

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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ORIGINAL

Appeal from Charleston County  
The Honorable R. Markley Dennis, Circuit Court Judge  
Appeal Case No. 2016-000870

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THE STATE,

RESPONDENT,

V.

BRANDON RASHAD MARSHALL,

APPELLANT.

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BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF ISSUE ON APPEAL

Did the trial court err by denying Appellant immunity from prosecution pursuant to the Protection of Persons and Property Act?

RESPONDENT'S COUNTERSTATEMENT OF ISSUE ON APPEAL

Did the trial court abuse its discretion in denying Marshall's motion for immunity under the Protection of Persons and Property Act when the trial court found Marshall's testimony, which served as the basis for the motion, was not credible, and the record supported the trial court's determination that Marshall failed to show he was entitled to immunity by a preponderance of the evidence?

## STATEMENT OF THE CASE

On September 2, 2014, Appellant Brandon Rashad Marshall ("Marshall") was indicted by the Charleston County Grand Jury during the September 2014 Term of the Charleston County Court of General Sessions for one count of murder (2014-GS-10-5261) and one count of possession of a weapon during the commission of a violent crime (2014-GS-10-5262).

The case was called to trial on April 4, 2016 before the Honorable R. Markley Dennis, Circuit Court Judge. Melisa W. Gay, Esquire and Robert Blanchard, Esquire represented Marshall. The State was represented by Assistant Solicitors David Osborne and Mark Bourdon of the Ninth Judicial Circuit Solicitor's Office. On April 4, 2016, Marshall moved for immunity from prosecution under the Protection of Persons and Property Act. After a Duncan<sup>1</sup> hearing, the trial court denied the motion for immunity. (R. pp. 201-08).

On April 5-7, 2016, Marshall was tried by a jury on the murder and possession of a firearm during the commission of a violent crime charges. The jury found Marshall guilty of both counts on April 6, 2016. (R. p. 761). Judge Dennis sentenced Marshall to forty years confinement on the murder conviction and five years confinement for the possession of a weapon during the commission of a violent crime conviction, both to be served concurrently. (R. pp. 771-72).

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<sup>1</sup> State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011).

Before this Court is Marshall's direct appeal. Marshall initially filed an Anders<sup>2</sup> Brief of Appellant. By Order filed November 13, 2017, this Court denied appellate counsel's motion to be relieved and directed the parties to brief the following issue:

Did the trial court err by denying Appellant immunity from prosecution pursuant to the Protection of Persons and Property Act?

Marshall now requests this Court reverse his convictions and grant immunity under the Protection of Persons and Property Act. The State respectfully requests this Court deny Marshall's appeal and affirm his convictions and sentences.

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<sup>2</sup> Anders v. California, 386 U.S. 738, 87 S. Ct. 1396 (1967).

## STATEMENT OF FACTS<sup>3</sup>

On May 22, 2014, Appellant Brandon Marshall shot and killed Anthony Williams outside of Williams' girlfriend's apartment. Williams was struck four times. (R. p. 187). The pathologist determined the shots were fired more than two to four feet away from the victim based on the lack of soot and stippling around the wounds. (R. pp. 188, 197). One gunshot entered the upper left side of the victim's chest, went through his trachea, his aorta, and his right lung, all before exiting from the upper right side of his back. (R. p. 189). The second gunshot entered Williams' abdomen and went through his liver and his right adrenal gland, causing significant bleeding in the abdomen. (R. pp. 190-91). The third gunshot entered the right side of the victim's groin, traveled to his lower abdominal cavity, went through a couple of loops of the intestine, and lodged in his pelvis. (R. p. 191). The pathologist noted two or three of these wounds could have been considered fatal. (R. p. 189). The fourth gunshot was a superficial wound to the victim's thigh. (R. pp. 191-92). Williams died at the scene. (See R. p. 122).

### Background

Marshall testified he met Williams, the victim, three months prior to the shooting at a friend's house. (R. p. 90). The two began to hang out after that initial meeting, and according to Marshall, the two began a sexual relationship about one month after they met. (R. p. 91). Marshall was then employed at Boeing as an electrician. (R. p. 92). In the weeks before the shooting, Marshall had been in two car accidents over a three week period. (R. p. 92).

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<sup>3</sup> These facts are based upon the testimony and evidence presented at the Duncan hearing.

