

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions

John C. Hayes, III, Circuit Court Judge

Opinion No. 2018-UP-169 (S.C. Ct. App. filed April 25, 2018)
Appellate Case No. 2018-001478

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S.C. SUPREME COURT

State of South Carolina, Respondent,

v.

Marquez Devon Glenn, Petitioner.

RETURN TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeals properly affirmed the trial court's finding that Petitioner was not entitled to immunity from criminal prosecution under the Protection of Persons and Property Act where Petitioner failed to carry his burden of proving by a preponderance of the evidence that he was "in another place he had a right to be" when he shot Victim three times.
2. Whether the Court of Appeals properly affirmed the trial court's finding that Petitioner was not entitled to immunity without considering proximate cause because: (1) the decision was based not on Petitioner's unlawful activity, but on the fact that his particular unlawful activity put him in a place he had no right to be, and (2) he did not hold the status of a "law-abiding citizen" at the time of the incident.
3. Whether the Court of Appeals properly affirmed the trial court's finding that Petitioner was not entitled to immunity where, regardless of whether Petitioner could be held criminally liable for trespass on the night of the shooting, the trial court properly found he was not in a place he had a right to be because: (1) he was on the apartment complex's "no trespass" list, (2) he had been being given a verbal trespass notice by police officers, (3) he could not attain the status of a lawful guest or licensee where the resident who invited him to her apartment had previously entered into a contract with the apartment complex prohibiting her from extending that invitation, and (4) he was not reasonably egressing the resident's apartment at the time of the incident.
4. Whether the Court of Appeals properly affirmed the trial court's finding that Petitioner was not entitled to immunity where his argument that the use of a three year old trespass notice as a bar to statutory immunity under the Act deprives him of his right to due process of law was not preserved for appellate review because it was neither raised to nor ruled upon by the trial court, and whether, even if preserved, the argument lacks merit because Petitioner was never charged with or found guilty of criminal trespass.

STATEMENT OF THE CASE

Marquez D. Glenn (Petitioner) was indicted at the July, 2014 term of the grand jury for Greenville County for attempted murder (count 1) and possession of a weapon during the commission of a violent crime (count 2) (2013-GS-23-006789). He was represented by Christopher Brumback, Esquire, and Spencer Langley, Esquire, and Respondent (the State) was represented by Assistant Solicitor Ryan Holloway of the Thirteenth Circuit Solicitor's Office. On August 3, 2015, the case was called for trial at the Greenville County Courthouse before the Honorable John C. Hayes, III. (App.p.23). At the call of the case, Petitioner made a motion to be granted immunity from prosecution pursuant to the Protection of Persons and Property Act (S.C. Code Ann. §§ 16-11-410 to -450) (Supp. 2012) (the Act). After the parties argued their respective positions, the jury was qualified and selected. Prior to the jury being sworn, the trial court conducted a pretrial immunity hearing per the procedures set forth in *State v. Duncan*, 392 S.C. 404, 709 S.E.2d 662 (2011). At the close of that hearing, after taking testimony, observing evidence, and hearing additional arguments from both sides, the trial court found that Petitioner had failed to establish he was entitled to immunity under the Act because, at the time of the shooting, he was not in a place he had a right to be. The trial court denied Petitioner's motion to dismiss the charges and the case proceeded to trial. (App.p.26-p.235). Petitioner was found guilty of assault and battery of a high and aggravated nature (ABHAN) and possession of a weapon during the commission of a violent crime. He was sentenced to twelve (12) years' imprisonment for ABHAN and five (5) years' concurrent imprisonment for possession of a weapon during a violent crime. (App.p.271-p.274; p.283-p.286).

Petitioner timely filed a notice of intent to appeal his convictions and sentences and the parties submitted briefs addressing the four issues raised by Petitioner on appeal. (App.p.309-

p.405). On April 25, 2018, the Court of Appeals issued an unpublished opinion that affirmed Petitioner's convictions. *State v. Glenn*, Op. No. 2018-UP-169 (S.C. Ct. App. filed April 25, 2018) (App.p.406-p.409). On May 8, 2018, Petitioner submitted a motion for rehearing or rehearing *en banc* pursuant to Rules 219 & 221(a), SCACR, and on June 1, 2018, the State filed a return. (App.p.410-p.425). By order filed July 9, 2018, the petition for rehearing was denied, and by letter of the same date the petition for rehearing *en banc* was rejected. (App.p.426-p.427). Petitioner timely served and filed a petition for a writ of certiorari to the Court of Appeals. This Return to Petition for a Writ of Certiorari, submitted on behalf of the State, now follows. Although a truncated statement of facts appears below, the full statement of facts and the substantive arguments recited in the Final Brief of Respondent are hereby incorporated by reference.

STATEMENT OF FACTS

On April 12, 2013, during an altercation in the parking lot of a Greenville apartment complex, Petitioner pulled a gun from the pocket of his shorts and shot Elfonso Bruster (Victim) three times, which resulted in Victim being paralyzed from the waist down. Although Petitioner spoke to a responding officer shortly after the shooting, he did not give that officer the gun during the conversation. Instead, he concealed the gun and later threw it in the Reedy River. It was never recovered by the police. (App.p.163-p.197; p.215, lines 8-15; p.216-p.223). Petitioner was subsequently charged with attempted murder and possession of a weapon during the commission of a violent crime. He was indicted by the Greenville County grand jury and was taken to trial in August of 2015.

