THE STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO THE COURT OF APPEALS

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

THE STATE, ...RESPONDENT,

v.

MARQUEZ DEVON GLENN, ... PETITIONER.

BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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S.C. SUPREME COURT

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RESPONDENT'S STATEMENT OF ISSUES ON CERTIORARI

1. Whether Petitioner's argument that, in light of this Court's decision in *State v. Scott*, he was entitled to immunity on grounds that he had proven by a preponderance all elements of common law self-defense, regardless of whether he was in "another place where he ha[d] a right to be," is preserved for appellate review where that argument was not raised to or ruled upon by either the trial court or the Court of Appeals. Furthermore, even if preserved, whether the argument lacks merit because the Legislature specifically restricted entitlement to seek immunity under the Act to "law-abiding citizens" and therefore *any* grant of immunity, whether "as permitted by the provisions of this article" or by "another applicable provision of law" is limited to circumstances where a person is: (1) "not engaged in an unlawful activity and (2) "attacked in [a] place where he has a right to be."

2. 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.

3. Whether the Court of Appeals properly affirmed the trial court's finding that Petitioner was not entitled to immunity without considering proximate cause where: (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.

4. 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.

5. 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 Devon 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, of the Greenville County Bar, 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) (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).

On August 24, 2018, Petitioner submitted a petition for a writ of certiorari to this Court and on September 28, 2018, the State submitted a return. In an order dated November 28, 2018, this Court granted the petition and directed the parties to serve and file the appendix and briefs as provided by Rule 242(i), SCACR. On January 17, 2019, Petitioner submitted a brief in support of his appeal. This Brief of Respondent now follows.

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.233). Petitioner was subsequently charged with attempted murder and possession of a weapon during the commission of a violent crime. He was later indicted by the Greenville County grand jury and was taken to trial in August of 2015.

Pretrial Immunity Hearing: Preliminary Arguments

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." The trial judge said he had reviewed Petitioner's written memorandum in support of the motion and asked for preliminary arguments from the parties. (App.p.26-p.27).

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 properly rather than arming himself at the moment in time he perceived a threat. (App.p.29-p.33; p.287-p.290; p.291-p.306).

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."[2] The State argued Petitioner's restriction against being at

[2] 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

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).

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.43-46).

Pretrial Immunity Hearing: Testimony

After jury qualification and selection, and pursuant to the procedures set forth in *State v. Duncan*,[3] Petitioner presented testimony to the trial court in an effort to persuade the judge he should be granted immunity under the Act. First, Petitioner called his brother, Tivarius Henderson (Tivarius), to the stand. Tivarius testified that on the evening of April 12, 2013, he was sitting at home with Petitioner, Jamar [a/k/a Jamarus] Smith (Jamar), and his father, John Henderson (John),[4] when he got a call from Shelricka Duncan (Shelricka) asking if they all wanted to come to her apartment and "chill." He said they accepted the invitation and were later at Shelricka's playing cards when Shelricka's friend Derisha asked Petitioner if he would drive

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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.

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

[4] Although the Transcript indicates Tivarius testified his father's name was John "Anderson," Petitioner subsequently testified their father's name was John "Henderson," which is likely more accurate considering Henderson is the same last name shared by Petitioner and Tivarius. (R.p.160, line 1).

with her to the store. Tivarius said that after Petitioner and Derisha left, Kevin Bruster (Kevin) suddenly came busting in the door of the apartment, threw a beer can, started yelling that he was going to kill Shericka's mother, and went towards the room where she was sleeping. He said that when Shelricka tried to stop Kevin, Kevin hit her. Tivarius claimed he then got up from the table, grabbed Kevin, and tried to get him out the door, but Kevin pulled out a razor blade and sliced his face. Tivarius said Jamar and John then joined in his efforts and helped him get Kevin out of the apartment. (App.p.72-p.75).

