STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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APR 11 2019
S.C. SUPREME COURT

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Appeal from Charleston County
The Honorable Kristi Lea Harrington, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

DENNIS ELVIN CERVANTES-PAVON,

PETITIONER,

Appellate Case No. 2017-001910

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**PETITION FOR REHEARING**

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Respondent requests rehearing pursuant to Rule 221(a), SCACR. In its March 27, 2019, Opinion, ("Opinion") *State v. Cervantes-Pavon*, Op. No. 27872 (filed March 27, 2019), this Court remanded Petitioner's case to the trial court for a new immunity hearing pursuant to the Protection of Persons and Property Act ("Act") S.C. Code Ann. §§ 16-11-410 to 450 (2015). Respondent respectfully submits the Court's opinion misconstrues or misapprehends important facts of record and erroneously construes and improperly applies Supreme Court precedent concerning the standard of review. Therefore, Respondent seeks modification of the Opinion to correct misapprehensions in the record and to be consistent with prior Supreme Court case law.

In short, the Opinion says "the circuit court's immunity ruling was controlled by multiple errors of law," and then re-weighs the evidence to conclude the trial court mischaracterized testimony. (Opinion, p. 7.) However, the record reveals the trial court's decision was not based

upon any errors of law, despite one misstatement after the ruling was issued, and the trial court properly considered the all evidence before it to determine Petitioner was not entitled to immunity. Respectfully, this Court has exceeded its standard of review by disregarding the findings of fact made by the trial court and misconstruing the record on appeal. The State seeks modification of the Opinion to be consistent with the standard of review in recent cases concerning the Act.

In determining Petitioner was not entitled to immunity under the Act, the trial court cited four findings of fact in support of its holding:

> There must be an absence of aggression. The testimony that has been presented today is that [1] the boss Mr. Evans had told both of them to cut it out, that [2] there had been a mutual confrontation. [3] Both the defendant and the victim had discarded the tools according to Mr. Somosa and at the time the victim was stabbed the victim was not armed and that [4] the witness believed that the victim and defendant were merely wrestling.

(R. p. 72, lines 14-21.) The trial court's findings are all supported by the state court record. First, Supervisor Herbie Evans warned **both** men about their conduct after learning they "had been mouthing off at each other all day." (R. p. 14, line 24 – p. 57, line 4.) Second, the testimony shows that at lunchtime, when Petitioner came down from the ladder to eat, the two men **did not** engage in a fight. (R. p. 22, lines 2-10.) Later, however, Jose Samosa testified, "Elvin got angry and came down and then he later went over to the tools and grabbed that steel thing." (R. p. 23, lines 1-3.) Samosa's testimony supports the trial court's finding Petitioner **elected** to engage in a fight with the victim at the end of the workday, despite having successfully avoided that confrontation earlier. Third, according to Samosa, Petitioner grabbed the pipe first "and then [Victim] grabbed like a metal thing for framing and **then the two of them went at each other.**" (R. p. 23, lines 13-17.) Somosa said the men then "threw" their metal objects down. (R. p. 23, line 25 – p. 24, line 2.) This testimony supports the finding the victim was not armed and the

combat was mutual when the men "when at each other." Lastly, when asked by the solicitor if he told the police the pipes were knocked down and the men were wrestling, Somosa said, "Yes." (R. p. 39, lines 3-8.) Somosa again says the men were "wrestling" when the men were chest to chest. (R. p. 40, lines 6-10.) Somosa testifies a third time the men were wrestling when the victim was stabbed. (R. p. 41, lines 17-21.) That testimony is evidence that supports the trial court's finding the men were wrestling just before the stabbing occurred. Moreover, unlike the appellate courts, the trial court had the benefit of observing the reenactment of the fight between the men. (R. pp. 56, 62-63.) After hearing and seeing this testimony, the court made a clear finding the men engaged in mutual combat, or, in "mutual confrontation." The finding of mutual confrontation, or, mutual combat, would preclude self-defense. *State v. Graham*, 260 S.C. 449, 196 S.E.2d 495 (1973).

Despite the probative evidence in the record supporting the trial court's findings, the Court found the trial judge made an "erroneous characterization of Somosa's testimony." (Opinion, p. 7.) This finding exceeded the Court's standard of review by substituting its own fact finding for the trial court. In *State v. Scott*, 424 S.C. 463, 819 S.E.2d 116 (2018), this Court emphasized two key holdings: 1) the analysis of self-defense in determining application of the Act ("We focus our analysis on self-defense"), and 2) the deference to the trial court's finding of facts ("Therefore, the circuit court made the necessary factual findings to support the existence of self-defense. Because those findings are supported by the evidence, our standard of review requires that we uphold them.") *Scott,* 424 S.C. at 468, 471, 819 S.E.2d at 118, 119. In disregarding the trial court's well supported findings, this Court misconstrued the record and failed to afford to the trial court the deference required by *Scott.*

The Opinion also says the trial court's immunity hearing was controlled by "multiple errors of law" (Opinion, p. 7), but this conclusion is also not supported by the record. First, the Opinion cites the trial court's reliance on the fact that the victim was unarmed when Petitioner stabbed him as an error of law. (Opinion, p. 5.) The Opinion says, "while the fact that a victim is unarmed is a relevant consideration under the Act, it does not automatically prohibit immunity, as the State contends." (*Id.*) Respectfully, the trial court did not find Petitioner was not entitled to immunity solely because the victim was unarmed when he was killed. The victim's disarmament at the time of the stabbing was one factor the trial court did take into consideration. However, the trial court cited four factual findings for why it found Petitioner did not meet his burden, only one of which discussed whether the victim was armed. The remaining factors supported the trial court's finding the men engaged in mutual combat. The trial court committed no error of law in considering the armed status of either man in determining whether Petitioner was entitled to immunity. The Opinion wrongfully assigns error to a finding the trial court did not make.