When the case was called for trial, the trial court noted Petitioner had submitted a pretrial motion for immunity from prosecution under the Act, or what the judge noted was commonly

called the “stand-your-ground law.” (App.p.5-p.22). At the hearing, Petitioner contended the evidence presented at the immunity hearing would establish beyond a preponderance of the evidence that all of the requirements for statutory immunity in his case were met. He argued there was not much dispute about the facts of the case and that his arguments centered on a disagreement about the law as it applies to those facts. In particular, he claimed there were two legal issues in dispute. First, Petitioner argued that regardless of whether he was under a trespass notice from the apartment complex, he was attacked in a place he was lawfully permitted to be because he was an invited social guest of a tenant of the complex, and as such, he had a license to reasonable ingress and egress the apartment in order to effectuate his visit to that tenant, and that license overrode any objection of the landlord. Second, Petitioner argued that although he was admittedly engaged in an unlawful activity by carrying an unpermitted concealed weapon, this did not preclude him from lawfully arming himself in self-defense, and therefore would not preclude immunity under the Act. (App.p.27-p.29).

In regard to Petitioner’s first point, the State responded by arguing that under the plain language in the Act Petitioner had no right to stand his ground because he simply had no right to be at the apartment complex in the first place. In support of this argument the solicitor handed up copies of eviction paperwork from April 2010, a model lease for the complex from 2010, and a model lease for the complex from 2014. He outlined what he expected certain witnesses would say about those documents in regard to Petitioner being subject to a no trespass notice for the apartment complex. The solicitor noted the model lease agreements included a provision stating that a current tenant cannot invite into an apartment a guest who would violate state or local laws, and that this lease provision effectively limits the scope of a tenant’s authority to delegate a right of entry to a guest. In regard to Petitioner’s second point, the State argued Petitioner was

not acting lawfully because he armed himself before entering the property rather than arming himself at the moment in time he perceived a threat. (App.p.29-p.33; p.287-p.240; p.291-p.304).

Under questioning from the trial judge, the parties continued to advance their respective positions on the two issues raised by Petitioner. Relying on case law from Massachusetts and a non-binding opinion issued by the South Carolina Attorney General's Office, Petitioner argued a landlord gives up certain property rights when he or she leases property to a tenant, including the right to prohibit a person placed on trespass notice from entering the property at the invitation of the tenant. He contended that if he could not be considered a trespasser, "the State's entire argument about him not being lawfully permitted to be there is void." (App.p.34-p.39). The solicitor countered that the tenant's rights are not unlimited and could be in fact be limited by the terms of the lease the tenant signs. He read from particular paragraphs of the 2010 model lease, which the trial court found "would be the operable one in 2013," (App.p.41, lines 16-17), specifically noting the lease provided "a resident may not invite any person on the property or into a unit who's listed on the site's trespass list" and "residents may not share their property with anyone who's not on the lease."¹ The State argued Petitioner's restriction against being at the apartment complex would be "more of a breach of contract issue" rather than what Petitioner was claiming to be a pure question about the right of a tenant to invite guests when those guests are under a no trespass notice. (App.p.39-p.43).

¹ Notably, Petitioner did not object to or otherwise challenge these findings of fact by the trial judge, instead arguing that the tenant's right to invite individual social guests to her apartment trumped the apartment complex's right to control access to the property by way of either trespass notice or terms of the lease. In criminal cases the appellate court sits to review errors of law only and is bound by the factual findings of the trial court unless clearly erroneous. *State v. Parker*, 391 S.C. 606, 611, 707 S.E.2d 799, 801 (2011); *State v. Wilson*, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001). The appellate court does not re-evaluate the facts based on its own view of the preponderance of the evidence, but instead, simply determines whether the trial judge's ruling is supported by any evidence. *Parker*, 391 S.C. at 611-12, 707 S.E.2d at 801. Thus, this Court is bound by the factual findings of the circuit court in regard to the applicability of the 2010 model lease.

In making his final pitch before calling witnesses, Petitioner did not dispute he was under a no trespass notice from the apartment complex at the time of the shooting, and he did not dispute that the fact that the standard lease terms for all tenants in the apartment complex prohibited them from inviting a person on the property or into a unit who is listed on the site's trespass list. Instead, he opined: "I simply don't think that the landlord has the right to tell someone that they cannot invite someone to an apartment." Thus, Petitioner maintained the tenant's right to invite guests to his or her apartment is an absolute right which is not subject to restriction, even if that restriction is part of a contract. (App.p.43-45).

After jury qualification and selection, Petitioner presented testimony to the trial court in an effort to persuade the judge he should be granted immunity under the Act. He elicited testimony from his brother, Tivarius Henderson (Tivarius) (App.p.72-p.91; p.305); his friend Shelricka Duncan (Shelricka) (App.p.97-p.117); his friend Delni Nunez (App.p.119-p.130); his friend Jamarus [a/k/a Jamar] Smith (Jamar) (App.p.132-p.145); his grandmother, Terry Glenn (App.p.150-p.153); and his friend Kiana Grayson (App.p.198-p.205). Petitioner also took the stand to offer his own version of events. (App.p.163-p.194). The State then presented three witnesses in response including Deputy Dorsy Lay of the Greenville County Sheriff's Office (GCSO) (App.p.207-p.210); GCSO Master Deputy Eric Whaley (App.p.212-p.215); and Victim (App.p.217-p.223).

At the conclusion of the testimony, the trial court heard additional arguments from Petitioner as to why he believed he was immune from prosecution under the Act (App.p.223-p.225), and heard from the State in response (App.p.225-p.230), and Petitioner again in reply. (App.p.230-p.233). The trial court then ruled as follows:

All right. Well, I'm reviewing this. And keep in mind that this ruling is solely for the purpose of this immunity motion and does not bear on any self-defense defense, but I deny the motion for immunity.