Williams was also dating Ashley Butler. (R. p. 152). The victim and Butler had been together for two and one-half years, and they had two children.<sup>4</sup> (R. p. 152). They lived together in an apartment in Charleston. (R. p. 152). Williams was not on the lease because men were not supposed to be on the leases. (R. p. 154). He started staying at the apartment with Butler in 2012. (R. p. 166). He left all of his property at the apartment, and he had a key. (R. p. 166).

The week prior to the shooting, Marshall and the victim went on a trip to Myrtle Beach. (R. pp. 92-3). Marshall indicated the trip was a secret from Butler between him and Williams. (See R. pp. 99-100).

**Marshall is invited to Ashley Butler's apartment.**

Marshall testified the victim had texted him earlier in the day on May 21st. (R. p. 95). The victim told Marshall that he had gotten a job, and had asked if he would hang out to celebrate the new job. Id. Marshall noted the victim contacted him several hours later, and Marshall agreed to meet up with the victim and Ashley Butler, his girlfriend, at Butler's residence.<sup>5</sup> (R. pp. 95-6).

Butler testified she and the victim went on a date that night. (R. p. 153). They got home from dinner between 8:30 and 9 p.m. (R. p. 154). Butler was unaware that the victim had been texting with Marshall while they were at dinner. (R. p. 154). She did tell the victim that it was okay to invite Marshall over to the apartment as a guest. (R. p. 154; see R. p. 143).

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<sup>4</sup> The younger child was a child they had together. (R. p. 166). While the older child was not the victim's, he was basically a dad to that child as well. (R. p. 167).

<sup>5</sup> The children were staying with the victim's mother for the night. (R. pp. 101, 153).

When Marshall initially arrived, he brought two bottles of tequila with him. (R. p. 97; see R. p. 158). Marshall left to purchase some orange juice to serve as a mixer. (R. pp. 97-8). When he returned, Marshall also brought in some chicken to eat. (R. p. 99). Marshall also brought in his pistol.<sup>6</sup> (R. pp. 103, 105, 159). When he walked in, he placed his gun on a table. (R. pp. 105, 175).

Marshall indicated the three were sitting on two couches in the living room. The victim and Butler were sitting on one couch, and Marshall was sitting on the other. (R. p. 100). Over the course of the night, Marshall had three mixed drinks. Butler had one tequila drink, and possibly some vodka drinks. (R. p. 98). Butler stated she did not drink too much. (R. p. 158). The victim had several drinks from the white tequila bottle. (R. pp. 98, 158).

#### **Marshall's version of the evening inside the apartment.**

Marshall and the victim's brother had a conversation through Facebook Messenger while he was Marshall the apartment. Marshall became concerned the victim's brother had talked with Butler about their trip to Myrtle Beach. (R. p. 99). At some point during the online exchange, the victim's brother asked Marshall to tell the victim to answer his brother's messages. (R. p. 100). Marshall relayed the message, which led Butler and the victim to get into an argument. Marshall recalled the argument stemmed from Butler called the victim's brother gay for asking Marshall if Williams was near him. (R. p. 100).

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<sup>6</sup> Marshall testified he had purchased the gun a week before the shooting. (R. p. 104). He initially claimed that he purchased the gun after he saw a beating in Butler's neighborhood. (R. pp. 104-05, 145). Marshall noted that he usually leaves the gun in his glove compartment with the clip next to it. (R. p. 146).

After that argument dissipated, Butler talked about going to Myrtle Beach with her boyfriend. (R. p. 101). This led to another argument between the victim and Butler. (R. p. 101). Marshall testified that after this argument started, he got up and went into the living room. (R. p. 101). Shortly thereafter, he heard Butler yelling, "get off on me, you are always putting your hands on me." (R. p. 101, l 25 – p. 102, l 1). Marshall also stated Butler called the victim a punk, and told the victim that all he did was hit her or something like that. (R. p. 102). Marshall walked into the kitchen and had another drink. (R. p. 102). Marshall then heard Butler say something. Next, he heard her say what she had been saying earlier. He thinks she said something about not being able to breathe. (R. p. 102). Marshall got up and looked out from the kitchen, and at that time he saw the victim on top of Butler with his hands around her neck with one hand like he was about to punch her in the face. (R. p. 102). According to Marshall, Butler was on her back on the floor. (R. p. 102).

