STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

ORIGINAL

Certiorari to the Court of Appeals
Appeal from Charleston County
Kristi Lea Harrington, Circuit Court Judge

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S.C. SUPREME COURT

Opinion No. 2017-UP-258 (S.C. Ct. App. filed June 28, 2017)

2015-GS-10-00418

THE STATE,

RESPONDENT,

V.

DENNIS E. CERVANTES-PAVON,

PETITIONER

APPELLATE CASE NO 2017-001910

BRIEF OF PETITIONER

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ISSUE PRESENTED

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STATEMENT

On February 10, 2015, a Charleston County grand jury indicted Petitioner for murder (2015-GS-10-418). R. 384-385. The state, represented by Bruce Durant, called the case to trial before the Honorable Kristi L. Harrington and a jury on November 9-13, 2015. R. 1. Christina D. Parnall and Charles Cochran represented Petitioner. R. 1.

Prior to trial, Petitioner moved for the trial court to find him immune from prosecution pursuant to the Protection of Persons and Property Act. R. 375-376; R. 8, ll. 6-20. After a hearing on the motion, Judge Harrington denied Petitioner's request for immunity. R. 72, l. 1 – R. 73, l. 5. Thereafter, the case proceeded to a jury trial.

At the conclusion of the presentation of evidence, Judge Harrington instructed the jury on the offense of murder, as well as the lesser-included offense of voluntary manslaughter. Additionally, Judge Harrington instructed the jury on self-defense. R. 353, l. 20 – R. 368, l. 12. During their deliberations, the jury asked numerous questions, including a request for an "explanation of the charges," to see a video again, and to take an overnight break. R. 369, l. 10 – R. 370, l. 19; R. 371, l. 4 – R. 372, l. 16; R. 377-380. Ultimately, the jury found Petitioner guilty of murder. R. 373, ll. 5-9. Judge Harrington sentenced Petitioner to thirty years' imprisonment. R. 374, ll. 20-23; R. 386.

Petitioner served his notice of appeal on November 18, 2015. Undersigned counsel filed the brief of appellant. Petitioner raised one issue on appeal – whether the trial judge erred in denying his request for immunity from prosecution pursuant to the Protection of Persons and Property Act. On June 28, 2017, the Court of Appeals affirmed Petitioner's conviction and sentence in an unpublished opinion. State v. Cervantes-Pavon, 2017-UP-259 (S.C. Ct. App. filed

June 28, 2017); App. 1-2. On July 13, 2017, Petitioner filed a petition for rehearing. App. 3-17. On August 18, 2017, the Court denied the petition. App. 18-19.

On September 15, 2017, Petitioner filed a petition for writ of certiorari requesting review. The state responded on October 5, 2017. On February 16, 2018, this Court granted the petition. This brief of petitioner follows.

ARGUMENT

The Court of Appeals erred in affirming the trial judge's erroneous decision denying Petitioner's request for immunity from prosecution pursuant to the Protection of Persons and Property Act where the undisputed evidence showed the deceased was the initial aggressor, Petitioner was in reasonable fear of imminent death or great bodily harm, and because Petitioner was in his place of business, he had no duty to retreat, but could meet force with force.

Relevant facts

Prior to trial, Petitioner moved for a pre-trial hearing to determine whether he was entitled to immunity from prosecution pursuant to the Act. R. 375-376. After selecting a jury, the judge entertained Petitioner's motion. R. 8, ll. 4-20. The state argued the Act did not apply because Petitioner "is an illegal alien and has no right to be in the country at all much less over there." R. 9, ll. 1-5.[1] Additionally, the state argued the "evidence will show that there will be a jury issue as to whether or not it was self-defense in this case." R. 9, ll. 5-7.

Evidence presented during the hearing

Herbie Evans was the superintendent over the construction site at Belk Department Store for Frisch and Associates on August 13, 2014. R. 10, ll. 16-22; R. 13, ll. 16-19.[2] Petitioner and Raymond Muniz were construction workers and reported to Evans. R. 10, l. 23 – R. 11, l. 1. On August 13, 2014, Evans became aware of a problem between the two men. R. 11, ll. 2-4.

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[1] Judge Harrington refused to address the state's argument that Petitioner was not entitled to immunity under the Act because he was not in the United States legally. According to Judge Harrington, "the statute was indicated to protect all persons," and therefore, Petitioner would be entitled to immunity if he satisfied the other statutory requirements.