I find that to follow the Defendant's logic and the logic of the Massachusetts' cases and the other literature in essence neuters trespass notices. I think a landlord has a right, if not the duty and obligation, to protect the safety of all the tenants of a project.

I do not believe the rights of the tenant to have guests of their choice overrides the duty and right of the landlord to protect the entire community from having troublemakers, and that's generally what trespassers are, and I'm not saying that Mr. Glenn is a troublemaker, but that's generally where we find trespass, from having troublemakers on the property. This overriding duty trumps any particular rights that the tenant may have.

In spite of the well articulated argument and the cases, I do not believe, at least under the South Carolina -- well, there is no real South Carolina law, but I do not believe that a landlord -- a tenant has unfettered rights. As the way of example, they can be told they can't have pets, they can be told they can't have a business, they can be told they can only have a certain number of occupants, they can be told that the occupants have to be relatives.

So I do not follow the logic of the Massachusetts cases that there are certain rights, and our Appellate Courts may determine different, that there are certain rights that exist and override the rights -- and, again, I think it's an obligation and a duty.

We have cases dealing not directly with this that indicate that owners of property have a duty to keep the people who come upon the property. There's a recent case dealing with the Harbison Community in -- it's not directly on point, but my point is that the property owner has an obligation and a duty to protect anyone that comes on the premises.

So I do not -- I find that the immunity argument fails solely on the issue of whether or not he had a right to be there. I find he did not.

As to any illegal activity, I believe this phrase addresses active illegal activity such as a drug deal, an assault, armed robbery. I believe passive activity, even if it allegedly does not come under the phrase, under this phrase, does not -- let me rephrase that. Passive activity such as Mr. Glenn's carrying an illegal weapon, I don't believe comes under the phrase illegal activity as envisioned by the Legislature. I think it has to be a more active illegal activity.

I find that Mr. Glenn's, and this, again, is solely for the purposes of this motion, Mr. Glenn's illegal activity or illegal act of having the pistol was not a

proximate cause of the incident. So as to the two sort of prongs, I find that immunity fails based on his not having the right to be there, but that I do not find that he was engaged in an illegal activity, which would prevent him from -- from having immunity but for his not being allowed on the property.

So I find that he is not clothed with the immunity provided by section 16-11-440 and 450 because he was not at a place he had a lawful right to be at the time of the incident. So the motion is denied.

(App.p.233-p.235) (emphasis added). After the court addressed additional pretrial matters, the case proceeded to trial.

Upon hearing all of the evidence and the trial court's charge on the law—which included a charge on self-defense—the jury found Petitioner guilty of ABHAN and possession of a weapon during the commission of a violent crime and the trial court sentenced him to twelve (12) years' imprisonment. (App.p.236-p.284).

CERTIORARI

Petitioner argues this Court should grant certiorari both to ensure justice for him, and “to ensure proper interpretation of the [Act] and to thereby provide clarity for every individual in South Carolina regarding one's right to act confidently in self-defense.” He argues that, in addition to raising several novel questions of first impression and the “fact” that the decision of the Court of Appeals is in “conflict with prior Supreme Court jurisprudence,” “the outcome of this appeal will directly and materially impact every South Carolinians' right and ability to defend themselves and their property.”

However, the Court of Appeals employed the proper standard of review in concluding: (1) the circuit court did not abuse its discretion in finding Petitioner was not immune from prosecution under the Act and (2) Petitioner's remaining arguments were unpreserved. The decision is consistent with precedent in South Carolina including *State v. Curry*, 406 S.C. 364, 752 S.E.2d 263 (2013), *State v. Green*, 35 S.C. 266, 14 S.E. 619 (1892), and *Strother v.*

Lexington Cty. Recreation Comm'n, 332 S.C. 54, 504 S.E.2d 117 (1998). The Court of Appeals found: “Glenn was not in a place where he had a right to be because his status at all times was that of a trespasser, regardless of Shericka Duncan’s invitation to Glenn to come to Spring Grove.” It noted the existence of evidence in the record reflecting that a sheriff’s deputy issued a verbal trespass notice and placed Petitioner on Spring Grove’s no trespass list after the deputy found Glenn loitering. The Court of Appeals concluded this demonstrated Petitioner knew he was prohibited from being on the grounds and, as a result, could not claim to believe he had a right to be at Spring Grove. Finally, it found Petitioner was not reasonably egressing Shericka’s residence at the time of the incident. All of these findings were consistent with evidence in the record before the trial court and upon which it relied in denying immunity under the Act.

Furthermore, as noted in the heading of the opinion, as an unpublished opinion it has no precedential value and should not be cited or relied upon as precedent. Therefore, it neither directly nor materially impacts the rights or abilities of any South Carolinians to defend themselves under the plain and ordinary meaning of the language of the Act. The Court of Appeals examined the Act in light of this language and agreed with the circuit court’s logical interpretation to find Petitioner did not have a right to be at Spring Grove at the time of the incident. The opinion was based on the specific facts and circumstances of Petitioner’s case and will not prohibit or prevent South Carolinians from seeking immunity under the Act or pursuing self-defense at trial, even if they are attempting to raise the same legal arguments put forth by Petitioner in this appeal. Thus, pursuant to Rule 242(b), SCACR, there are no “special and important reasons” for this Court to exercise its discretion to grant review of the decision of the Court of Appeals in this matter. Petitioner’s petition for a writ of certiorari should be denied and dismissed.