Marshall remembered grabbing his gun off of the table when Butler first started making the noise. (R. p. 102). At that point, he had put the clip in the gun. (R. p. 102). Marshall walked to the doorway, and as soon as he saw the physical confrontation, he told the victim that he needed to stop and to get off of Butler. (R. p. 102).

**Butler's version of what occurred inside the apartment.**

According to Butler, at around 2 a.m., Marshall acted like he was a little intoxicated, and he indicated he wanted to spend the night. (R. p. 159). Butler believed Marshall was faking intoxication. (R. pp. 168, 175). However, Williams asked Butler if Marshall could stay because Marshall was probably drunk. (R. p. 160). Butler initially agreed he could stay, but she wanted both to leave at 6 a.m. (R. pp. 160, 175). Butler

also noted the victim was more in the mood to stay up partying, but Butler was not keen on that idea. (R. p. 160). Butler went upstairs for bed, but she came back down to retrieve the victim. (R. pp. 161, 168).

Butler and the victim then got into an argument that was both physical and verbal. (R. p. 161). Butler testified they argued because Butler thought the victim should go to bed to rest up for the new job he was starting in the morning; the victim, however, felt like Butler was nagging him. (R. pp. 161, 168; see R. p. 176). Butler spit at the victim because she knew he would not like that. (R. pp. 161, 169). When she did, the victim grabbed her and held her down on the couch. (R. p. 161). Butler testified she never told the victim to stop hitting her. The victim never hit her. (R. p. 169). While Butler was not being choked, she could not breathe. (R. pp. 161-62). The victim was holding both of her arms down, so Butler used her head to knock a picture on the wall down. (R. p. 162). The victim never put his hands around Butler's neck. (R. p. 169). However, the way the victim was holding Butler made it difficult for her to breathe. (R. p. 169). Butler stated she did not believe the victim was going to kill her, and she did not think he would seriously hurt her, even though he was physically capable of doing so. (R. p. 169). Butler also testified that she was not injured that night; she suffered no bruises or scrapes. (R. p. 170). Butler noted the victim never assaulted her before that night. (R. p. 166).

**Marshall and Williams leave the apartment through the back door.**

Marshall testified he encouraged the victim they needed to leave. (R. pp. 102-03). According to Marshall, the victim stopped holding Butler right away, and he got off of Butler. (R. p. 103). The victim pushed past Marshall and walked out of the back

door. (R. pp. 104, 106). Butler confirmed Marshall grabbed the victim and told him to leave Butler alone. (R. p. 162). Marshall looked back at Butler. (R. p. 103). Marshall testified he put the clip in the gun at that time.<sup>7</sup> (R. p. 103). Marshall asked Butler if she was all right, and she indicated that she was. (R. p. 106). Marshall then walked out of the back door. Butler testified she told Marshall to leave twice. (R. p. 170). According to Butler, the two left out of her back door. (R. p. 162). Butler immediately locked the door after he walked outside. (R. pp. 106, 162).

Marshall saw the victim going to his car, and Marshall thought he was leaving. (R. p. 106). Marshall then tried to walk back into the house to grab his bags, but the door was locked. (R. p. 106). Marshall knocked on the door. (R. pp. 106, 107, 162). He asked Butler to hand him his things, and she told him she would put it on the front porch because she did not want to open the back door again. (R. pp. 107, 162, 170). Butler gathered the two bottles of tequila and Marshall's gun holster, and she put it in a bag. (R. pp. 106, 162, 170). She placed the bag outside her front door for Marshall. (R. pp. 162, 170). Marshall walked around to the front porch and retrieved the bag. (R. p. 106).

#### **Williams returns to the back door of the apartment.**

When he walked back around to the back of the building, where he had parked, Marshall saw the victim getting out of his car and walking towards Butler's back door. (R. pp. 108, 109). At that time, Marshall had both his gun in his hand. (R. p. 108).

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<sup>7</sup> Marshall admitted that he had previously indicated that he had put the clip in the gun when he was outside of the apartment. (R. p. 103). He also admitted that he had stated he put the clip in the gun when he first grabbed the gun off of the table. (R. p. 103).