Tivarius testified that after the altercation in Shericka's apartment, he briefly went to his grandmother's house but returned to Shelricka's apartment just as Petitioner and Derisha were coming back from the store. Tivarius said he told Petitioner about the incident with Kevin in part because his grandmother had asked him to go get Petitioner to make sure nobody tried to hurt him. Tivarius testified Petitioner stated he was going to walk to Tivarius' grandmother's house, which was in "the next court over" at the complex, when an officer pulled up and asked if anybody was fighting. Tivarius told the officer "no" and shortly after the officer pulled away, Victim and his Kevin showed up. He claimed he had just gotten back in the car while Petitioner started to walk to his grandmother's house, when he saw some individuals coming around the corner of the building. Tivarius backed up and turned on his high beams and recognized the individuals as Victim and Kevin. (App.p.75-p.76).

Tivarius testified that Kevin made a comment to Victim that "you said we was gonna get one of these N-word in this car, if not all of them," and then Kevin hit Petitioner, knocking a drink out of Petitioner's hand and into his face. He claimed he saw Victim reaching under his shirt, and then saw a gun in Victim's hand, so he jumped out of his car and pushed Victim. He claimed Petitioner was wiping the spilled drink out of his eyes when Tivarius heard a female

voice say "gun." Tivarius testified he saw Victim drawing his weapon again and that he looked like he was going to shoot Petitioner, when Petitioner pulled out a gun and shot Victim first. He said Jamar and John were in the back of the car when the shooting took place, and that he had no idea Petitioner had a gun with him. Tivarius described Victim and Kevin as "hostile" when they initially approached and claimed Victim said: "who jumped my mother fucking uncle?" (App.p.76-p.79). Tivarius proceeded to point out specific locations where these events took place in the Spring Grove Apartment complex by using an aerial photograph which was subsequently introduced into evidence by the State. (App.p.307; p.79-p.84). The solicitor then cross-examined Tivarius about details from his story. (App.p.84-p.95). Tivarius repeated his statement that rather than merely leaving Shelricka's apartment, Petitioner said he was going to walk to Tivarius' grandmother's house. (App.p.93, lines 1-9). Tivarius also acknowledged he was told Petitioner threw the gun he used to shoot Victim, into the river. (App.p.95, lines 7-14).

Next, Petitioner put Shelricka Duncan on the stand. She explained she knows Petitioner, Tivarius, Jamar, and John because she is a friend of the family and that she knows Victim through her best friend Derisha. She testified she also knows Kevin because at the time of the incident he was her mom's boyfriend. Shelricka then testified as to the events of April 12, 2013, providing a similar story as the one given by Tivarius. She said she invited Petitioner, Tivarius, Jamar, and John to her apartment that evening and that despite being under a no trespass notice, Kevin showed up later. She said Kevin was drunk and angry at her mother, and had to be physically removed from the apartment. (App.p.97-p.105). Shelricka testified that about fifteen minutes after the initial altercation, she went outside and saw Petitioner talking to the deputy. She said she walked towards Petitioner after the deputy left and then saw Victim and Kevin approach. Shelricka said Kevin made a comment about wanting to "get somebody" and then hit

Petitioner, at which point she took off running. She testified she did not know Petitioner had a gun and never saw anyone with a gun that evening. Shelricka described Kevin's demeanor as "amped" and Petitioner's demeanor as "calm" before the incident. She testified she believed Kevin was the aggressor and that Petitioner had no other option to avoid serious bodily injury than to shoot Victim. Shelricka said her invitation to Petitioner to come over that evening included an invitation for him to return after going to the store with Derisha. She concluded her testimony by describing the approximate height and weight of the four men involved in the shooting incident. (App.p.105-p.111). On cross-examination Shelricka confirmed she never saw Victim with a gun; however, she would not confirm she gave a statement to the police that suggested Petitioner also had not seen a gun and instead simply assumed Victim had a gun when Victm reached for his waistband. (App.p.111-p.117).

Petitioner then called Delni Nunez to the stand. Delni testified she knew all the parties involved and was hanging around outside at the apartment complex on the night of April 12, 2013, at the time of the shooting. She said she first heard Kevin yelling that somebody had "jumped him" and noticed he had blood on his shoes and a black eye. Delni said a few minutes later she saw Victim trying to speak to Petitioner when Kevin suddenly hit Petitioner in the face. She testified she turned her back, heard four gunshots, and then turned around again in time to see Victim lying on the ground. Delni testified Kevin and Victim were standing between Petitioner and the parking lot so that he would have to pass by them to leave; however, Kevin and Victim were both "really calm" and she did not hear anything they said. She said only seconds passed between the punch and the gunshots. (App.p.119-p.125). On cross-examination, Delni emphasized Kevin was the person who attacked Petitioner, not Victim, and that Victim did not make any threats to Petitioner before the shooting. She testified she never

saw Victim with a gun and never saw Victim move like he was going to draw a gun. (App.p.125-p.130).