I.

The Court of Appeals properly affirmed the trial court's finding that Petitioner was not entitled to immunity from criminal prosecution under the Protection of Persons and Property Act where Petitioner failed to carry his burden of proving by a preponderance of the evidence that he was "in another place he had a right to be" when he shot Victim three times.

In his introduction, Petitioner relies primarily on this Court's opinion in *State v. Jones*, 416 S.C. 283, 786 S.E.2d 139 (2016), and its alleged "rejection of artificial constraint of geographical circumstances" to support his petition for a writ of certiorari. Petitioner claims the Court of Appeals decision: "rejects this Court's focus on relative rights as between parties in favor of the random circumstances of physical boundaries set by third parties." He claims it will: "undoubtedly have a chilling effect on the right and ability of every individual in South Carolina to defend themselves without fear of prosecution pursuant to the [Act]" and argues "the right to self-defense should not be dictated by the threshold of a doorway, a sign stating that a city park closes at a specific time, or an arbitrary property line that is crossed by mistake or under a bona fide claim of right." Then, in his first substantive argument, Petitioner contends the Court of Appeals improperly constrained the scope of immunity granted by the Act to bona fide individuals to defend themselves against attack.

The State disagrees with these arguments and submits Petitioner's dramatic take on the import of the Court of Appeals decision both misinterprets the reach of *Jones* and fails to recognize long established principles of self-defense which already protect the rights of all individuals to defend themselves from attack. The only way in which the Court of Appeals "constrained" the scope of immunity in reviewing the trial court's ruling was by ensuing the lower court followed the constraints imposed by the Legislature in the terms of the Act.

Standard of Review

The appellate court reviews the trial court's pretrial determination of immunity for an abuse of discretion. *State v. Curry*, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013). In criminal cases, the appellate court sits to review errors of law only. *State v. Black*, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012); *State v. Wilson*, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). The appellate court does not re-evaluate the facts based on its own view of the preponderance of the evidence but, instead, simply determines whether the trial judge's ruling is supported by *any evidence*. *Wilson*, 345 S.C. at 6, 545 S.E.2d at 829 (emphasis added); *see also State v. Gracely*, 399 S.C. 363, 371, 731 S.E.2d 880, 885 (2012) ("The trial court will only be reversed when there is no evidence to support the ruling below."). "[T]he trial court's ruling will not be disturbed absent a prejudicial abuse of discretion amounting to an error of law." *State v. Sheldon*, 344 S.C. 340, 342, 543 S.E.2d 585, 585-86 (Ct. App. 2001). An abuse of discretion occurs only when the trial court's conclusions lack evidentiary support or are controlled by an error of law. *State v. Scott*, 414 S.C. 482, 486, 779 S.E.2d 529, 531 (2015) (quoting *State v. McDonald*, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000)); *see also Reed v. Becka*, 333 S.C. 676, 684, 511 S.E.2d 396, 400 (Ct. App. 1999) ("In appeals of pretrial rulings, this Court is 'bound by fact findings in response to motions preliminary to trial when the findings are supported by the evidence and not clearly wrong or controlled by error of law.'" (quoting *State v. Amerson*, 311 S.C. 316, 320, 428 S.E.2d 871, 873 (1993))).

The Protection of Persons and Property Act

The subsection of the Act which creates immunity provides:

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

unless the person against whom deadly force was used is a law enforcement officer

S.C. Code Ann. § 16-11-450 (Supp. 2012). A claim of immunity under the Act must be determined pretrial and the defendant has the burden of proving entitlement to immunity by a preponderance of the evidence. *State v. Duncan*, 392 S.C. 404, 411, 709 S.E.2d 662, 665 (2011). Consistent with the Castle Doctrine and the text of the Act, a valid case of self-defense must exist, and the trial court must necessarily consider the elements of self-defense in determining a defendant's entitlement to the Act's immunity. *Curry*, 406 S.C. at 371, 752 S.E.2d at 266. This includes each element of self-defense, save the duty to retreat. *Id.* at 372, 752 S.E.2d at 266-67 (“[I]mmunity is predicated on an accused demonstrating the elements of self-defense to the satisfaction of the trial court by the preponderance of the evidence.”)

Section 16-11-440 sets forth the circumstances under which the Act allows the use of deadly force. It creates a presumption of reasonable fear of imminent peril of death or great bodily injury when a person is subject to an unlawful or forceful entry of his or her dwelling, residence, or occupied vehicle, or when a person is subject to removal or attempted removal against his or her will from a dwelling, residence, or occupied vehicle, and it establishes certain exceptions to this presumption. S.C. Code § 16-11-440(A) & (B) (Supp. 2012). The Act then provides:

(C) A person who is not engaged in an unlawful activity **and who is attacked in another place where he has a right to be**, including, but not limited to, his place of business, has no duty to retreat and has the right to stand his ground and meet force with force, including deadly force, if he reasonably believes it is necessary to prevent death or great bodily injury to himself or another person or to prevent the commission of a violent crime as defined in Section 16-1-60.

S.C. Code Ann. § 16-11-440(C) (Supp. 2012) (emphasis added).