Marshall placed the bag containing his holster and the bottles of tequila in his car. (R. p. 109). He described the victim as charging towards Butler's back door. (R. p. 109).

Butler did not immediately hear the victim. When Williams got to the back door and knocked on it, he told Butler that he wanted to get some clothes. (R. p. 163). When she heard the victim at the door, Butler noted he was banging on the door, and it was louder than Marshall's knocking. (R. p. 172). She noted that she was not worried the victim was going to come through the door. (R. p. 172). She did not want to let him in because he was a little loud, and she was concerned if the police were called, she would be evicted from the apartment. (R. pp. 172-73).

Butler yelled through the door and told him that she would get some clothes for him. (R. p. 164). Williams also sent her a text message to the same effect. Butler indicated she received the text shortly after she told Marshall to leave, and while she was putting clothes into a bag. (R. pp. 171, 172). In the text, the victim noted he wanted his clothes. (R. p. 171).

Butler went upstairs, grabbed a bag, and placed some underwear and clothes in it. (R. p. 164). Butler did not respond to the text message, but she yelled through the door to the victim to let him know she was getting his clothes. (R. p. 176). Butler noted that she was going to hand the victim the clothes at the back door. (R. pp. 173-74). Also in the bag were the victim's identification and wallet. (R. p. 174). The victim was downstairs and outside of the back door. (R. p. 164). Marshall testified he could not hear the victim tell Butler to bring him his clothes. (R. pp. 128-29).

### **Marshall confronts the victim.**

Marshall rushed back to where the victim was. (R. p. 109). Marshall testified he thought he could try to calm the victim down and avoid something worse from happening. (R. p. 110). When Marshall walked towards the victim, he heard the victim kicking the door. (R. p. 111). Marshall testified he thought the victim was trying to kick the door in so he could get back in the house at Butler. (R. p. 111). The victim was not saying anything until Marshall walked up and tried to talk to him. (R. pp. 111, 129). Marshall tried to talk to the victim, and he mentioned the victim should not get in trouble because he was not supposed to be at the apartment.<sup>8</sup> (R. p. 111). According to Marshall, the victim then showed Marshall that Butler had scratched him on his face and on his chest. (R. p. 113). Marshall continued to try to calm the victim down. (R. pp. 113, 130). The victim then shoved Marshall to the ground. (R. pp. 113, 131). Marshall claimed he flew back about ten feet. He got caught up, and his back was hurting because of his prior injuries from the car accidents. (R. p. 113). Marshall then stood up, and he was pretty sure that his glasses flew off from the push.<sup>9</sup> (R. pp. 113-14).

When Marshall got up, he looked on the ground for his glasses. (R. p. 115). He walked back up to the victim again, and he was still trying to calm the victim down. (R. p. 115). Marshall was three feet or less from the door. (R. p. 115). Marshall tried to

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<sup>8</sup> Marshall testified there was a no-trespass order against the victim that was filed about two weeks before the shooting. (R. p. 112). Butler noted the victim was put on notice to not be at her apartment by authorities the day before the shooting. (R. p. 155). If police were called about the victim, he could have gone to jail. (R. p. 156). Butler noted they were planning on appealing the trespass notice, and that the reason he received it was because he had been arrested for disorderly conduct for loitering outside the apartment. (R. pp. 167-68).

<sup>9</sup> In his statement to law enforcement, Marshall claimed his glasses were still on when he shot Williams. (R. p. 137).

grab the victim's wrist, but the victim snatched it away and started kicking and punching the door again. (R. pp. 115-16, 131, 133). Marshall tried to grab the victim's hand again, but the victim turned around and shoved Marshall again. (R. p. 116). Marshall did not fall immediately, but the victim rushed him and shoved him harder. (R. p. 116). Marshall flew back into a nearby tree. (R. p. 116).

Marshall testified he was slow to get up the second time. (R. p. 117). When he got up, the victim shoved him into the tree again, and Marshall fell on top of the base of the tree. (R. p. 117). The victim was then on top of him and was assaulting him; he remembered being hit once in the face. (R. p. 117). Marshall tried to get away. He had his gun in his right hand. (R. p. 118). Marshall swung at the victim, and that was when he thinks he fired the gun at that time. (R. p. 118). Marshall stated, "I remember saying get off of me. I remember saying stop. I remember literally begging him to get off of me, to stop attacking me." (R. p. 118, ll 11-13). Marshall admitted he was the one who shot the victim. (R. p. 119). Marshall claimed he did not know he hit the victim with a shot until later. (R. p. 149).