Next, the Opinion incorrectly states the trial judge found "that *the immunity* issue presented a jury question." (Opinion, p. 6 (emphasis added).) That is not what the trial court said in its ruling. After denying immunity (R. p. 72, lines 10-11), the court said, "The issue of *self-defense* presents itself as a jury question." The court then again denied the motion. (R. p. 72, lines 22-23 (emphasis added).) The court did not say the question of immunity was a jury issue, as the Opinion states, nor did the trial court give any indication it was unable to make factual findings for purposes of the immunity hearing. Indeed, the trial court had just specified the reasons it determined Petitioner was not entitled to immunity. As the Opinion states, "Of course, at the conclusion of any given hearing, if the circuit court determines the movant has not met his burden of proof as to immunity, the case will go to trial, and the issue of self-defense may—

depending upon the evidence presented at trial—be presented to the trial jury." (Opinion, p. 7.) This is precisely what happened in the instant case: the trial court determined Petitioner had not met his burden of proof, and the judge indicated the case would go to trial and the jury could decide self-defense. The Court finds an error of law in the trial court's correct statement of law. That finding is misplaced.

As for the misstatement concerning the burden of proof required in an immunity hearing, Respondent maintains the trial judge merely misspoke. The court used the correct standard for Petitioner's burden of proof only sentences before this misstatement and correctly stated the law within the particular context of the Protection of Persons and Property Act. (R. p. 72, lines 1-9.) The Opinion recognizes this likelihood in its footnote 3, but claims the misstatement is "one of several errors of law" contributing to their conclusion. Respectfully, this misstatement was the only error of law in the record. However, this misstatement was not the basis for the trial court's decision, as is clear from the ruling. The Opinion's use of this misstatement to augment its finding of several errors of law misconstrues the record before the Court.

Lastly, the Opinion asserts a new rule of law in which the appellate court limits its review of the evidence to that only presented in the immunity hearing, citing *Sifuentes v. State*, 746 S.E.2d 127, 131 n.3 (Ga. 2013). (Opinion, p. 8.) Respectfully, Respondent submits this limited review is in error, particularly when the trial court's findings are considered unsupported or "mischaracterized" by the record. In this case in particular, the evidence presented in the pre-trial hearing included instances of witnesses acting out, or, demonstrating, the manner in which the men approached and held each other prior to the stabbing. (See, for example, R. pp. 56, 62-63.) The trial court, in a better position to assess the credibility of the witnesses than the appellate

court, made its determination based on the pre-trial immunity hearing. Only upon **review** of the trial court's decision does the remainder of the record become necessary.

Petitioner sought immunity under the Act in a pre-trial motion pursuant to *State v. Duncan*, 392 S.C. 404, 709 S.E.2d 662 (2011.) In finding the trial court's ruling unclear, the Opinion directs the State to conduct a new immunity hearing to determine whether Petitioner is entitled to immunity under the Act. This remand for a new hearing is neither practical nor consistent with the State's precedent. As this Court said in *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000), "The appellate court may review respondent's additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment." In interpreting the record before the trial court, the appellate court should not limit its review to only one portion of the testimony, even if that portion of the testimony was the basis for the trial court's ruling. The appellate court cannot see what the trial court sees. Its scope of review must necessarily be greater to ensure judicial economy. "An affirmance promotes judicial economy and finality in private and public affairs, which are important public policies." *I'On*, 338 S.C.at 421, 526 S.E.2d at 723. Certainly, had the trial judge heard some testimony at the trial that altered its ruling on immunity, and the immunity was again requested and granted at the directed verdict stage, this Court would not limit its review to the trial court's granting of immunity only to evidence presented at the pre-trial hearing. The evidence presented at the trial should be considered as additional sustaining support for the trial court's findings. Remanding the case for another immunity hearing, when the trial testimony clearly supports the pre-trial determination, undermines judicial economy. Respondent respectfully asks this Court to reconsider its holding.

For all the foregoing reasons, Respondent submits this Court may have misapprehended, several crucial points raised by the parties which bear directly upon this Court's ultimate conclusion the trial court committed several errors of law when it denied immunity to Petitioner. Respondent respectfully asks this Court to reconsider its position considering the unique facts of Petitioner's case in rehearing this matter.

WHEREFORE, the State respectfully requests that this Court grant this petition for rehearing, reconsider and rehear this matter, and issue an order affirming Petitioner's convictions and sentence.

Respectfully submitted,

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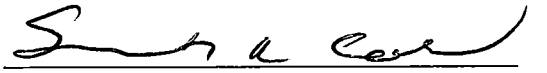

Susannah R. Cole
ATTORNEY FOR RESPONDENT

April 11, 2019
Columbia, South Carolina

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**PROOF OF SERVICE**

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I, Susannah R. Cole, counsel for Respondent, certify that I have served the within Petition for Rehearing on Petitioner by depositing two (2) copies of the same via United States Postal Service, addressed to his attorney of record at:

Susan B. Hackett
Appellate Defender
SCCID/Division of Appellate Defense
1330 Lady Street, Suite 401
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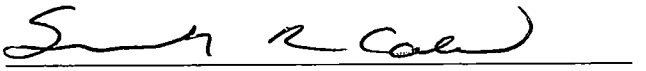
I further certify that all parties required by Rule to be served have been served.

This 11th day of April, 2019.



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