Discussion / Analysis

In Petitioner's case, the trial court followed the appropriate procedure under rulings from this Court—holding a pretrial hearing, evaluating the credibility of the witnesses and weighing the evidence, and ultimately finding Petitioner did not carry his burden of proving he was entitled to immunity under the Act. Petitioner's argument cannot prevail under this Court's standard of review. As in *State v. Curry*, 406 S.C. 364, 752 S.E.2d 263 (2013), Petitioner's claim of self-defense presented a quintessential jury question, which is not a situation warranting immunity from prosecution. The trial court's finding that Petitioner failed to carry his burden of proving he was in a place he had a right to be at the time the shots were fired has evidentiary support and is not controlled by an error of law. The case was properly submitted to the jury, with the claim of self-defense being fully presented, and the State having to disprove at least one element of self-defense beyond a reasonable doubt. The trial judge's pretrial immunity ruling was properly affirmed by the Court of Appeals.

In support of his position, Petitioner argued to the Court of Appeals that the conclusion reached by the trial court was an abuse of discretion because the trial judge's broad interpretation of the statutory language was "in direct opposition to the expressly stated legislative intent of the [Act]." (App.p.323). After artfully rendering a favorable version of the facts which led to the shooting, which he repeats in his petition for a writ of certiorari,² Petitioner argued the question before the Court of Appeals is "fundamentally a determination of the scope of a bona fide individual's right to defend himself against attack." He referenced the legislative intent

² Petitioner claims he was "unaware of the events that transpired in his absence" at the time of the shooting; however, Tivarius testified he told Petitioner what happened and Petitioner himself testified Kiana, Maria, and Jamar filled him in on the events that had happened while he was gone. Petitioner also describes Kevin and Victim as "concealing themselves in the shadows and lying in wait" despite testimony that the two men walked up to Petitioner in view of several other people. Finally, Petitioner notes he "willingly cooperated with the police officers investigating the reports of the [earlier] assault perpetrated by Kevin" but fails to mention the fact that he disposed of the gun he used to shoot Victim instead of giving it to the police. (App.p.322).

expressed in the language of Section 16-11-420(B) concerning the right of “law-abiding citizens to protect themselves” and “that no person or victim of crime should be required to surrender his personal safety to a criminal,” and contended the Act is intended to extend the right to defend one’s self to victims of crime “indiscriminate of where an attack may occur and without obligation to flee when attacked.” (App.p.324). Yet, the Legislature itself ensured the Act is not indiscriminate in this regard. Section 16-11-440(C) contains clear limitations, one of which provides that a person can stand his ground and meet force with force, including deadly force, only if he is attacked in a “place where he has a right to be.” Generally, a specific statutory provision prevails over a more general one. *Dreher v. S.C. Dep’t of Health and Env’tl. Control*, 412 S.C. 244, 251, 772 S.E.2d 505, 509 (2015). Thus, the sweeping scope of the Act as propounded by Petitioner must succumb to the more restrictive and specific provisions of the Act that were enacted by the Legislature.

The State submits the legislative intent to significantly restrict when to grant pretrial immunity where a person has used deadly force is further supported when considered in the context the principles of self-defense upon which it is founded. Prosecutors are already imbued with broad discretion to decline to prosecute where they determine the circumstances of the case do not merit pursuit of criminal charges. *Ex parte Littlefield*, 343 S.C. 212, 218-19, 540 S.E.2d 81, 84 (2000). Also, individuals may avail themselves of the common law Castle Doctrine and the common law defenses of habitation, of others, and self-defense in the event of a trial. Granting an individual immunity from prosecution rather than letting a jury determine whether the State has disproven self-defense beyond a reasonable doubt is an extreme result and should occur only in circumstances where a defendant has carried his burden of proof as to each and every aspect of the Act. Contrary to Petitioner’s assertion, any other result would be absurd and

would lead to a society akin to the wild-wild-west, where an individual in an altercation can shoot first, and if he kills another person, attempt to justify his actions by giving self-serving facts which cannot be contested by the person who has been killed. Even where a person is in a place he has no right to be when attacked, he may still be able to rely on self-defense before the jury. Thus, a pretrial denial of immunity does not eliminate the presumption of innocence or the State's high burden of proof for a criminal conviction. Here, the trial court properly considered whether Petitioner carried his burden of proving he was in a place he had a right to be in ruling on his request for immunity, and that ruling was properly affirmed. *See Duncan*, 392 S.C. at 411, 709 S.E.2d at 665 (affirming the pretrial ruling on immunity because there was evidence to support the trial court's findings).

Petitioner's new reliance on *Jones* does not affect the propriety of the ruling by the Court of Appeals. In *Jones*, this Court held "another place" encompasses a residence within the meaning of a provision of the Act relating to immunity for use of deadly force by a person who is not engaged in an unlawful activity and who is attacked in "another place" where he has a right to be. *Jones*, 416 S.C. at 298, 786 S.E.2d at 140. In reaching this conclusion, the Court found: "the Legislature intended the protection of subsection (C) to apply to incidents, provided the other requirements are met, without a geographical restriction." *Jones*, 416 S.C. at 139, 786 S.E.2d at 297. It also held: "To interpret 16-11-440(C) as the State proposes would improperly limit the protection of the Act based on the geography of the incident and the identity of the assailant." *Id.* However, these findings were made in the context of a person who was, without dispute, in a place she had a right to be—her own apartment. *Jones*, 416 S.C. at 292, 786 S.E.2d at 137. This informed the trial court's ultimate conclusion that it would be nonsensical to hold that a person can defend themselves from attack by their co-resident while outside of the home,

but not inside of the home. *Jones*, 416 S.C. at 289, 786 S.E.2d at 135. Indeed, even in the language relied upon by Petitioner, the *Jones* court rejected the use of geographical restrictions “provided the other requirements [of 16-11-440(C)] are met.” Here, the trial court concluded they were not, not because of a nonsensical geographical restriction, but because Petitioner was simply not in a place he had a right to be. The Court of Appeals properly affirmed and certiorari should be denied.