Marshall testified that when he was trying to calm the victim outside, the victim seemed to be in an uncontrollable rage. (R. p. 122). Marshall was aware the victim was intoxicated (his blood alcohol content was .13). (R. p. 123). Marshall thought he was trying to kill him or that he would kill Marshall if he did not stop. (R. p. 122). He thought that could have happened to Butler, and believed she would have been dead if Marshall did not stop the victim from choking her. (R. p. 122). Marshall was not physically strong enough to get the victim off of him. (R. p. 124). While he was larger than the victim, his back injury from the car accidents prevented him from doing so. (R.

p. 124). In explaining why he shot the victim, Marshall stated, “[i]t wasn't really a decision. It is not like I sat there and had time to think about it. I was trying to get him off of me. And that is the only thing that seemed to get him off of me.” (R. p. 124, ll 19-22). Marshall claimed he did not mean to kill the victim, and he was just hoping to get him off top of him. (R. pp. 124-25).

Marshall later admitted that he initially said he fired a couple of shots, and then he fired a couple more shots shortly thereafter. (R. pp. 134, 148). He was also aware that three other shell casings fired from his gun were found on the scene. (R. p. 149). He did not recall telling the detective the victim was having a hard time breathing after he shot. (R. pp. 139-40).

Butler heard the gunshots when she was on the way back downstairs with the bag of clothes. (R. p. 164). Butler thought she heard four shots, one right after another. (R. p. 165). She started running down the stairs, and she dropped the bag. (R. p. 165). A picture of the bag of clothes was admitted into evidence. (R. p. 173). Butler testified she told investigators that she heard shots, then a pause, and then more gunshots. (R. p. 174).

Lanette Smalls, Butler's neighbor, testified she woke up to some gunshots and someone talking. (R. p. 179). She did not recall what time this occurred. (R. p. 183). She noted, she heard, “Pop, pop, pop, pop, you are messing with the wrong one, mother fucker.” (R. p. 179, l 25 – p. 180, l 1; see R. p. 185). Smalls said there was no pause in the shooting. The voice came from the same area as the gunshots. (R. p. 180). She looked out of her window, and she saw the victim hitting the ground. (R. p. 185). Smalls saw the victim, and she heard him drop to the ground. (R. p. 182).

Smalls tried to run downstairs because she heard a car squeaking, trying to leave. (R. pp. 180, 185). When she got downstairs, she saw a light colored car speeding away. (R. pp. 180-81). Smalls went back upstairs, and when she looked out her window, she saw Butler. (R. p. 181).

Butler opened the back door, and she saw the victim lying on the ground. (R. p. 165). Butler then ran back up the stairs to grab her cell phone so she could call 911. (R. p. 165).

**Marshall leaves the scene, and later returns.**

Marshall then got in his car and left the scene. (R. p. 120). Shortly thereafter, Marshall turned around and returned to the shooting site. (R. p. 121). At that time, a police officer was present. (R. p. 121). Marshall told the officer that he was the one who shot the victim. (R. p. 121).

Marshall admitted he did not see the victim with a weapon that night. (See R. pp. 137-38). Butler never heard Marshall talk about shooting his gun. (R. p. 175). The victim's gun was locked in his glove compartment. (R. p. 176).

## ARGUMENT

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING MARSHALL'S MOTION FOR IMMUNITY UNDER THE PROTECTION OF PERSONS AND PROPERTY ACT. THE TRIAL COURT FOUND MARSHALL'S TESTIMONY, WHICH SERVED AS THE UNDERLYING BASIS FOR MEETING THE ELEMENTS FOR SELF-DEFENSE, WAS NOT CREDIBLE. THUS, MARSHALL COULD NOT SHOW HE WAS ENTITLED TO IMMUNITY BY A PREPONDERANCE OF THE EVIDENCE.

### Discussion at the Immunity Hearing

At the immunity hearing, Marshall contended immunity was warranted under S.C. Code § 16-11-440(C). (R. p. 200). First, Marshall noted he was in a place where he had the right to be. He was an invited guest of the victim, who claimed to live at the apartment. (R. p. 200).