[2] In August of 2014, the Belk Department Store in Mount Pleasant was undergoing remodeling of its women's store. R. 208, ll. 15-18. Frisch and Associates was the lead contractor on the job. R. 208, ll. 10-18. Short on labor, Frisch and Associates subbed out some of the work to C.D. Contractors out of Richmond, Virginia. R. 209, ll. 2-13. Petitioner and Raymond Muniz worked for C.D. Contractors and traveled to South Carolina for the work. R. 208, l. 19 – R. 209, l. 3.

Although Petitioner spoke very little English, around one o'clock in the afternoon, Petitioner reported to Evans that Muniz was "picking on him and messing with him." R. 12, ll. 15-23; R. 12, l. 24 – R. 13, l. 3; R. 14, ll. 4-13. Petitioner asked Evans to intervene. R. 12, ll. 21-23. Evans did so by speaking with Muniz about his conduct. Specifically, Evans told Muniz that he "would not allow conflict or any problems on the project ... and if there was going to be conflict between any employees that [Evans] would immediately send them home." R. 13, ll. 8-11. Evans also told Petitioner that he would not tolerate conflict at work. R. 14, l. 24 – R. 15, l. 12.

Jose Somosa was also working on the remodeling project at Belk during August of 2014. R. 18, ll. 8-10. He and Petitioner had traveled from Richmond, Virginia, for the work. R. 18, ll. 14-17. During the early part of August, Muniz and Petitioner had a physical altercation over a tool. R. 29, ll. 8-16. Petitioner had a broom, and Muniz snatched it from him. R. 35, l. 21 – R. 36, l. 1. Then, the two fought, punching each other in the face. R. 36, ll. 2-9.

On August 12, 2014, Muniz, who was yelling at Petitioner, took off his shirt and tried to fight Petitioner at the hotel where the out-of-state workers were staying. R. 18, l. 18 – R.1 9, l. 4; R. 19, ll. 3-12; R. 28, l. 25 – R. 29, l. 3; R. 36, ll. 10-13. However, Petitioner refused to fight. R. 19, ll. 9-10; R. 20, ll. 12-13; R. 36, ll. 17-19.

The following day, August 13, 2014, Somosa and Petitioner were framing a wall. R. 20, ll. 17-24. Petitioner was up on the ladder while Somosa was on the ground acting as Petitioner's helper. R. 20, l. 25 – R. 21, l. 9. Muniz was in the same area working on the concrete floors. R. 21, ll. 10-11. Every time Muniz passed Petitioner, who was standing ten feet off the ground on a ladder, Muniz would taunt him about fighting. R. 21, ll. 12-21; R. 36, l. 24 – R. 37, l. 7. Petitioner responded that he did not want any trouble. R. 21, ll. 22-24.

Around 5:30 p.m., Petitioner climbed down the ladder to end his workday. R. 22, ll. 3-14. Muniz, who was taller and bigger than Petitioner, continued his taunts by suggesting they take it "outside," but Petitioner refused. R. 22, ll. 15-18; R. 24, ll. 15-18. However, Petitioner grabbed a pipe, and Muniz grabbed a metal object used for framing. R. 23, ll. 13-17; R. 37, l. 25 – R. 38, l. 4; R. 38, ll. 11-13. The two then "went at each other." R. 23, l. 17. During the scuffle, Petitioner and Muniz dropped their pieces of metal. R. 23, l. 25 – R. 24, l. 2; R. 39, ll. 3-5. Then, "they were grabbing each other." R. 24, l. 8; R. 39, ll. 6-8; R. 40, ll. 7-8. Petitioner grabbed Muniz around his waist, and Muniz grabbed Petitioner around his shoulders. R. 24, ll. 11-15. Muniz had his arms around Petitioner's neck. R. 24, l. 20 – R. 25, l. 3. Petitioner grabbed his saw from his waist and stabbed Muniz once. R. 25. 67, ll. 5-24. After the stabbing, Muniz released Petitioner and ran outside. R. 26, l. 9-23. Somosa was emphatic – Muniz started the fight. R. 27, ll. 2-3.

Petitioner testified at the pre-trial hearing as well. He explained that he worked for a construction company in Richmond, Virginia, that was contracted to do work at Belk in Charleston. R. 46, ll. 3-20. About a week before the stabbing, Petitioner and Muniz fought when Muniz snatched a broom from him. R. 47, ll. 4-10. On another day, Petitioner tried to inform his boss of Muniz's threats, but the boss was not in his office. R. 47, ll. 17-20. Seizing the opportunity, Muniz first checked to ensure no security cameras were monitoring, and then, he began to assault Petitioner. R. 47, l. 25 – R. 48, l. 2. Thereafter, Muniz continued his campaign against Petitioner by calling him a "faggot" and threatening to kill him. R. 48, ll. 4-11.