II.

The Court of Appeals properly affirmed the trial court’s finding that Petitioner was not entitled to immunity without considering proximate cause because: (1) the decision was based not on Petitioner’s unlawful activity, but on the fact that his particular unlawful activity put him in a place he had no right to be, and (2) he did not hold the status of a “law-abiding citizen” at the time of the incident.

In his petition for a writ of certiorari, Petitioner argues that “even assuming *arguendo* that [he] was trespassing when he was attacked, the Court of Appeals erred in denying [him] self-defense immunity without determining whether [his] allegedly unrightful presence was the proximate cause of his being attacked and having to defend himself.” He again invokes *Jones*, and argues that where it stands for the proposition that the protections of the Act should not be limited by geographical location, it also means those protections should not be limited by a restriction that individuals must be in a place they have a right to be, unless the failure to meet that requirement is the **proximate cause** of the resulting incident. Equating his situation with one where our Courts have examined the effect of engaging in an “unlawful activity” in the context of self-defense, Petitioner claims there already exists a common sense framework by which to analyze claims that you should be able to obtain immunity even when you are not in a place you have a right to be.

However, Petitioner appears to mischaracterize the basis upon which the trial court denied immunity and upon which the Court of Appeals determined immunity was properly denied. He suggests the request for immunity was denied because his act of trespassing was an “unlawful act” where location should not matter. But, this is not the case. While being “engaged in an unlawful activity” can be a reason to exclude a person from a grant of immunity under the Act, and would have been a valid basis for doing so here, failing to be “in another place where [the person] has a right to be” is a separate and independent bar to immunity.

Here, the trial court specifically denied immunity because, as a trespasser, Petitioner was not in a place he had a right to be. Immunity was not expressly denied because, as a trespasser, Petitioner was also engaged in unlawful activity. Petitioner’s proximate cause argument is based on case law in South Carolina recognizing that, in the context of self-defense, a person may be acting lawfully in self-defense even where engaging in an unlawful activity, such as unlawfully possessing a weapon. Because the trial court’s decision was based not on Petitioner’s unlawful activity, but on the fact that his particular unlawful activity happened to put him in a place he had no right to be, no discussion of proximate cause was relevant or required. *Jones* does not suggest otherwise.

In any event, the Act itself makes clear it is intended only to provide immunity to “law-abiding citizens.” This intent informs the breadth of the Act’s language barring immunity for someone “engaged in an unlawful activity.” Thus, even if Petitioner’s unlawful activity was the basis of the trial court’s ruling, it nevertheless was properly affirmed. The rules of self-defense in the context of a jury determining whether the state has proven guilt beyond a reasonable doubt are inapplicable in the context of a judicial grant of immunity from prosecution under the Act. The Court of Appeals properly affirmed and certiorari should be denied.

III.

The Court of Appeals properly affirmed the trial court's finding Petitioner was not entitled to immunity where, regardless of whether Petitioner could be held criminally liable for trespass on the night of the shooting, the trial court properly found he was not in a place he had a right to be because: (1) he was on the apartment complex's "no trespass" list, (2) he had been being given a verbal trespass notice by police officers, (3) he could not attain the status of a lawful guest or licensee where the resident who invited him to her apartment had previously entered into a contract with the apartment complex prohibiting her from extending that invitation, and (4) he was not reasonably egressing the resident's apartment at the time of the incident.

In his appeal to the Court of Appeals, Petitioner argued his status as a guest and licensee of a resident of the apartment complex conferred on him a license to ingress and egress through the common areas of the complex such that he, while reasonably exercising his license to egress, was "in a place where he had a right to be" when he defended himself from an unprovoked attack." (App.p.325-p.335). The State continues to maintain the position argued in its Final Brief that regardless of whether Petitioner could be held criminally liable for trespass on the night of the shooting, the trial court properly found he was not in a place he had a right to be for purposes of immunity under the Act. (App.p.391-p.395).

In his petition for certiorari, Petitioner makes a similar claim and contends "it was error for the Court of Appeals to find [him], while reasonably exercising his license as a social guest of Spring Grove tenants, was not "in a place where he had a right to be" when he defended himself from an unprovoked attack." Again, the State disagrees.

In making this argument to the Court of Appeals, Petitioner relied primarily upon an opinion issued by the South Carolina Attorney General's Office which, among other things, purported to answer the following question: "Does law enforcement have the authority to *arrest someone for trespassing* if it is determined that an apartment manager has had them placed on

trespass notice?” 2013 WL 3133638 at 1 (S.C.A.G. June 5, 2013) (emphasis added). He contended the opinion is “on all fours with the central issue presented by this appeal” and that it “provides in-depth and persuasive analysis of the respective property rights of landlords and tenants in housing complexes and the ability of tenants to lawfully invite persons to a complex over objection of the landlord.” (App.p.326). Petitioner further relied on two published opinions from Massachusetts, *Commonwealth v. Richardson*, 48 N.E.2d 678 (Mass. 1943) and *Commonwealth v. Nelson*, 909 N.E.2d 42 (Mass. App. Ct. 2009), on which the South Carolina Attorney General’s opinion is based, as well as published opinions from several other jurisdictions and law review articles discussing the propriety of public housing authorities having unwanted visitors arrested for trespassing. (Brief of Petitioner, p.13-p.17). Next, Petitioner claimed the referenced the authorities cited “are consistent with those found in South Carolina [property] jurisprudence.” (App.p.332-p.335).