The trial court found Marshall failed to meet his burden of establishing he was entitled to immunity. First, the trial court agreed Marshall was in a place where he had a right to be for the purposes of S.C. Code § 16-11-440(C). (R. p. 202).

The trial court ultimately determined it could not find Marshall was entitled to immunity by a preponderance of the evidence. (R. p. 202, II 23-4).

Because I think the credibility of the defendant is suspect, due to the inconsistent statements throughout and even today. And then you factor in the other part where the scientific evidence just simply doesn't support his theory. Furthermore, the distance in where he was and where the body is and where the tree is, according to his testimony, those are inconsistent.

So there are just -- there are just too many inconsistencies for me to conclude that his testimony is reliable; and, therefore, I would -- I couldn't find that he -- if I were to decide whether self-defense exists and it was left to my standard, preponderance of the evidence, I would conclude it doesn't.

(R. p. 202, I 23 – p. 203, I 12). The trial court further found Marshall's case was distinguishable from the scenario presented in State v. Douglas, 411 S.C. 307, 768

S.E.2d 232 (Ct. App. 2014). (R. p. 203). The court noted that there was no evidence the victim had his gun present that night. (R. p. 204).

The trial court also found Marshall failed to establish he was not at fault in bringing on the difficulty. While Marshall did not have a duty to retreat, the trial court noted "clearly the persistent come on, you come home, when he really didn't have any right or duty to do that in the first place, aggravated the situation." (R. p. 204, ll 15-18).

The trial court also made specific findings regarding the credibility of witnesses:

I find the witnesses concerning this -- I think Ms. Butler basically was very credible. There was certainly disagreement between she and the victim and possibly even the defendant. Although that was sort of a subtle one. It was more inference that could be drawn.

But clearly going to get the clothing is consistent in what they found. And that is just consistent with -- there wasn't this guy try to break in to harm this lady. And that being said, that goes again also against the credibility and believability of a witness.

(R. p. 206, ll 2-11). The trial court also found there were inconsistencies in Marshall's statement to law enforcement, and the main inconsistency was with what happened during the shooting. (R. pp. 206-07). The trial court expressed concern about the fact Marshall was the only person brandishing a weapon, and he never put the gun away after taking it off of the table inside the house. (R. p. 207). The trial court noted a jury could easily determine Marshall got mad too, and he took out his anger on somebody. (R. p. 207). Overall, the trial court found there was not enough evidence to warrant a grant of immunity under the Protection of Persons and Property Act.

#### Standard of Review

Whether a defendant is entitled to immunity under the Protection of Persons and Property Act must be decided prior to trial if either party moves for a determination

regarding the Act's application to a defendant's case. State v. Duncan, 392 S.C. 404, 410, 709 S.E.2d 662, 665 (2011). "[W]hen a party raises the question of statutory immunity prior to trial, the proper standard for the circuit court to use in determining immunity under the Act is a preponderance of the evidence." Id. at 411, 709 S.E.2d at 665. S.C. Code § 16-11-440(C) states,

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, which this court reviews under an abuse of discretion standard of review." State v. Curry, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." State v. Jones, 416 S.C. 283, 290, 786 S.E.2d 132, 136 (2016)(citing State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007)). "Section 16-11-450 provides immunity from prosecution if a person is found to be justified in using deadly force under the Act." Id. "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.”<sup>10</sup> Id. at 371, 752 S.E.2d at 266.

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001) (citing State v. Cutter, 261 S.C. 140, 199 S.E.2d 61 (1973)). The appellate court is bound by the trial court's factual findings unless they are clearly erroneous. Wilson, 345 S.C. at 6, 545 S.E.2d at 829. Review is limited to determining whether the trial judge abused his discretion. Id. The appellate court may not re-evaluate the facts based on its own view of the preponderance of the evidence, but must determine whether the trial judge's ruling is supported by any evidence. Wilson, 345 S.C. at 6, 545 S.E.2d at 829; see generally Felts v. Richland County, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991) (“In law actions, the lower court must be affirmed where there is “any evidence” to support its findings.”).