Next, Petitioner called Jamarus [a/k/a Jamar] Smith to the stand. He described Petitioner and Tivarius as his "homeboys" and said he knew everyone involved in the two altercations that evening besides Kevin. Jamar first described the incident at Shelricka's apartment on the night of April 12, 2013, repeating the story previously told by Tivarius and Shelricka. He then described the altercation that ended in the shooting. Jamar said he was standing beside Petitioner when Kevin and Victim approached from behind the building. He claimed everybody in the neighborhood knows Victim "keeps a gun." Jamar testified Kevin said "we gonna get one of these N's in this white car," which he believed meant Kevin intended to either fight or kill him, Petitioner, and Tivarius. He said Kevin then hit Petitioner, knocking liquor out of his hand and into his eye. Jamar said he then noticed Petitioner reaching for something and heard three shots. He claimed he did not know Petitioner had a gun and that it all happened very fast. (App.p.132-p.140). On cross-examination Jamar testified he never saw Victim with a gun but saw him reaching under his shirt and figured he had a gun. (App.p.140-p.145).

Petitioner then called his grandmother, Terry Glenn, to the stand. She testified she moved into the Spring Grove apartment complex in December of 2012. Ms. Glenn testified that before she moved she asked the apartment manager if Petitioner was on the no trespass list and was told he was not. (App.p.147-p.150). Under cross-examination, Ms. Glenn could not explain why she would have asked the manager this question in the first place, and she then claimed she knew nothing about her own lease or whether it included a provision prohibiting her from inviting someone from the no trespass list to her apartment. (App.p.150-p.153). After denying

Petitioner's request to introduce a recorded audio statement from Kevin, Petitioner took the stand to offer his own version of events.

Petitioner testified that on the evening of April 12, 2013, he, Jamar, Tivarius, and John were invited to Shelricka's apartment to have drinks. After they arrived, he offered to drive Derisha to the store in her car because she was already intoxicated. Petitioner said when they returned nobody was in the apartment, so he went outside where he saw two women named Kiana and Maria trying to flag him down from the apartment building across the street. He said as he walked over to talk to them, he was met by Jamar and they all filled him in on the events that had happened while he was gone. Petitioner claimed he set his bag down in Kiana's apartment and then saw Shelricka walking to the middle of the parking lot to talk to the officer, so he walked over as well. He said the officer asked if he had seen or knew anything about an earlier altercation and he explained he did not because he had just arrived. Petitioner testified he then walked back to Kiana's apartment to get his bag and pay for a pizza she had ordered for him, while Tivarius finished talking to the officer. He said Tivarius then got in Petitioner's car, backed it out of a parking space at Shelricka's apartment, and moved it closer to Kiana's apartment. (App.p.163-p.166).

Petitioner testified that as he walked out of Kiana's apartment he was "greeted" by Victim and Kevin. He said Victim asked him what happened to his mother f'ing uncle and he responded that he did not know and had no part in it because he was gone to the store. Petitioner testified Kevin then said to Vicitm: " . . . let's do what we said – what you just said we came to do. You said we gonna get one of these [n's] in this white Lincoln right here, we gonna get all these [n's] right here, so let's do what we came to do." (App.p.169, lines 2-6). He said Kevin then took a swing at him, which knocked him off balance and knocked a cup out of his hand,

splashing alcohol into his eyes. Petitioner testified he heard someone yell "gun" and when he finally wiped away the alcohol and regained his vision he saw Victim with a black handgun in his hand. He claimed approximately 45 seconds passed between being hit and hearing the word "gun", and that approximately 20 seconds passed between seeing Vicitm's gun and when he pulled out his own gun and shot Victim. Petitioner testified he had no opportunity to avoid Kevin and Victim as he left Kiana's apartment because he had to walk past then to get to his car, and that if he could have avoided the assault he would have just left. (App.p.166-p.172).