The State responded that Petitioner’s argument fails for a number of reasons. First, he misconstrues the trial court’s ruling in regard to criminal trespass. Nothing in the record suggests the trial court was making an “interpretation or application” of section 16-11-620 of the Code. In fact, the trial judge did not reference section 16-11-620 and never made a finding that Petitioner should be held criminally guilty of trespass under the statute. Instead, the trial judge broadly interpreted the restrictive language from the Act to conclude Petitioner was not in a place he had a right to be. The court referenced a recent case concerning a lawsuit which alleged an apartment complex was negligent in failing to providing adequate security to its tenants³ and concluded the landlord’s obligation to its tenants was superior to that of the tenant’s rights to invite social guests to that property, in the context of seeking immunity under the terms of the

³ *Wright v. PRG Real Estate Mgmt., Inc.*, 413 S.C. 276, 775 S.E.2d 399 (Ct. App. 2015) (discussing a lawsuit filed against an apartment complex located in the Harbison community in Columbia).

Act. Based on this finding, the trial court held the trespass notice given to Petitioner was sufficient to mean he was not in a place he had a right to be when he disregarded that notice and accepted Shelricka's invitation to come onto the landlord's property to get to her apartment.

Petitioner made the mistake of equating the State's ability to hold an individual criminally liable for trespassing, with a private property owner's ability to determine whether an individual has the right to enter that property. Although the two concepts are related, they are not one and the same. Indeed, the South Carolina Attorney General's opinion, *Richardson, Nelson*, and the other authorities cited by Petitioner all seem to concern criminal trespass statutes and whether law enforcement has the authority to **arrest** someone for trespassing if it is determined that an apartment manager has had them placed on trespass notice. That was not the issue before the lower court; therefore, the authorities as a whole are inapplicable and certainly do not dictate the result sought by Petitioner. The denial of immunity was properly affirmed.

In regard to the Attorney General opinion itself, the State submits it should only be considered as to the purpose for which it was written. The municipal judge who requested the opinion did not ask any questions about the Act or whether a person on trespass notice from an apartment complex could be deemed to be in a place he had a right to be if he had been invited to the apartments by a tenant, for purposes of the Act. The opinion similarly does not address immunity under the Act; therefore, it has no applicability to the question before the trial court in Petitioner's case. Furthermore, it is well settled that although it may be persuasive authority, an Attorney General's opinion is not binding on the Court. *State v. Ramsey*, 409 S.C. 206, 212, 762 S.E.2d 15, 18 (2014). Given the limited purpose and nature of the Attorney General's opinion, and South Carolina's still developing jurisprudence on the provisions of the Act, this is a

question that would best be resolved under this Court's independent reasoning, not that of the Attorney General, or the appellate courts of Massachusetts.

Notably, in one of the cases Petitioner found persuasive, the Appeals Court of Massachusetts applied contract law when determining the customary usage of hallways in Boston Housing Authority (BHA) properties. *Nelson*, 909 N.E.2d at 45-46. It noted the BHA police department's trespass policy specifically gave a resident the right to invite an individual to visit, even if they had been served with a No Trespass Notice, and it further noted the model BHA public housing lease terms acknowledged that residents are entitled to have guests in their apartments. *Id.* Stating it was "loath to construe contracts in a manner that would render any provision meaningless" the court concluded "the lease's provisions indicate that it is customary to permit invited guests to pass through the common hallways in order to reach their tenant-host's apartment." *Nelson*, 909 N.E.2d at 46. Here, the 2010 model lease for Shelricka's apartment included terms that are the polar opposite from those in *Nelson*. Specifically, the 2010 model lease provided in part:

15. Residents may not invite any person onto the property or into their unit who is listed on the site's No Trespass List.

....

19. Under federal regulations applying to this community, **Residents may not share their apartment with anyone who is not on the lease or allow unauthorized persons in the unit or on the property.** Management has the right to prohibit anyone, other than the resident from coming on the leased premises or any part of the community for any length of time once the resident receives a copy of a written notice barring an individual from entering the community.

(App.p.304) (emphasis added). Although he continues to question the applicability of the 2010 model lease on grounds it was used by a prior management company for the apartment complex,

Petitioner did not object or otherwise challenge the trial court's finding of fact that the 2010 model lease: "would be the operable one in 2013." (R.p.37, lines 16-17). Thus, the factual finding is the law of the case. *Parker*, 391 S.C. at 611, 707 S.E.2d at 801; *Wilson*, 345 S.C. at 5-6, 545 S.E.2d 829.

In his brief on appeal, Petitioner also argued: "The housing project's use of [16-11-620] in conjunction with the project's "Ban List" are in violation of the United States Housing Act's statutory mandate and HUD's implementing regulations such that they cannot constitute the grounds for the forfeiture of an individual's statutory right to self-defense." (App.p.350-p.352). In his petition for certiorari, he continues to argue that HUD regulations support his claim that a social guest of a tenant is not a trespasser. Yet, as argued by the State and as found by the Court of Appeals, this argument is not preserved for appellate review because it was not specifically raised to and ruled upon by the trial court. *Dunbar*, 356 S.C. at 142, 587 S.E.2d at 693-94.