Around 9 a.m. on August 13, 2014, Muniz's friend and co-worker approached Petitioner, getting "on top of him like he wanted to hit" Petitioner. R. 49, ll. 10-18. At lunchtime, Petitioner went to his boss, Evans, and asked for help. R. 50, ll. 17-22. Petitioner was "terrified,

afraid." R. 51, ll. 1-3. The boss called attention to it, but Muniz was undeterred. R. 51, ll. 4-9. The threats continued into the afternoon. R. 51, ll. 15-17. While Petitioner remained up on the ladder, Muniz threatened him with a pipe. R. 51, ll. 21-25. At the end of the day, Petitioner got down from the ladder, and Muniz approached him with a pipe. R. 52, ll. 3-6. Petitioner grabbed a pipe as well. R. 52, l. 6. Muniz began his assault. R. 52, ll. 6-7. Muniz struck Petitioner on his stomach and his jaw. R. 52, ll. 15-22; Defendant's Exhibit #1.

During the attack, Muniz, who was stronger and taller than Petitioner, took the pipe from Petitioner. R. 55, ll. 14-23; R. 56, ll. 6-12. Muniz grabbed Petitioner around the neck, strangling him. R. 56, ll. 1-2; R. 56, ll. 13-20; R. 62, ll. 12-14. Petitioner had a saw used to cut sheetrock in his tool belt. R. 23, ll. 20-24. Petitioner pulled out his saw and stabbed Muniz once. R. 56, ll. 3-5; R. 56, ll. 21-24; R. 57, ll. 2-13. Muniz released Petitioner and ran outside. R. 57, ll. 14-20. Still fearful, Petitioner left. R. 57, ll. 19-25.

The state presented no witnesses or other evidence during the pre-trial immunity hearing. R. 65, ll. 3-10.

Argument on the motion

Defense counsel argued that Petitioner was in a place where he had a right to be – his place of business, and therefore, the duty to retreat was not applicable pursuant to the Act. R. 66, ll. 1-14. According to trial counsel, Petitioner was not causing any problems with Muniz, but there was "continual harassment, bullying" by Muniz directed toward Petitioner. R. 66, ll. 15-23. In fact, there had been a physical altercation between the two prior to this incident. R. 66, ll. 23-24. Additionally, a co-worker was joining Muniz's harassment of Petitioner at Muniz's instigation. R. 66, l. 24 – R. 67, l. 4. During Muniz's threats, Petitioner was on top of a ladder – "a very vulnerable position." R. 67, ll. 5-9. Petitioner stood approximately "five foot three" and

was "very small in stature." R. 67, ll. 9-10. However, Muniz was "about six feet." R. 67, ll. 10-11.

Muniz was armed with a large piece of metal, which he swung at Petitioner. R. 67, ll. 11-13. Petitioner also had a piece of metal and there was "a clash of metal" as Petitioner tried to defend himself. R. 67, ll. 14-18. Petitioner was struck by Muniz's metal pole and received several injuries, which were documented by the police. R. 67, ll. 14-21. Muniz wrapped his arm around Petitioner and began to strangle him. R. 67, l. 25 – R. 68, l. 2. Then, Petitioner was forced to pull his saw from his tool belt and stab Muniz. R. 68, ll. 2-5. Only then did Muniz let him go. R. 68, l. 5. According to trial counsel, Petitioner testified he was actually afraid and that fear was reasonable because of the difference in sizes and the fact that Muniz's friend had been threatening earlier in the day. R. 68, ll. 7-23. In conclusion, trial counsel explained Petitioner satisfied each element of self-defense except the duty to retreat, which he was not required to satisfy because he was in his place of business. R. 68, l. 23 – R. 69, l. 4. Defense counsel explained that Muniz was holding Petitioner around the neck, which placed Petitioner at risk of serious bodily harm. R. 71, ll. 1-12. According to defense counsel, this risk of harm, and certainly the appearance of risk of harm, was made even more evident by Muniz's striking of Petitioner. R. 71, ll. 4-12.

The prosecutor argued that the case presented a "clear question of fact" based on the testimony of Somosa and Petitioner. R. 70, ll. 1-4. According to the prosecutor, Somosa testified to a physical altercation involving a broom and an offer to fight the night before, but "that at no time other than mouthing off at each other at no time was Mr. Muniz armed until he came after him with a pipe in which point he picked up the piece of pipe." R. 70, ll. 4-10. The

prosecutor claimed that both men were unarmed when Petitioner stabbed him in the chest and killed him. R. 70, ll. 11-14.