Petitioner admitted he was carrying a concealed weapon without a permit and claimed nobody knew he had it until he pulled it out and shot Victim. He noted that during the altercation Kevin was the one who was aggressive while Victim was just standing there as backup; however, when Victim started tussling with Tivarius, Petitioner saw Victim holding a black gun so he pulled his own gun and shot Victim. Petitioner claimed that after the shooting he told the responding officer he had shot Victim and that he was bleeding and needed help. (App.p.172-p.176). On cross-examination, Petitioner claimed he did not know he was not allowed to carry a gun despite having a prior conviction for criminal domestic violence. He testified he bought the gun off the streets seven or eight months before the shooting and carried it everywhere with him. (App.p.176-p.191). On redirect, Petitioner testified he was not holding or touching the gun during the altercation until he heard someone yell gun and that he immediately drew it and fired at Victm when he saw a gun in Victim's hand. (App.p.191-p.194).

Finally, Petitioner called Kiana Grayson to the stand. She explained she was a friend of Petitioner's and knew Kevin through Shelricka, but did not know Victim. Kiana testified that on the night of April 12, 2013, she was outside of her apartment when she saw Kevin drive up, park, go into Shelricka's apartment, and get pushed back out. She said she later saw the deputy talking

to Petitioner in the parking lot just before Kevin and Victim walked up. Kiana testified she saw Kevin hit Petitioner, and then saw Petitioner stumble back and start shooting. She described Kevin as angry. Kiana insisted that only seconds passed between Kevin's blow and when shots were fired. She testified that from her perspective, Petitioner did not have any opportunity to avoid the attack and she believed Petitioner's life was in jeopardy. (App.p.198-p.203). On cross-examination Kiana testified she did not see Victim with a gun and never saw him reaching for a gun. She also agreed that Kevin initiated the altercation, not Victim. (App.p.203-p.205). On re-direct Kiana testified that when Kevin struck Petitioner, both Kevin and Victim were moving towards Petitioner and both were a threat. Finally, on re-cross Kiana testified she could not say Victim was attacking Petitioner when he was shot. (App.p.205-p.206).

After Petitioner completed presenting evidence in an attempt to establish statutory immunity, the State presented three witnesses in response, including Victim. First, Deputy Dorsy Lay of the Greenville County Sheriff's Office (GCSO) took the stand. He explained that in October of 2010 he was assigned to secondary employment at the Spring Grove Apartments where he and several other deputies were doing security detail. He said they worked for the management as far as enforcing some of the lease terms along with enforcing criminal laws under their regular jurisdiction. Deputy Lay testified that when issuing no trespass notices the deputies are acting as employees of the apartment complex, and that the notices just had to be verbal. He explained the GCSO records department keeps a database of people who have been placed on no trespass notices, and that there were several ways for an officer to confirm if a particular individual had been placed in that database, including calling records on the phone and providing the individual's name. Deputy Lay testified that in October of 2010 he made contact with a group of people congregating in a breezeway of an apartment building, including

Petitioner. He remembered Petitioner was on a list of people whom had previously been evicted from the complex, so he and Deputy Jumper verbally placed him on trespass notice for loitering and not having a residence. Deputy Lay used Petitioner's State issued ID along with a mobile mugshot on his in-car computer to verify the person he place on verbal trespass notice was in fact Petitioner. (App.p.207-p.210).

Next, the State called GCSO Master Deputy Eric Whaley to the stand. Whaley explained he was working as a homicide investigator at the time of the shooting and although he did not respond to the scene that night, he later interviewed several of the key witnesses as part of the overall investigation. He testified Tivarius, Petitioner, and their father, John, all came to the law enforcement center to be interviewed. Whaley recounted the interview with Petitioner, who said he was at the party, then went to the store and came back to learn there had been an altercation while he was gone. Petitioner further claimed Kevin and Victim came back after the initial altercation, Kevin assaulted Petitioner, Petitioner was blinded by alcohol, and then Petitioner pulled out a gun, fired three shots, jumped in his car, spoke to the police, and left. Whaley testified that while the officers who responded to the scene remembered talking to several people after the shooting, they did not remember if one of those people was Petitioner. He said that whoever talked to those deputies did not say they had been the one who shot Victim because if they had, they would have been detained. Whaley testified that during the interview Petitioner claimed the gun he used to shoot Victim was in the Reedy River. He said Petitioner never came back to offer to help police try to find the gun. (App.p.212-p.215).

