a way to stop

something in self-defense before it actually happens" and directed the court to the self-defense case of State v. Dickey, 394 S.C. 491, 716 S.E.2d 97 (2011). R. 68, l. 22 – 69, l. 2.

Judge Newman interrupted and said "**Well, if you're talking self-defense then you're -- then we're not talking stand your ground. We're talking you're convincing the jury about self-defense, not me.**" R. 69, ll. 3-6 (emphasis added). Defense counsel argued that self-defense is relevant to establishing immunity. She noted that the Dickey court considered the disability and size differences in determining that the defendant had the right to shoot somebody who was coming at him quickly though it turned out that they were unarmed. She argued that Capell was similarly entitled to pull his gun on someone who he thought was going to seriously injure him. Defense counsel also pointed to the Court to the memorandum of law that she filed in this case. R. 69, ll. 7-20; R. 3.

The solicitor agreed with the defense's position that in order to be entitled to immunity, the defense must "establish a baseline of self-defense" and "meet the specification of the Act." R. 69, l. 22 – 70, l. 12. However, the solicitor argued that the defense's reliance on case law regarding acting on appearances was misplaced and that the Act requires that the victim use force upon the defendant in order for immunity to apply. R. 70, ll. 12-22. He argued that a reasonable view of the testimony and video could lead to the conclusion that a reasonable prudent person would not believe that he was under physical attack in the situation that Capell was in. R. 70, l. 22 – 71, l. 4.

Regarding the elements of self-defense, the solicitor noted the defense's quotation of State v. Bryant, 336 S.C. 340, 345, 520 S.E.2d 319, 322 (1999), that "[a]ny act of the accused in violation of law and reasonably calculated to produce the occasion amounts to bringing on the difficulty and bars his right to assert self-defense as a justification or excuse for a homicide." He

argued that a defendant can still be at fault in bringing on the difficulty even if he is acting lawfully, citing State v. Strickland, 389 S.C. 210, 697 S.E.2d 681 (Ct. App. 2010). He argued that Capell's tone and actions were calculated to provoke Bunucci and that Capell "got what he asked for." R. 71, l. 5 – 73, l. 22. The solicitor further argued that Capell did not retreat from the situation in order to become later entitled to self-defense. Though both Bunucci's testimony and the video show that he was still standing up behind the desk when the door was closed, the solicitor argued that Capell "slammed the door in the victim's face," continuing the hostilities. R. 73, l. 23 – 75, l. 1.

Defense counsel responded that the solicitor's argument regarding "force with force" suggests that someone has to wait to be physically assaulted or shot in order to defend themselves, which is a complete contradiction to the purpose of the Act. R. 75, l. 19 – 76, l. 19. Regarding acting on appearances, defense counsel argued that a threat to sue the property management office was a far cry from the language used in Strickland. Additionally, the solicitor's theory that Capell came there intending to incite to Bunucci was belied by the fact that Bunucci had never reacted in such a fashion before during a confrontation regarding the same or similar matters. R. 76, l. 19 – 77, l. 5.

*Judge Newman's Ruling*

At the conclusion of the immunity hearing, Judge Newman found that Capell was not engaged in unlawful activity. R. 77, ll. 9-14. However, he found that Capell failed to show that he was attacked or under the threat of any force, finding instead that Capell was the aggressor. R. 77, ll. 15-22. Judge Newman further found that there was nothing that demonstrated any reasonable belief that his action – pulling a weapon – was necessary to prevent death or great bodily injury. R. 77, l. 22 – 78, l. 4. Thus, Judge Newman ruled that Capell "failed to convince

the Court by a preponderance of the evidence that he's entitled to immunity." R. 78, ll. 4-6. He further said:

> I think the entire hearing in that connection is a waste of time if you believe that he can enter into the property manager's office in a threatening and menacing fashion and pull a gun on him after threatening to get him arrested and sued and all that, and then to expect the law to protect his actions. So I deny the motion.

R. 78, ll. 7-13.

*Trial and Renewal of Motions*

Capell's trial proceeded in much of the same fashion as the immunity hearing. At the close of the state's case, the defense renewed all of their previous motions to include "the immunity hearing on January 19th." R. 225, ll. 18-20. The trial judge indicated that all prior rulings would stand. R. 225, ll. 21-22. Defense counsel also renewed all of their motions following the jury's verdict. R. 275, ll. 5-9.