Ruling on the motion

At the conclusion of the hearing and counsel's arguments, Judge Harrington denied Petitioner's request for immunity. According to the judge, in order for the Act to apply, "[t]here must be an absence of aggression." R. 72, ll. 12-14. The judge construed the testimony as showing "there had been a mutual confrontation." R. 72, ll. 16-17. She relied heavily upon Somosa's testimony, which she interpreted to show that Petitioner and Muniz "had discarded the tools" and at the time of the stabbing, Muniz was unarmed. R. 72, ll. 17-20. The judge also noted that Somosa "believed" that Muniz and Petitioner "were merely wrestling." R. 72, ll. 20-21. Thus, the judge denied the motion for immunity and concluded the issue of self-defense was for the jury. R. 72, ll. 22-23. According to the judge, "[t]he intent of the Act is for defensive not offensive protections." R. 72, ll. 12-13. The judge explained she did "not believe the testimony [rose] to the level *beyond a preponderance of the evidence* to grant the immunity designed by the legislature to protect someone from criminal prosecution." R. 72, l. 23 – R. 73, l. 1 (emphasis added).

Discussion

Protection of Persons and Property Act

In 2006, the South Carolina General Assembly adopted the Protection of Persons and Property Act. S.C. Code Ann. § 16-11-410, et seq. The General Assembly explained its intent was to "codify the common law Castle Doctrine which recognizes that a person's home is his castle and to extend the doctrine to include an occupied vehicle and the person's place of business." S.C. Code Ann. § 16-11-420(A). The General Assembly recognized "that persons

residing in or visiting this State have a right to expect to remain unmolested and safe within their homes, businesses, and vehicles." S.C. Code Ann. § 16-11-420(D). Finally, the General Assembly explained "that no person or victim of crime should be required to surrender his personal safety to a criminal, nor should a person or victim be required to needlessly retreat in the face of intrusion or attack." S.C. Code Ann. § 16-11-420(E).

To effectuate this intent, the General Assembly created a statute providing for immunity from prosecution to "[a] person who uses deadly force as permitted by the provisions of this article or another applicable provision of law." S.C. Code Ann. § 16-11-450(A). One of the provisions of the Act provides:

> 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(C).

"A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard." State v. Curry, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013). During the pretrial hearing, a defendant must set out "a valid case of self-defense must exist," excluding the duty to retreat prong, "and the trial court must necessarily consider the elements of self-defense in determining a defendant's entitlement to the Act's immunity." Id. at 371, 752 S.E.2d at 266.

To establish self-defense, four elements must be present: (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; (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; and (4) the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in the particular instance. State v. Hendrix, 270 S.C. 653, 657-658, 244 S.E.2d 503, 505-506 (1978); see also State v. Davis, 282 SC. 45, 46, 317 S.E.2d 452, 453 (1984).

This Court recently affirmed a grant of immunity in State v. Jones, 416 S.C. 283, 786 S.E.2d 132 (2016). Jones and her boyfriend, Eric Lee, shared a residence. Id. at 287, 786 S.E.2d at 134. On the evening of November 1, 2012, Jones and Lee were involved in a physical altercation. Id. Jones left the residence and returned when she had "cooled down." Id. at 288, 786 S.E.2d at 134. While Jones gathered her things, Lee yelled at her and followed her around. Id. at 288, 786 S.E.2d at 135. Jones grabbed a knife for protection. Id. Lee grabbed Jones, shook her, and told her it was over. Id. Believing Lee was going to hit her again, Jones grabbed the knife out of her shirt and stabbed him once in the chest. Id. Although Jones initially left Lee, she and a friend shortly returned to the residence and took Lee for help. Id. However, Lee later died at the hospital. Id.

This Court found there was "nothing in the record to suggest that Jones was at fault in bringing on the difficulty" because she attempted to leave the apartment before the first altercation, returned to the apartment to gather her belongings, and called her friends to pick her up. Id. at 301-302, 786 S.E.2d at 142. Jones told police that she believed Lee "was going to hit her again and that had she not acted as she did, then she would have been killed." Id. at 302, 786 S.E.2d at 142. Next, this Court held Jones' belief that she was in imminent danger of losing her life or sustaining great

bodily injury was reasonable in light of Lee having punched her earlier in the night and in Lee grabbing Jones and shaking her immediately prior to the stabbing. Id. Finally, this Court held that Jones had no duty to retreat pursuant to the Act because she was attacked in her home. Id.