Finally, the State called the Victim, Elfonso Bruster, to the stand. He testified he was at the apartment complex visiting his kids on the night of April 12, 2013, and was standing in the breezeway when he heard his uncle Kevin calling his name. He said Kevin claimed someone

had jumped on him and beat him down like a rag doll, and he asked Victim to come help get his moped back. Victim testified he agreed to walk towards Shelricka's apartment when they came upon Petitioner, who he knew from the neighborhood. Victim said he asked Petitioner what happened when suddenly Kevin punched Petitioner. As Petitioner was getting up off the ground, Victim saw him fumbling in his pocket. Victim testified Petitioner then got up with a gun, yelled "die n-----" and started shooting. He said he hit the ground and while he was down Tivarius ran over and kicked him in the face. Victim testified he was shot in the arm and the front of the chest and that as a result of the shooting he is paralyzed from the waist down. He testified he was not carrying a gun that night and he had no reason to carry a gun. (App.p.217-p.220). On cross-examination, Victim testified he did not go looking for trouble and that his only intention that night was to help Kevin get his moped back. (App.p.220-p.223).

Pretrial Immunity Hearing: Post-Evidentiary Arguments

At the conclusion of the pretrial immunity hearing, the trial court heard additional arguments from Petitioner as to why he believed he was immune from prosecution under the Act, focusing on three particular issues. First, Petitioner argued he had established by a preponderance of the evidence that was an invitee to the property that evening and that as a result, regardless of the existence of a trespass notice, he was lawfully permitted to be outside of the invited apartment for the purposes of ingress and egress, and that he was leaving the apartment to return to the vehicle and depart when the incident occurred. Second, he argued that even if he unlawfully had possession of a gun, he was nevertheless entitled to arm himself in self-defense at the time of the attack such that he would not be precluded from statutory immunity. Third, Petitioner argued that because the gun was concealed and no one knew he was

carrying it, it could not have had any relation to the escalation of the verbal confrontation or been the reason for the attack from Kevin and Victim. (App.p.223-p.225).

In response, the solicitor argued Petitioner had failed to carry his burden of proving each and every one of the three elements of self-defense which would be required to warrant statutory immunity. He noted the contradictory facts presented by Petitioner's own witnesses and argued those witnesses simply were not credible. The trial judge asked the solicitor to focus on the statutory question of whether Petitioner was in a place he had a right to be. The solicitor responded by arguing the eviction and the subsequent verbal no trespass notice given to Petitioner by Deputy Lay meant Petitioner did not have a right to be at the apartment complex. He then continued to argue Petitioner also had failed to sufficiently prove the elements of self-defense. (App.p.225-p.230).

In reply, Petitioner argued the trespass notice he was given was no longer valid at the time of the incident because it was made when the complex was under prior ownership. He also repeated his argument that a lessee who invites a person to their apartment grants a license allowing reasonable ingress and egress to that apartment even though the person is under trespass notice. Petitioner referenced the out of state cases and other authorities set out in his written pretrial motion, including a 2013 opinion issued by the South Carolina Attorney General's Office, and argued a person who rents a property has a right to invite persons to their premises even over the objection of a landlord. (App.p.230-p.233).

At the conclusion of the immunity hearing, the trial court 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 addressing additional pretrial matters and conducting a Jackson v. Denno hearing, the case proceeded to trial.

After hearing the evidence and the trial court's charge on the law—which included a charge on self-defense—the jury found Petitioner guilty beyond a reasonable doubt of assault and battery of a high and aggravated nature (ABHAN) and possession of a weapon during the commission of a violent crime. Citing mitigating circumstances, the trial court sentenced Petitioner to twelve (12) years' imprisonment for ABHAN and five (5) years' concurrent imprisonment for possession of a weapon during a violent crime. (App.p.236-p.284).

Direct Appeal

Petitioner appealed his conviction and sentence, raising multiple challenges to the trial court's finding he was not entitled to immunity from criminal prosecution. The Court of Appeals affirmed upon 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 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.

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)).