## Discussion

### A. Capell established the elements required under S.C. CODE ANN. § 16-11-440(C).

Pursuant to S.C. CODE ANN. § 16-11-440(C), a person has no duty to retreat and has the right to stand his ground and meet force with force, including deadly force, if (1) he was not engaged in an unlawful activity; (2) he was attacked in another place where he had a right to be; and (3) he reasonably believed the use of force was necessary to prevent death or great bodily injury to himself. "Great bodily injury" is statutorily defined as "bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of a bodily member or organ." S.C. Code Ann. § 16-11-430(2).

Judge Newman properly found that Capell was not engaged in an unlawful activity. R. 77, ll. 9-14. However, he erred in finding that Capell was not attacked, that "there was no intent by anyone to impose any force upon [Capell]," and that there was no evidence that Capell had a

reasonable belief that pulling his weapon was necessary. R. 77, l. 15 – 78, l. 6. Judge Newman's final comments are demonstrative of his flawed analysis – he said that the law would not protect Capell after he "enter[ed] into the property manager's office in a threatening and menacing fashion and pull[ed] a gun on him after threatening to get him arrested and sued and all that." R. 78, ll. 7-13. While Capell was certainly rude to Bunucci, his actions were not sufficient to warrant his being physically advanced upon by Bunucci while he yelled "I'll fucking have your shit down." It was only then that Capell brandished his weapon in an effort to stop Bunucci's attack.

As a homeowner in the Point Arcadia condominium complex, Capell had a legal right to be in the clubhouse and in the manager's office. Even Bunucci admitted that homeowners frequently came to his office and "absolutely" had a right to come there to talk to him. R. 59, l. 14 – 60, l. 8. The crux of Judge Newman's ruling was that he did not believe that Capell was attacked or that Capell reasonably believed it was necessary to point his firearm in order to prevent death or great bodily injury to himself. However, the video and testimony reflected that Capell had threatened only legal action and then slammed closed the office door. While Bunucci never made physical contact with Capell, the video of the incident reflected the quick change in Bunucci's tone and demeanor. He stormed out after Capell, yelling: "Are you threatening me? 'Cause if you're threatening me, I'll fucking have your shit down" while taking several large steps and rapidly decreasing the distance between them. Bunucci's claim that his words meant that he was going to call the police was simply incredible.

Capell had never seen Bunucci so enraged. Bunucci was not a small man, outweighing Capell by at least one hundred pounds and standing eight inches taller. Capell further explained:

> I chose to do what I did because of the short distance between us. You don't sit there when somebody is holding a knife in their hands at 10 feet away from you

> and think that, oh, it's just a knife, it's not gonna harm me. They can close that distance and stab you before you can blink your eye.

R. 25, ll. 1-7. Capell appeared to be referring to "the twenty-one foot rule," a standard that "is based on studies which have shown that an armed individual within twenty-one feet of an officer still has time to get to the officer and stab and fatally wound the officer even if the officer has his weapon brandished and is prepared to or has fired a shot." Sigman v. Town of Chapel Hill, 161 F.3d 782, 785 (4th Cir. 1998). Though Capell did not see a weapon in Bunucci's hand, he aptly noted that Bunucci's bare hands could have been used as a weapon. See State v. Bennett, 328 S.C. 251, 262, 493 S.E.2d 845, 851 (1997) (finding that "a hand or fist may be considered a deadly weapon depending on the factual circumstances"). Capell also suffered physical disabilities that made him more vulnerable to attack, adding to the reasonableness of Capell's belief that a blow from Bunucci could cause him great bodily injury.

Judge Newman's ruling reflects an acceptance of the solicitor's argument that "force" required some sort of contact between the men. However, as will be discussed more fully *infra*, **"a defendant, in a self-defense case, has the right to act on appearances."** State v. Fuller, 297 S.C. 440, 443, 377 S.E.2d 328, 331 (1989). "The right to act on appearances is not limited to the situation where the defendant testifies he mistakenly thought he saw a weapon in the victim's hand. While an appearance charge is appropriate when the defendant erroneously believes he sees the victim with a weapon, it has been applied elsewhere." State v. Starnes, 340 S.C. 312, 321, 531 S.E.2d 907, 912 (2000). Further, "[o]nce the right to fire in self-defense arises, **a defendant is not required to wait until his adversary is on equal terms** or until he has fired or aimed his weapon in order to act." Id. at 322, 531 S.E.2d at 913 (citing State v. Hendrix, 270 S.C. 653, 244 S.E.2d 503 (1978)). "Similarly, **the accused doesn't have to wait until his assailant gets the drop on him, he has the right to act under the law of self-preservation and prevent**