Furthermore, the argument is without merit. The 2010 model lease consists of forms promulgated by HUD, each page of which bears the HUD "equal housing opportunity" logo. Even if it was raised, it is incredulous to suggest lease forms approved by HUD would be deemed by the trial court to be in violation of HUD regulations. Indeed, it is incredulous to believe a lease term prohibiting a resident from inviting a person onto the property or their unit who is listed on the site's no trespass list would be considered by the District Court of South Carolina to be an unreasonable term or condition, notwithstanding the opinion of the District Court of Maryland in *Diggs v. Housing Authority*, 67 F. Supp.2d 522 (D. Md. 1999). The trial court properly considered the lease terms in the 2010 model lease in rejecting Petitioner's claim that he was in a place he had a right to be, and its decision was properly affirmed by the Court of Appeals.

Petitioner's entire argument hinges on whether he was a lawful guest or licensee when he was invited to Shelrick's apartment. However, that determination depends on whether Shelricka had the right to extend the invitation. Under the model 2010 lease, which was the operable lease in 2013, she did not. Shelricka validly and legally gave up any right to invite guests on the site's no trespass list to her apartment. Petitioner was on the site's no trespass list, as confirmed by Deputies Lay and Jumper when they encountered Petitioner loitering at the complex in October of 2010. At trial, the lower court appears to have acted in accordance with the contract principle espoused in *Nelson* by being loath to construe Shelricka's contract in a manner that would render any provision meaningless. In seeking support for his position from South Carolina property jurisprudence, Petitioner commented that "the landlord cannot exercise a right he has previously given up to a tenant." (App.p.334). Yet on appeal, Petitioner implored the Court of Appeals and now implores this Court to let a tenant exercise a right she has previously given up to her landlord. Petitioner was not a legal guest or licensee of a resident of the apartment complex; therefore, he had no right to visit Shelricka's apartment, no right to ingress and egress, and was not in a place he had a right to be for purposes of the Act. The Court of Appeals properly affirmed and certiorari should be denied.

IV.

The Court of Appeals properly affirmed the trial court's finding that Petitioner was not entitled to immunity where his argument that the use of a three year old trespass notice as a bar to statutory immunity under the Act deprives him of his right to due process of law was not preserved for appellate review because it was neither raised to nor ruled upon by the trial court, and where, even if preserved, the argument lacks merit because Petitioner was never charged with or found guilty of criminal trespass.

In his appeal to the Court of Appeals, Petitioner argued the use of a three year old trespass notice as a bar to statutory immunity under the Act deprived him of his right to due

process of law. (App.p.355-p.357). Petitioner argued his “right to immunity under [the Act] constitutes an important liberty interest” and argued: “The trial court’s assumption that [Petitioner] was guilty of trespass violates his constitutional right to due process.” In his petition for certiorari he continues to advance this position and argues the Court of Appeals erred in affirming despite the challenges he raised to the trial court’s conclusion he was trespassing. (App.p.357). As with his argument about the non-specific allegation of loitering, the State argued and the Court of Appeals found this argument was not preserved for appellate review because it was never raised to or ruled upon by the trial court. *Dunbar*, 356 S.C. at 142, 587 S.E.2d at 693-94; *McCracken*, 346 S.C. at 92, 551 S.E.2d at 238.

In addition, the argument lacks merit. As explained above, the trial court never assumed or found Petitioner was guilty of trespass. Indeed, Petitioner was never charged with criminal trespass. Had he been so charged, he would have been afforded due process of law by way of South Carolina’s existing criminal procedures. Furthermore, Petitioner’s claim that he has a liberty interest in statutory immunity presupposes he meets the requirements in the Act. Here, after following the immunity hearing procedures set out by our supreme court in *Duncan*, the trial court found he did not, and the Court of Appeals affirmed. Petitioner’s right to due process was provided by the trial court and the decision to affirm the denial of immunity should likewise be affirmed. The Court of Appeals properly affirmed, and certiorari should be denied.

CONCLUSION

Contrary to Petitioner’s assertion, the limitation previously placed on the right to self-defense, i.e., the duty to retreat, has not been eliminated by our Legislature in every situation regardless of geographical location. Instead, the Legislature restricted the reach of the Act in regard to the circumstances in which a person does not have a duty to retreat. It made immunity

possible only for a “law-abiding citizen[]” who is “in another place where he has a right to be.” As found by the Court of Appeals, Petitioner was trespassing, was not egressing Shelricka’s apartment, and was not in a place where he had a right to be. The trial court properly denied immunity and the Court of Appeals properly affirmed. Based on the foregoing reasons, the State submits this Court should deny the petition for a writ of certiorari and let stand the decision of the Court of Appeals. If the Court grants the petition for a writ of certiorari, the State would request permission under the rules to fully brief the issues contained herein.

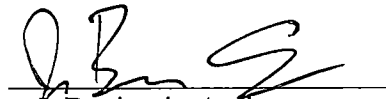
Respectfully submitted,

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Columbia, South Carolina
September 28, 2018

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
SEP 28 2018
S.C. SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions

John C. Hayes, III, Circuit Court Judge

Opinion No. 2018-UP-169 (S.C. Ct. App. filed April 25, 2018)
Appellate Case No. 2018-001478

State of South Carolina,Respondent,

v.

Marquez Devon Glenn,Petitioner.

PROOF OF SERVICE

I, Troyeshi Brailey, Legal Coordinator, hereby certify that I have served the within *Return to Petition for a Writ of Certiorari*, dated September 28, 2018, on Petitioner by depositing two copies of the Return in the United States mail, postage prepaid, addressed to his attorneys of record:

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I further certified that all parties required by Rule to be served have been served. This 28th day of September, 2018.

Troyeshi Brailey
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