ARGUMENT

I.

Petitioner's argument that, in light of this Court's decision in *State v. Scott*, he was entitled to immunity on grounds that he had proven by a preponderance all elements of common law self-defense, regardless of whether he was in "another place where he ha[d] a right to be," is not preserved for appellate review because that argument was not raised to or ruled upon by either the trial court or the Court of Appeals. Furthermore, even if preserved, the argument lacks merit because the Legislature specifically restricted entitlement to seek immunity under the Act to "law-abiding citizens" and therefore *any* grant of immunity, whether "as permitted by the provisions of this article" or by "another applicable provision of law" is limited to circumstances where a person is: (1) "not engaged in an unlawful activity and (2) "attacked in [a] place where he has a right to be." Petitioner's argument also lacks merit because the trial court's decision to deny immunity was properly affirmed where Petitioner failed to carry his burden of proving the elements of self-defense by a preponderance of the evidence.

In his general introduction, Petitioner relies primarily on this Court's opinions in *State v. Jones*, 416 S.C. 283, 786 S.E.2d 139 (2016) and *State v. Scott* to support his claim that the trial court erred in denying immunity and that the Court of Appeals erred in failing to reverse that denial and vacate his convictions. In his petition for certiorari, Petitioner focused on *Jones* and this Court's alleged "rejection of artificial constraint of geographical circumstances." Petitioner claimed 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 claimed it would: "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 argued "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." This argument is addressed in part II below.

Now, in his brief, Petitioner pivots his introductory focus to *Scott* and this Court's finding that the common-law right to self-defense is a "provision of law" which, if established at the pretrial immunity hearing by a preponderance of the evidence, would allow a stand-alone basis for the grant of immunity under the Act. He argues reversal in this case is "dictated by the Legislature's 'clearly enunciated' intent and reasons for promulgating the [Act]," cannons of statutory interpretation, a shift in public policy "towards protecting innocent citizens and victims or crime and away from the protection of criminals," well founded legal principles, and "the reasoning of this Court." Petitioner specifically contends that in light of *Scott*, he "was entitled to immunity by having proven, beyond a preponderance, all elements of common law self-defense regardless of whether the was in 'another place where he ha[d] a right to be.'" (Brief of Petitioner, p.9). The State disagrees with each of these arguments and submits they are without merit.

Petitioner's argument, which is being raised for the first time, is simply not preserved for review because it was not adequately raised to or ruled upon by either the trial court or the Court of Appeals. In any event, on its merits, Petitioner's reliance on *Scott* is misplaced. He selectively references portions of this Court's opinion but fails to consider those portions in the context of the entire case, or in the context of the Legislative constraints imposed on *all* grants of immunity. Furthermore, the Court of Appeals properly affirmed the denial of immunity because Petitioner failed to carry his burden of proving all elements of self-defense to the trial court by a preponderance of the evidence.

Improper Remedy

Initially, the State submits the relief sought by Petitioner—that his convictions be vacated—is not a proper remedy under the circumstances of his case. (Brief of Petitioner, p.38).

The trial court found that Petitioner's immunity argument failed "solely on the issue of whether or not he had a right to be there" and therefore, it specifically did not address whether Appellant had satisfied his burden of proving entitlement to immunity by a preponderance of the evidence. *See Duncan*, 392 S.C. at 411, 709 S.E.2d at 665 ("We hold that when 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."). 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."). Alternatively, as recognized by this Court in *Scott*, an individual may seek immunity under the Act pursuant to a theory of common law self-defense.

Here, the trial judge was so focused on the issue of whether Petitioner was in a place he had a right to be pursuant to Section 16-11-440(C), that he asked the parties to limit their arguments on the actual elements of self-defense. (App.p.223-p.233). The trial judge then specifically restricted his ruling to a finding that Petitioner was not entitled to immunity because he was not in a place he had the right to be. The court did not rule on whether Petitioner otherwise had demonstrated the elements of self-defense by a preponderance of the evidence, likely because he did not. Petitioner would only be entitled to statutory immunity "as a matter of law" if the trial court explicitly found he had proven the elements of self-defense, save the duty to retreat, by a preponderance of the evidence. *Curry, supra.* Because no such findings were made, vacating Petitioner's conviction would be an entirely inappropriate remedy. Instead, if

this Court determines the trial court erred in finding Petitioner was not in a place he had a right to be at the time of the incident, the Court of Appeals erred in affirming, and a grant of relief is indeed warranted, the only appropriate remedy would be to remand to the lower court with instructions to make findings as to whether Petitioner carried his burden of proof as to each element of self-defense.