The Court of Appeals affirmed a grant of immunity in State v. Douglas, 411 S.C. 307, 768 S.E.2d 232 (Ct. App. 2014).[3] Douglas and his friend, Charles Smith, had spent the day on the golf course drinking. Id. at 312, 768 S.E.2d at 236. After leaving the golf course, the two went to Douglas' home and continued drinking. Id. at 313, 768 S.E.2d at 236. Smith found a bottle of Douglas' anti-anxiety medicine and began teasing Douglas about it. Id. When Douglas grew angry, Smith "snapped" and "went crazy." Id. Smith grabbed Douglas by his arms and threw him against the refrigerator. Id. When Douglas fell to the floor, Smith got on top of him and struck him in the eye. Id. at 314, 768 S.E.2d at 236. Although Douglas told Smith to leave, Smith refused, but did go into another room. Id. Douglas crawled to his bed and got a pistol from the nightstand. Id. Douglas, returning to the kitchen, again told Smith to leave. Id. Instead, Smith advanced toward Douglas. Id. Douglas lifted the pistol to scare Smith. Id. When Smith was two feet away, Douglas fired the pistol. Id. A bullet hit Smith, and he died within minutes. Id.

The Court held Douglas proved by a preponderance of the evidence that he reasonably believed shooting Smith was necessary to prevent great bodily injury to himself, and that he acted in self-defense. Id. at 319, 768 S.E.2d at 239. The physical evidence was consistent with Douglas' testimony, showing that Smith was in close proximity when the pistol was fired. Id. at 319-320, 768 S.E.2d at 239. The Court noted that Douglas was injured in the altercation prior to the fatal shot, and that in light of Smith's lack of serious injury, Douglas' believe that Smith was about to inflict

[3] This Court granted certiorari on November 5, 2015. However, on July 13, 2016, this Court dismissed the petition as improvidently granted. State v. Douglas, 416 S.C. 427, 788 S.E.2d 686 (2016).

serious bodily injury upon him if he did not act to protect himself was reasonable. Id. at 320, 768 S.E.2d at 240. The Court also considered evidence that several years prior to the shooting, Smith assaulted Douglas by slamming him against a wall and choking him. Id. According to the Court, Douglas was not at fault in brining on the difficulty where "Smith's violent behavior was an unreasonable reaction to a reasonable demand for Smith to return [Douglas]'s medicine." Id. at 321, 768 S.E.2d at 240. Further, the Court found that after Smith attacked Douglas and Douglas retreated to his bedroom, his "reappearance at the kitchen's threshold with a loaded pistol by his side was lawful, as he had a right to defend his home and demand that Smith leave." Id.

Self-defense

In light of the immunity statute's incorporation of the elements of self-defense save the retreat prong, an examination of South Carolina's self-defense jurisprudence is necessary and helpful. An individual who provokes or initiates an assault may not assert self-defense. State v. Bryant, 336 S.C. 340, 345, 520 S.E.2d 319, 322 (1999). "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 as a justification or excuse for a homicide." Id. "[T]he mere unlawful possession of a firearm, with nothing more, does not automatically bar a self-defense charge." State v. Slater, 373 S.C. 66, 70, 644 S.E.2d 50, 52 (2007). In Slater, this Court determined the defendant was not entitled to a charge on self-defense because he was not without fault in bringing on the difficulty where the defendant was "in unlawful possession of a weapon; he carried the cocked weapon, in open view, into an already violent attack in which he had no prior involvement." Id. at 71, 644 S.E.2d at 53.

In State v. Light, 378 S.C. 641, 650, 664 S.E.2d 465, 469 (2008), this Court held a defendant's statement that it was either "her or me" after the defendant took the gun from the victim

established that the defendant believed he was in imminent danger. This Court determined this belief was reasonable in light of the defendant's testimony that in the preceding weeks the victim had been acting jealous, had followed him, and told him that if she caught him with another woman it was "going to be messy." Id.