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<sup>10</sup> Self-defense is a complete defense. If established, you must find the defendant not guilty. There are four elements required by law to establish self-defense in this case. First, the defendant must be without fault in bringing on the difficulty. Second, the defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger. Third, if his defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief. If the defendant actually was in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life. Fourth, the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance. If, however, the defendant was on his own premises he had no duty to retreat before acting in self-defense. These are the elements of self-defense.

State v. Davis, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984)

**The trial court did not abuse its discretion in denying Marshall's request for immunity under the Protection of Persons and Property Act.**

The trial court properly found Marshall failed to establish by a preponderance of the evidence that he was entitled to immunity in this case. The trial court applied the proper standard of review in assessing Marshall's motion for immunity. As reflected in the record, the trial court applied the standard outlined by the Supreme Court in State v. Curry, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013). (R. pp. 201-04). The trial court found Marshall did not meet his burden because his credibility was suspect. Marshall's testimony at the immunity hearing presented inconsistencies from the statements he provided to law enforcement, and inconsistencies with the physical evidence. (R. pp. 202-03). Marshall's argument for immunity below relied extensively upon his testimony about the events preceding the shooting. In light of the Marshall's suspect credibility regarding his recollection of what happened the night of the shooting, the trial court could not find he was entitled to immunity by a preponderance of the evidence. (R. p. 203).

The trial court's determination was supported by the record. There were numerous inconsistencies between Marshall's testimony at the hearing and his statement to law enforcement. Marshall had initially recalled to police the sequence of shots fired included a pause, but at the hearing he indicated there was no pause. (See R. pp. 134-35, 148). When explaining his confrontation with the victim outside, he gave differing accounts regarding his attempts to grab the victim by the wrist and the details of being assaulted by the victim to law enforcement and to the trial court. (See R. pp. 115-16, 131-34). Marshall was inconsistent about when he put the clip in his pistol,

initially indicating that he inserted the clip outside of the apartment, but contradictorily testifying at the hearing that he inserted the clip while inside the apartment just before he intervened in the confrontation between the victim and Butler. (R. pp. 102, 103). Marshall also gave conflicting accounts regarding when he lost his glasses at the scene. (R. pp. 113-15, 137). Marshall even admitted that his testimony regarding their positioning in the back yard when the shooting occurred differed from the explanation he gave law enforcement. (See R. p. 138). In light of these inconsistencies, along with others, it was not unreasonable for the trial court to find Marshall's testimony was not credible, or that he had failed to show he was entitled to immunity by a preponderance of the evidence.

The trial court's denial of immunity here is analogous to the situation presented in Curry. In Curry, the defendant and the victim were guests at the defendant's mother's apartment. Curry, 406 S.C. at 368, 752 S.E.2d at 265. The two got into an argument, and a brief scuffle ensued. Id. They were separated, but shortly thereafter, the two began fighting again. Id. After the second argument ended, the fight appeared to be over. Id. The account of what occurred next varied among witnesses. Several of the State's witnesses indicated Curry ran upstairs, came back downstairs, and started shooting at the victim. Id. Curry testified he pulled his gun from his pocket because he believed the victim was lunging towards him. Id. The victim was shot six times in the back, and it was undisputed he was unarmed. Id.

The trial court denied Curry's motion for immunity. The Supreme Court affirmed, concluding the facts supported the trial court's denial of immunity. Curry, 406 S.C. at 372, 752 S.E.2d at 267. "Appellant's claim of self-defense presents a quintessential jury

question, which, most assuredly, is not a situation warranting immunity from prosecution.” Id.

As found by the trial court in Curry, Marshall’s case presented a “quintessential jury question,” which warranted a denial of the request for immunity. Marshall’s testimony conflicted with Butler’s in several respects regarding what occurred inside the apartment before the shooting outside. More importantly, the inconsistencies in Marshall’s recollections of what occurred outside prior to the shooting created credibility issues that should have been resolved by a jury. The trial court was not required to accept Marshall’s version of the underlying facts, which would have proved to be difficult in light of the variances in Marshall’s account. Curry, 406 S.C. at 371, 752 S.E.2d at 266.