Issue Not Preserved for Appellate Review

"In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal." *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003), *citing Humbert v. State*, 345 S.C. 332, 548 S.E.2d 862 (2001). "A party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground." *Dunbar*, 356 S.C. at 142, 587 S.E.2d at 694 (2003), *citing State v. Russell*, 345 S.C. 128, 546 S.E.2d 202 (Ct. App. 2001). "An issue that was not preserved for review should not be addressed by the Court of Appeals . . ." *Dunbar*, 356 S.C. at 142, 587 S.E.2d at 694 (2003), *citing Hendrix v. Eastern Distribution, Inc.*, 320 S.C. 218, 464 S.E.2d 112 (1995). Indeed, if an error is not presented to and ruled upon by the trial court, it cannot be raised for the first time to the appellate court. *State v. Freiburger*, 366 S.C. 125, 135, 620 S.E.2d 737, 742 (2005).

Until now, Petitioner has never specifically argued he was entitled to immunity because common law self-defense qualifies as "another applicable provision of law" under the Act and that because he allegedly proved the elements of that defense by a preponderance of the evidence, he should be granted immunity regardless of whether he was in another place he had a right to be. Indeed, the entire focus of Petitioner's argument to the trial court centered on

Section 16-11-440(C) and trying to convince the judge he was in fact in a place he had a right to be when he shot Victim. (App.p.8-p.22; p.23-p.25; p.30-p.35; p.39-p.42; p.219-p.221; & p.226-p.229). Although Petitioner correctly notes he referenced "the common-law of self-defense" in his pretrial motion and memorandum (App.p.6 & p.21), he did not actually make the argument to the trial court he now makes pursuant to *Scott*. As a result, the trial court did not rule on the argument now being made, and instead concluded: "the immunity argument fails solely on the issue of whether or not he had a right to be there. I find he did not. . . . 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). By not making the alternative argument to the trial court, Petitioner effectively deprived Judge Hayes the opportunity to make a ruling on the issue addressed in *Scott*. Thus, because Petitioner's "*Scott*" argument was not raised to or ruled upon by the trial court, it is not preserved for appellate review. Similarly, because the argument was not raised in either Petitioner's initial arguments to the Court of Appeals or his petition for rehearing, it is likewise unpreserved for this Court's review. Rule 242(d)(2), SCACR; *Camp v. Springs Mortgage Corp.*, 310 S.C. 514, 516, 426 S.E.2d 304, 305 (1993) (declining to address issue not addressed by the court of appeals and not raised in the petition for the rehearing); *Holly Hill Lumber Co. v. McCoy*, 210 S.C. 440, 442, 43 S.E.2d 143, 144 (1947) (holding issue not raised in petition for rehearing is the law of the case). Nevertheless, even if preserved, Petitioner's "*Scott* argument" fails on its merits.

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). This Court recently held that the purpose of subsection 16-11-440(C) was merely to extend the common law right to stand one's ground and meet force with force without a duty to retreat, to other places where a person has a right to be and not simply his or her home. *Scott*, 424 S.C. at 474-75, 819 S.E.2d at 121-22.

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 brief,[5] Petitioner argued the question before the Court of Appeals was "fundamentally a determination of the scope of a bona fide individual's right to defend himself against attack." He referenced the legislative intent 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 Envtl. 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

[5] 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).

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 not strictly a law-abiding citizen 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).

State v. Scott

Petitioner now argues the error of both the trial court and Court of Appeals is the result of the "misconception that immunity under the [Act] required, as a predicate, proof of the common law elements of self-defense, but proving the common law elements of self-defense without also establishing the requisite elements of subsections 440(A) or 440(C) would be insufficient to entitle one to [] immunity." (Brief of Petitioner, p.10-p.11). He focuses on the language used by this Court that: "Self-defense is the classic provision of law that justifies the use of deadly force.