An individual has the right to act on appearances. State v. Starnes, 340 S.C. 312, 531 S.E.2d 907 (2000); see also State v. Jackson, 277 S.C. 271, 87 S.E.2d 681 (1955). This Court held the trial judge erred in failing to instruct the jury that the defendant had the right to act on appearances concerning one of the shootings. Starnes, 340 S.C. at 320, 531 S.E.2d at 912. In Starnes, one of the potential drug buyers, Wellborn, pointed a gun at the defendant, cursed him, and questioned where he was going. Id. This Court held the defendant was not entitled to a charge on the right to act on appearances concerning Wellborn because his claim to self-defense arose from an *actual* threat. Id. However, concerning the shooting of the other potential buyer, Champlin, this Court held the defendant was entitled to an appearances charge. Id. at 321, 531 S.E.2d at 912. The pertinent fact noted by this Court was that "[i]mmediately prior to the shooting, [the defendant] observed Champlin hold a gun to [another]'s head and threaten to shoot him, apparently because the intended drug deal, which [the defendant] had arranged, had gone awry." Id. This Court held the defendant was entitled to an appearances charge even though the defendant did not testify that he thought he saw a weapon in Champlin's hand at the time of the shooting. Id.

Additionally, "words accompanied by hostile acts, may, depending on the circumstances, establish a plea of self-defense" from State v. Harvey, 220 S.C. 506, 68 S.E.2d 409 (1951). Furthermore, "when a person is justified in firing the first shot, he is justified in continuing to shoot until it is apparent that the danger to his life and body has ceased." Hendrix, 270 S.C. at 661, 244 S.E.2d at 507. In Douglas v. State, 332 S.C. 67, 72-73, 504 S.E.2d 307, 309-10 (1998), this Court

noted the judge had charged that if the defendant was justified in firing the first shot he was justified in continuing to shoot until any danger to his life and body had ceased.

Analysis

As an initial matter, the trial judge used the wrong legal standard when examining Petitioner's request for immunity. Although the judge at first correctly stated that Petitioner must prove his case by a preponderance of the evidence, when she was ruling on the motion, she stated she did "not believe the testimony [rose] to the level *beyond* a preponderance of the evidence to grant the immunity designed by the legislature to protect someone from criminal prosecution." Cf. R. 72, ll. 7-9 with R. 72, l. 23 – R. 73, l. 1 (emphasis added). By requiring Petitioner prove his entitlement to immunity *beyond* a preponderance of the evidence, the judge committed a legal error and a reversal is necessary. Examining the evidence in the proper light reveals Petitioner established his right to statutory immunity from prosecution by a preponderance of the evidence.

The Act – "Attacked"

The Act provides immunity to a person "who is attacked." S.C. Code Ann. § 16-11-440(C). The state argued that because Muniz "was unarmed when he was stabbed," "this fact alone supports the trial court's discretion to deny immunity." Ret. 19. In support of this position, the state cited State v. Manning, 418 S.C. 38, 791 S.E.2d 148 (2016), another recent case interpreting the Act. Ret. 19. The issue on appeal was whether the trial court was "required to conduct a complete testimonial evidentiary hearing prior to ruling on whether the immunity provision of the Act applie[d]." Manning, 418 S.C. at 43, 791 S.E.2d at 150. The Court of Appeals explained that Manning "made a motion requesting that the trial court determine whether he was immune from prosecution under" the Act "by conducting a full evidentiary

hearing." State v. Manning, 2014-UP-411 (S.C. Ct. App. filed Nov. 19, 2014). The trial court declined to conduct a full evidentiary hearing; instead, the trial court "heard arguments from counsel and reviewed a statement Manning gave police." Id. Thereafter, the judge denied Manning immunity. Id. The Court of Appeals held the "trial court erred in denying Manning's motion without first conducting an evidentiary hearing." Id. The Court of Appeals remanded the case for such a hearing. Id.

The state appealed, and this Court granted certiorari. Manning, 418 S.C. at 40-41, 791 S.E.2d at 148-149. After determining an extensive evidentiary hearing was unnecessary in the case because the facts were undisputed, this Court held "the undisputed facts support[ed] a denial of immunity" under the Act. Id. at 45, 791 S.E.2d at 151. Additionally, this Court explained "the victim was unarmed at the time she was shot, meaning we cannot say that the trial judge abused his discretion in denying [Manning] immunity" under the Act. Id. In the current case, the state relied upon this quotation to argue this Court should deny certiorari. Ret. 3; Ret. 19. The state argued "that because [Muniz] was unarmed when Petitioner started toward him and when the men began fighting, that factor alone could be sufficient evidence supporting a trial court's discretion to deny immunity." Ret. 3; Ret. 19. The continued, arguing "the facts of the case showed [Muniz] deliberately attempted to diffuse the confrontation by disarming himself and attempting to disarm Petitioner before engaging in hand to hand combat." Ret. 3; Ret. 19. Respondent misconstrued the facts as presented during the pre-trial hearing. See Ret. 19-21.