**his assailant [from] getting the drop on him.**" Id. (citing State v. Rash, 182 S.C. 42, 50, 188 S.E. 435, 438 (1936)). "[I]f it is apparent, or reasonably apparent his assailant is taking steps to get the drop on him, he must take steps first to prevent such assailant from getting the drop on him." Rash, 182 S.C. at 42, 188 S.E. at 438.

Therefore, Judge Newman erred in finding that Capell did not establish that he was attacked and that he reasonably believed it was necessary to prevent death or great bodily injury to himself. Judge Newman's implicit ruling that Bunucci's failure to strike Capell rendered the Act inapplicable was an error of law, in contradiction to our state's jurisprudence regarding the right to act on appearances.

**B. Capell established a valid case of self-defense.**

In State v. Curry, 406 S.C. 364, 371, 752 S.E.2d 263, 266 (2013), our Supreme Court ruled: "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. This includes all elements of self-defense, save the duty to retreat." Thus, Capell was required to show by a preponderance of the evidence that (1) he was without fault in bringing on the difficulty; (2) he actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; and (3) a reasonably prudent man of ordinary firmness and courage would have entertained the same belief. See Curry, 406 S.C. at 371 n. 4, 752 S.E.2d at 266 n. 4. The applicability of self-defense to immunity under the Act was reiterated by this Court in State v. Douglas, 411 S.C. 307, 318, 768 S.E.2d 232, 238-39 (Ct. App. 2014).

1. Capell was not at fault in bringing on the difficulty.

Despite that precedent, Judge Newman made no specific findings regarding self-defense, instead stating: "Well, if you're talking self-defense then you're -- then we're not talking stand your ground. We're talking you're convincing the jury about self-defense, not me." R. 69, ll. 3-6. Even so, Judge Newman's ruling that Capell "was the aggressor" was essentially a finding that he was not without fault in bringing on the difficulty. R. 77, ll. 6-18. This ruling was not supported by the evidence. Undoubtedly, Capell was the person who entered Bunucci's office without knocking and began listing a laundry listed of grievances against the condo manager. When he first entered the office he said "what y'all criminals up to today" and later said that Bunucci was "play[ing] ignorant." Capell said that he would call the police if Bunucci would not "confess." However, Capell ended the conversation by saying that he would see Bunucci in court, indicating his intention to deal with their dispute in a legal forum. While Capell's tone was condescending and far from an effective way of dealing with his problems with Bunucci, it did not constitute "aggression" to the point that he forfeited his right to self-defense.

In State v. Bryant, 336 S.C. 340, 345, 520 S.E.2d 319, 322 (1999), the Court stated, "any act of the accused **in violation of law** and reasonably calculated to produce the occasion amounts to bringing on the difficulty and bars his right to assert self-defense." (emphasis added). The defendant in Bryant admitted that he was attempting to break into the victim's car when he alleged that the victim jumped on him such that he was at fault in the bringing on the difficulty. 336 S.C. at 345, 520 S.E.2d at 322. Here, Judge Newman properly found that Capell did not act unlawfully in his interaction with Bunucci. R. 77, ll. 9-14.

The solicitor argued that Capell was still at fault in bringing on the difficulty because "self-defense is not available to one who uses language so opprobrious that a reasonable man would expect it to bring on the physical encounter, and which did actually contribute to bringing

it on." State v. Strickland, 389 S.C. 210, 215, 697 S.E.2d 681, 684 (Ct. App. 2010) (quoting State v. Woodham, 162 S.C. 492, 502, 160 S.E. 885, 889 (1931)). In Strickland, this Court found that the victim's testimony that he struck the defendant after the defendant told him to "shut your fucking mouth" generated a jury question as to whether that language "might reasonably have been expected to bring on the difficulty" in Strickland's trial for assault and battery of a high and aggravated nature. 389 S.C. at 215, 697 S.E.2d at 684. Here, a review of the video reveals that Capell did not use any profanity until after Bunucci charged toward him. Neither his "threats" to contact police and sue Bunucci nor his use of the words "criminal" or "ignorant" were of such an "opprobrious" nature "that a reasonable man would expect it to bring on the physical encounter."