It was clearly the Legislature's intent that if a person seeking immunity under subsection 16-11-440(A) could prove the elements of self-defense in an immunity proceeding, immunity must be granted." *Scott*, 424 S.C. at 474, 819 S.E.2d at 120-21. Yet this broad language only tells part of the story, and must be taken in the context of the Legislature's intent as a whole, not just its intent in cases where an individual, like Scott, was undisputedly acting as an otherwise "law abiding citizen" by: (1) "not [being] engaged in an unlawful activity" and (2) being in a "place where he has a right to be." Indeed, the State submits that the Legislature, as stated in Section 16-11-420, intended compliance with each of the Act's prerequisites to abide by the law, even in cases of common law self-defense.

In *Scott*, after recognizing self-defense could serve as an "applicable provision of law" for immunity under the Act, this Court analyzed subsection 16-11-440(C) and explained why the applicability of that subsection "was not essential to the circuit court's finding of immunity *in this case*." *Scott*, 424 S.C. at 474, 819 S.E.2d at 121 (emphasis added). This Court noted that because Scott was in the curtilage of his home when he used deadly force, he already had no duty to retreat pursuant to the Castle Doctrine. *Scott*, 424 S.C. 474-75, 819 S.E.2d at 121. The Court then found: "The purpose of subsection 16-11-440(C) was merely to extend this common law right [the right to use deadly force with no duty to retreat] to '[]other place[s] where he has a right to be.'" *Scott*, 424 S.C. at 475, 819 S.E.2d at 121. Thus, contrary to Petitioner's assertion, this Court did not find the extension of this right somehow extinguished the overriding Legislative intent to limit use of the Act to "law abiding citizens." Rather, this Court's entire analysis was predicated on the underlying circumstances of Scott being a law abiding citizen, not engaged in unlawful activity, in a place he had a right to be. It therefore affirmed the trial court's grant of immunity under the standard of review because there was evidence in the record to

support Scott's use of force under the doctrine of self-defense. Scott, 424 S.C. at 474, 819 S.E.2d at 122. Here, the trial court properly concluded Petitioner was not entitled to immunity, not because it failed to consider whether Petitioner satisfied the four elements of self-defense, but because Petitioner was simply not a law abiding citizen where he was not in a place he had a right to be. That finding was properly affirmed.

In addition, and as an alternative sustaining ground, the Court of Appeals properly affirmed pursuant to Rule 220(c), SCACR, where evidence in the record supports the denial of immunity because Petitioner failed to carry his burden of proving to the trial court that he was not without fault in brining on the danger or that he had no other probable means of avoiding the danger. For all of these reasons, the Court of Appeals properly affirmed the trial court's refusal to grant immunity and that decision should be affirmed.

II.

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.

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 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.

Discussion / Analysis

As noted above, 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.

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. This means he was not a law abiding citizen for purposes of the Act. The Court of Appeals properly affirmed the trial court, and this Court should likewise affirm.

III.

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.

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, as argued above, 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 should be affirmed by this Court.

IV.

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). Now 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 Appellant, 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 misconstrued 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 tenants[6] and

[6] *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).

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 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 this Court should likewise affirm.

V.

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; *In re McCracken*, 346 S.C. 87, 92, 551 S.E.2d 235, 238 (2001).

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 it should be affirmed by this Court.

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 affirm the decision of the Court of Appeals and the denial of immunity by the trial court.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that this Court affirm the decision of the Court of Appeals affirming Petitioner's convictions and sentence.

Respectfully submitted,

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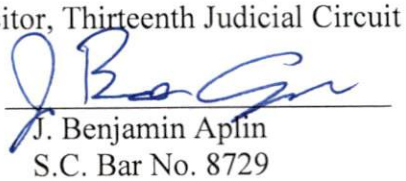
BY: 
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Columbia, South Carolina
February 12, 2019

THE STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO THE COURT OF APPEALS

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

THE STATE, ...RESPONDENT,

v.

MARQUEZ DEVON GLENN, ... PETITIONER.

PROOF OF SERVICE

I, Troyeshi Brailey, Legal Coordinator, hereby certify that I have served the within *Brief of Respondent* dated February 12, 2019, on Petitioner by depositing two copies of the brief 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 12th day of February, 2019.

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