Marshall’s reliance upon State v. Douglas, 411 S.C. 307, 768 S.E.2d 232 (Ct. App. 2014), is misplaced. In Douglas, this Court affirmed the trial court’s grant of immunity. Douglas and the victim had been drinking and playing golf on the morning and early afternoon of the shooting. Id. at 313, 768 S.E.2d at 236. The two returned to Douglas’ home and continued drinking. Id. At some point, the victim found Douglas’ anti-anxiety medication, and he taunted Douglas with them until Douglas yelled at him. Id. The victim allegedly “snapped” and “went crazy,” grabbing Douglas by his upper arms and throwing him up against the refrigerator. Id. Douglas then fell to the floor, and he asked the victim to leave him alone. Id. at 314, 768 S.E.2d at 236. Douglas crawled to his bedroom and retrieved a pistol. Id. Douglas then walked back to the kitchen with the pistol and told the victim to leave. Id. According to Douglas, the victim began advancing towards him, and when Douglas realized he was not going out the

front door, Douglas lifted the pistol. Id. When the victim was approximately two feet away, Douglas fired the pistol. Smith was hit in the chest, and the bullet pierced his heart. Id.

This Court affirmed the trial court's grant of immunity. This Court specifically noted, "[u]nlike Curry and Butler, here, the circuit court found by a preponderance of the evidence that (1) Respondent reasonably believed shooting Smith was necessary to prevent great bodily injury to himself, and (2) Respondent acted in self-defense. The evidence supports these findings." Douglas, 411 S.C. at 319, 768 S.E.2d at 239. The circuit court had found Douglas' testimony to be credible "because it was consistent with the forensic evidence at the scene and other evidence in the case." Id. at 320, 768 S.E.2d at 240.

Marshall's case is distinguishable from Douglas. Unlike the circuit court in Douglas, the trial court here did not find Marshall's testimony to be credible. To the contrary, the trial court found Marshall's credibility suspect because of the numerous inconsistencies in the statement he provided to law enforcement, inconsistencies between Marshall's testimony and the statement, and inconsistencies between Marshall's version of events and the physical evidence. As noted in Douglas, "the abuse of discretion standard of review does not allow this court to reweigh the evidence or second-guess the trial court's assessment of witness credibility." Douglas, 411 S.C. at 316, 768 S.E.2d at 238.

Similarly, the Supreme Court's opinion in State v. Jones, 416 S.C. 283, 286, 786 S.E.2d 132, 134 (2016), does not support Marshall's argument for immunity. In Jones, Jones and the victim, her boyfriend, had been in a physical confrontation earlier in the

evening over a cell phone. Id. at 287, 786 S.E.2d at 134. Jones left the residence, but she later returned. Id. With the assistance of her cousin and a friend, Jones began collecting her belongings and removing them from the apartment she and the victim shared. Id., 786 S.E.2d at 134-35. At some point during this process, Jones grabbed a knife for protection. Id. 786 S.E.2d at 135. Jones asserted in her statement to law enforcement that the victim grabbed her and began shaking her. Id. Believing the victim was getting ready to hit her, Jones stabbed the victim once in the chest. Id. She then ran out of the apartment, and she and the other two left the scene. Id.

The circuit court granted relief, finding S.C. Code § 16-11-440(C) applied, and finding Jones had shown she was acting in self-defense. The Supreme Court affirmed. It held § 440(C) was applicable when the homicide occurred inside Jones' residence. Further, the Supreme Court held there was evidence to support the judge's findings as to each element of self-defense. Id. at 302, 786 S.E.2d at 142.

Marshall is also distinguishable from Jones. The circuit court in Jones did not have an opportunity to assess Jones' credibility because she did not testify. Instead, Jones relied upon her statement to law enforcement for her version of events. Further, unlike Jones, Marshall's account of what happened prior to the shooting was riddled with inconsistencies. In Jones, there was no discrepancy regarding what occurred before the stabbing.

Finally, Marshall's contention that he was entitled to immunity because he presented evidence supporting each of the required elements for self-defense is without merit. In presenting this argument, Marshall ignores the trial court's determination that his testimony was not credible. 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, 167-68, 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.”). In light of the fact that the evidence presented to support Marshall’s claim for immunity was not credible, it was not an abuse of discretion for the trial court to deny the motion. The denial of immunity should be affirmed.

CONCLUSION

For the foregoing reasons, the Respondent respectfully requests this Court deny Marshall's appeal and affirm his convictions for murder and possession of a weapon during the commission of a violent crime.

Respectfully submitted;

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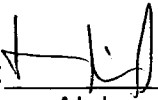
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