In Woodham, the Court found no error in trial court's charge on opprobrious language where there was testimony that prior to the victim's firing a gun at Woodham, Woodham called the victim "a God Damn Dago Son-of-a-bitch." 162 S.C. at 502, 160 S.E. at 889. However, it is significant that there was also testimony that Woodham drew an open knife while he used the profanity and epithets toward the victim. Id. at 492, 160 S.E. at 886-88. Moreover, in State v. Rowell, 75 S.C. 494, 56 S.E. 23, 27 (1906), relied upon in Woodham, the Court found the following flaws with the "opprobrious language" charge used therein:

> The charge laid down the rule that if in using words a party fails in his duty, any breach of decorum, any breach of good conduct, or any breach of the rights of his fellow man, that any act or words that reflect on or does violence to the feelings, reputation or character of another, will exclude the right of self-defense. The court should have held: That **a person is not deprived of the right of self-defense because he uses insulting language**. That one **who insults another by opprobrious words may be bound to anticipate that the insulted person will repel the insult to the extent the law allows, but he is not bound to anticipate that he will go to the extent of attempting to take his life.**

(emphasis added).

Notably, Strickland is the only modern case in South Carolina to cite the "opprobrious language" principle as a bar to self-defense. Conversely, modern jurisprudence includes the principle that "**words alone, however opporbrious, are not sufficient to constitute a legal provocation**" but "**words accompanied by hostile acts may**, according to circumstances, not only reduce a killing from murder to manslaughter, but may **establish the plea of self-defense.**" State v. Dickey, 394 S.C. 491, 716 S.E.2d 97 (2011); State v. Harvey, 220 S.C. 506, 518, 68 S.E.2d 409, 414 (1951), *overruled on other grounds by* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). **It seems inconsistent that "words accompanied by hostile acts" from the victim are required, at minimum, for a defendant to establish self-defense but a defendant's words alone can be sufficient for him to lose the right to act in self-defense.**

Assuming *arguendo* that Capell was at fault, "[i]f, after commencing the assault, the aggressor withdraws in good faith from the conflict and announces in some way to his adversary his intention to retire, he is restored to his right of self-defense." Bryant, 336 S.C. at 345, 520 S.E.2d at 322. "One's right to self-defense is restored after a withdrawal from the initial difficulty with the victim if that withdrawal is communicated to the victim by word or act." Id. (citing State v. Graham, 260 S.C. 449, 196 S.E.2d 495 (1973)). When Mr. Capell said "I'll see you in court" and left the office, slamming the door shut behind him. The solicitor's contention that the door was slammed in Bunucci's face, representing a continuation of hostilities, was refuted by the video of the incident, which shows Bunucci getting up from his desk when the door is closed. While all of the events occurred within a very short time span, Capell's conduct communicated his intent to retreat and restored his right to self-defense.

2. Capell believed that he was in imminent danger of sustaining serious bodily injury.

"A person has the right to act on appearances, even if the person's belief is ultimately mistaken." State v. Dickey, 394 S.C. 491, 501, 716 S.E.2d 97, 102 (2011); see also State v. Gandy, 113 S.C. 147, 148, 101 S.E. 644 (1919). Thus, in establishing the second prong of self-defense, "[a] defendant must show that he **believed** he was in imminent danger, **not that he was actually in such danger**, because he had **the right to act on appearances**, and under the circumstances as they appeared to him, he believed he was in such danger . . . ." State v. Fuller, 297 S.C. 440, 443–44, 377 S.E.2d 328, 331 (1989) (quoting State v. Jackson, 277 S.C. 271, 87 S.E.2d 681, 684-685 (1955)) (emphasis added). "The test is not whether there was testimony of an *intended* attack [upon the defendant]." Jackson, 227 S.C. at 278, 87 S.E.2d at 684 (emphasis in original). In Fuller, the defendant was entitled to an appearances charge based on his testimony that he saw the victims open the trunk of their car, and that he saw a shiny object in their hands, even though no weapons were found or recovered from the victims. 297 S.C. at 443–44, 377 S.E.2d at 331. Importantly, once the right to fire in self-defense arises, a person is not required to wait until his adversary "on equal terms" with him or "gets the drop on him." State v. Starnes, 340 S.C. 312, 322, 531 S.E.2d 907, 913 (2000); State v. Hendrix, 270 S.C. 653, 660–61, 244 S.E.2d 503, 507 (1978); State v. Rash, 182 S.C. 42, 50, 188 S.E. 435, 438 (1936)).