All day, and for many of the preceding days, Muniz taunted Petitioner with threats. When Petitioner ended his work day, he climbed down from his ladder. He placed his saw in his toolbelt. Muniz and Petitioner grabbed metal objects, but dropped their objects in the fracas. Muniz began choking Petitioner. Only then did Petitioner remove the saw from his belt and use

it to stab Muniz. Petitioner's use of the saw was to defend against Muniz's choking of him. Petitioner was in actual danger of losing his life or sustaining serious bodily injury due to this chokehold. His belief in the danger was reasonable. Although Muniz was not armed with a weapon, he was armed with his hands, which can be deadly weapons. In this case, Muniz was using his hands and arms as deadly weapons because he was choking the life out of Petitioner. See State v. Davis, 309 S.C. 326, 344, 422 S.E.2d 133, 144 (1992)(explaining that whether an object has been used as a deadly weapon depends upon the facts and circumstances of each case) *overruled on other grounds by* Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999); State v. Bennett, 328 S.C. 251, 262-263, 493 S.E.2d 845, 850-851 (1997)(finding fists could be a deadly weapon for purposes of armed robbery or assault).

The state argued that Petitioner was not "attacked" because, in the state's estimation of the testimony presented during the pre-trial hearing, he consented to the fight. Ret. 18. Thus, the question regarding what the term "attacked" means in the statute requires greater discussion.

The Court of Appeals recently decided State v. Scott, 420 S.C. 108, 114, 800 S.E.2d 793, 796 (Ct. App. 2017), *cert. granted* (S.C. Sup. Ct. Feb. 1, 2018), a case interpreting the relevant provision of the Act.[4] According to the Court of Appeals, a person claiming immunity under the Act must show a reasonable belief of death or serious bodily injury existed so as to justify a claim of self-defense *and* that the person was being attacked. Scott, 420 S.C. at 114-15, 800 S.E.2d at 796-97. In a footnote, the Court of Appeals explained, that "[t]he clear language of section 16-11-440(C) ... also requires that the defendant be actually attacked." Id. at 115 n.8, 800 S.E.2d at 797 n.8. Although the Court acknowledged that "the question of a perceived threat and an attack may sometimes overlap," the Court remained steadfast that "absent a showing that

[4] Oral argument in the case is scheduled for April 18, 2018.

a defendant has been attacked, a request for immunity, pursuant to subsection (C), which would excuse the duty to retreat, must fail, and a defendant must present his evidence of self-defense to a jury." Id.

The Scott decision remains unclear as to whether a *physical* attack is required under the Act. However, such a requirement would run counter to common sense and years of jurisprudence concerning the Castle Doctrine. South Carolina has never required a person show a physical attack in order to invoke the privileges and protections of the Castle Doctrine. See State v. Jackson, 277 S.C. 271, 279, 87 S.E.2d 681, 685 (1955)(explaining "a man's home is his castle where if he or a member of his family is assaulted in the home, he is not required to retreat but may use such force as is reasonably necessary to protect himself or a member of his family from death or serious bodily harm"); State v. Wiggins, 330 S.C. 538, 547, 500 S.E.2d 489, 494 (1998)(holding the defendant's threat to kick the deceased's and another's "asses" raised a question regarding whether the deceased "assaulted" the defendant). Additionally, South Carolina has never required a person show a physical attack in order to invoke the privileges and protections of self-defense. Once 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." State v. Starnes, 340 S.C. 312, 322, 531 S.E.2d 907, 913 (2000)(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.

Requiring a physical attack prior to exercising one's rights under the Act would be an absurd result and must be rejected. See State v. Sweat, 386 S.C. 339, 351, 688 S.E.2d 569, 575 (2010)(stating appellate "[c]ourts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the Legislature or would defeat the plain legislative intention"). When the General Assembly enacted the Act, it did so with the express intent to provide for individuals "to protect themselves, their families, and others from intruders and attackers without fear of prosecution or civil action for acting in defense of themselves and others." S.C. Code Ann. § 16-11-420(B). "[P]ersons residing in or visiting this State have a right to expect to remain unmolested and safe within their homes, business, and vehicles." S.C. Code Ann. § 16-11-420(D). Finally, the General Assembly explained the Act would accomplish the twin goals of ensuring "no person" "be required to surrender his personal safety to a criminal" or "needlessly retreat in the face of intrusion or attack." S.C. Code Ann. § 16-11-420(E). Therefore, interpreting the statute as the General Assembly intended requires this Court to not require a physical attack prior to a person being authorized to act in self-defense and invoke the immunity provided for by the Act.