"[W]ords accompanied by hostile acts may, depending on the circumstances, establish a plea of self-defense." Fuller, 297 S.C. at 444, 377 S.E.2d at 331. Here, Bunucci's words and actions led Capell to believe that he was going to be physically attacked. Bunucci's dismissive demeanor toward Capell quickly changed to one of rage when Capell attempted to end their interaction. Bunucci charged through his office door, yelling: "Are you threatening me? 'Cause if you're threatening me, I'll fucking have your shit down." While Bunucci denied such an intention and claimed that "I'll fucking have your shit down" meant he would call the police,

Bunucci's subjective intent was not the proper focus of the trial court's analysis. Physically, Bunucci had eight inches and one hundred pounds on Capell, who was 5'6 and 150 pounds. Additionally, Capell's disability made him particularly vulnerable to physical attack. See State v. Hendrix, 270 S.C. 653, 661, 244 S.E.2d 503, 507 (1978) ("The difference in age; the fact of the prior bad blood between the two men; the heavy consumption of alcohol by Cherry; and the prior threat of the deceased are all factors which would give appellant the right to judge the conduct of his adversary more harshly than otherwise."). It was for those reasons that Capell believed it necessary to defend himself by pulling his gun and demanding the Bunucci get back. Capell made no additional threats and left once Bunucci calmed down and returned into his office.

3. A reasonably prudent man of ordinary firmness and courage would have entertained the same belief as Capell.

In addition to Capell's subjective belief, he was also required to prove that "a reasonable prudent man of ordinary firmness and courage would have entertained the same belief." Fuller, 297 S.C. 440, 443–44, 377 S.E.2d 328, 331 (1989) (quoting Jackson, *supra*). On this point, the video is the best evidence. While Capell's statements were rude, the dynamic of their interaction changed when Bunucci got up from his chair and began yelling at and pursuing Capell.

In State v. Dickey, 394 S.C. 491, 716 S.E.2d 97 (2011), our Supreme Court held that the defendant, a security guard, was entitled to a directed verdict on self-defense when he fatally shot a man he was lawfully ejecting from an apartment building. The Court determined that the defendant's reasonably believed he was in actual danger of death or serious bodily injury because the victim was highly intoxicated, acted aggressively over the course of the conflict, began advancing toward the defendant quickly with the purpose of assaulting him, continued advancing toward the defendant after defendant pulled the gun, and there was great disparity in their

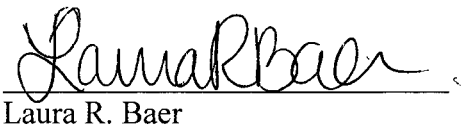
physical stature and capabilities. Dickey, 394 S.C. at 501, 716 S.E.2d at 102. The Court found it reasonable that Dickeys' belief that he was in danger of death or serious bodily harm and ruled "that a person of Petitioner's stature and limited agility would entertain the same fear when faced with an attack by a belligerent, intoxicated, more agile, and younger male, who appeared to be reaching for a weapon." Id. at 502, 716 S.E.2d at 102.

As discussed more fully *supra*, Capell made no allegation that he could see a weapon but testified that he was intimidated and fearful due to Bunucci's large size, aggressive charge towards him, and threatening words. Unlike the defendant in Dickey, Capell did not shot Bunucci because he was successful in neutralizing the threat. However, his failure to shoot did not lessen the reasonableness of his fear.

In summary, Judge Newman's ruling that Capell did not prove his qualification for immunity from prosecution under the Act by a preponderance of the evidence was premised upon numerous errors of law, which he misapplied to the facts presented. The denial of Capell's motion for immunity should accordingly by reversed.

## CONCLUSION

Based on the foregoing, Appellant Richard A. Capell respectfully requests that this Court vacate his conviction and reverse the trial court's denial of immunity under the Protection of Persons and Property Act.



Laura R. Baer
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ATTORNEY FOR APPELLANT

This 30th day of May, 2017.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 20014, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

May 30, 2017

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