The Act – In a place where he has a right to be

Petitioner had no duty to retreat because he was at his place of business. The Act removes this element of self-defense when a person is attacked in his place of business.

Self-defense – Not at fault for bringing on the difficulty

The undisputed evidence demonstrated prior difficulties between Petitioner and Muniz and Muniz as the initial aggressor during those prior difficulties. The undisputed evidence demonstrated that Petitioner was not at fault at bringing on the difficulty. Muniz had been taunting Petitioner for weeks and continued his campaign of threats and harassment on the day of

the stabbing. Although Petitioner sought help, his pleas were unanswered and Muniz was undeterred. The sole independent eyewitness to the encounter testifying during the pre-trial hearing, Jose Somosa, was emphatic – Muniz ***started*** the fatal fight.

Self-defense - Danger

Petitioner testified that he was in fear of losing his life or imminent bodily harm. Petitioner's fear was reasonable in light of the difference in size, Muniz choking Petitioner, and Muniz's prior threats and physical assaults. Petitioner had to act in an effort to save his life. He used the only thing he could find – his saw – to stab Muniz once in the chest. Contrary to the state's assertions on appeal, Petitioner did not arm himself with the saw in order to harm Muniz. The saw was in his tool belt as he was a construction worker on the job framing a wall. The saw was not in Petitioner's possession as a weapon – it was a tool of his trade. Only when Muniz was choking the life out of him did Petitioner reach for the saw to defend himself.

In Starnes, this Court held the defendant was in actual danger when a person pointed a gun at him, cursed him, and questioned him as to where he was going. Starnes, 340 S.C. at 912, 531 S.E.2d at 912. In State v. Light, 378 S.C. 641, 650, 664 S.E.2d 465, 469 (2008), this Court held a defendant's statement that it was either "her or me" after the defendant took the gun from the victim established that the defendant believed he was in imminent danger. This Court determined this belief was reasonable in light of the defendant's testimony that in the preceding weeks the victim had been acting jealous, had followed him, and told him that if she caught him with another woman it was "going to be messy." Id.

Also, in Hendrix, 270 S.C. at 659-660, 244 S.E.2d at 506, this Court held the second and third elements of self-defense were easily met as "the conclusion that he was actually in immediate danger of losing his own life was inescapable." When the deceased arrived at the scene, he walked

toward defendant who leveled a shotgun at the deceased and told him to "back off." Id. at 660, 244 S.E.2d at 506. The deceased then retrieved his shotgun and returned to confront the defendant. Id. Although some witnesses testified the deceased never pointed his gun at the defendant and others testified he did, this Court concluded that under *any* version of the evidence "it [was] clear that an actual, imminent danger confronted the [defendant] a danger which, unless met with an immediate response, held the promise of death for the [defendant]." Id.

Furthermore, Petitioner had the right to act on appearances, which included the advancing of Muniz, a much larger man, toward him in a fighting stance. See Starnes, 340 S.C. at 911-912, 531 S.E.2d at 319-320 (explaining a person has the right to act on appearances); State v. Fuller, 297 S.C. 440, 377 S.E.2d 328 (1989); State v. Jackson, 227 S.C. 271, 278-279, 87 S.E.2d 681, 685 (1955); State v. Gandy, 113 S.C. 147, 148, 101 S.E. 644 (1919).

Petitioner was entitled to immunity from prosecution based upon the evidence presented during the pre-trial hearing that he was in his workplace where he was attacked by Muniz, who was the initial aggressor. Petitioner was in imminent danger due to Muniz's conduct and his size. Petitioner's fear of danger was reasonable in the circumstances. Thus, Petitioner was entitled to immunity and the trial judge erred in denying his motion to bar prosecution.

CONCLUSION

Petitioner respectfully requests this Court reverse the decision of the Court of Appeals and find that he was entitled to immunity from prosecution pursuant to Protection of Persons and Property Act.

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 8th day of March, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED

MAR 08 2018

S.C. SUPREME COURT

Appeal from Charleston County

Kristi Lea Harrington, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DENNIS E. CERVANTES-PAVON,

PETITIONER

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of Petitioner in the above referenced case has been served upon Susannah R. Cole, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Brief of Petitioner has been served on Dennis Elvin Cervantes-Pavon, #366042, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 8th day of March, 2018.

Susan B. Hackett

Susan B. Hackett
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 8th day of March, 2018.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.