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June 26, 2019

RECEIVED  
JUN 26 2019  
SC Court of Appeals

The Honorable Jenny Abbott Kitchings  
Clerk, S.C. Court of Appeals  
Post Office Box 11629  
Columbia, S.C. 29211

Re: State v. John William McCarty, Appellate Case No. 2017-002377

Dear Ms. Kitchings:

Please find enclosed the South Carolina Supreme Court's recent decisions of State v. Cervantes-Pavon, 827 S.E.2d 564 (S.C. 2019) and State v. Andrews, Op. No. 27894 (S.C. Sup. Ct. filed July 19, 2019) (Shearouse Adv. Sh. No. 25 at 9). Pursuant to Rule 208(b)(7), SCACR, I am advising this Court that these decisions represent pertinent and significant authority for the issues presented by undersigned counsel.

If you have any questions concerning this matter, please do not hesitate to contact me.

Sincerely,

Susan B. Hackett  
Appellate Defender

SBH/

cc: Michael D. Ross, Esquire (with enclosures)  
John William McCarty (with enclosures)

Enclosures: as stated

827 S.E.2d 564  
Supreme Court of South Carolina.

The STATE, Respondent,  
v.  
Dennis Elvin CERVANTES-PAVON, Petitioner.

Appellate Case No. 2017-001910

Opinion No. 27872

Heard January 31, 2019

Filed March 27, 2019

Rehearing Denied May 30, 2019

**Synopsis**

**Background:** Defendant was convicted in the Circuit Court, Charleston County, Kristi Lea Harrington, J., of murder, and he appealed. The Court of Appeals affirmed. Defendant filed petition for a writ of certiorari.

**Holdings:** The Supreme Court, Hearn, J., held that:

[1] while fact that victim is unarmed is relevant consideration under Protection of Persons and Property Act, it does not automatically prohibit immunity under Act;

[2] fact defendant armed himself does not, in and of itself, make him the aggressor in a given confrontation for purposes of determining if he is entitled to immunity;

[3] just because conflicting evidence as to immunity issue exists does not automatically require the court to deny immunity;

[4] case would be remanded to circuit court for new hearing to determine whether murder defendant was entitled to immunity; and

[5] court's immunity ruling must be based solely on the evidence presented at a pretrial hearing.

Reversed and remanded.

**Procedural Posture(s):** Appellate Review; Pre-Trial Hearing Motion.

West Headnotes (17)

[1] **Criminal Law**

⇒ Special pleas in bar in general

Circuit courts utilize pretrial hearings to determine whether a defendant is entitled to immunity under the Protection of Persons and Property Act, employing a preponderance of the evidence standard. S.C. Code Ann. § 16-11-410 et seq.

Cases that cite this headnote

[2] **Criminal Law**

⇒ Amendments and rulings as to indictment or pleas

Supreme Court reviews an immunity determination under Protection of Persons and Property Act for abuse of discretion. S.C. Code Ann. § 16-11-410 et seq.

Cases that cite this headnote

[3] **Criminal Law**

⇒ Discretion of Lower Court

Circuit court abuses its discretion when its ruling is based on an error of law, or when grounded in factual conclusions, is without evidentiary support.

Cases that cite this headnote

[4] **Criminal Law**

⇒ Special pleas in bar in general

Protection of Persons and Property Act provides immunity from prosecution if a person is found to be justified in using deadly force under the Act. S.C. Code Ann. § 16-11-450.

Cases that cite this headnote

[5] **Criminal Law**

⚡ Special pleas in bar in general

To warrant immunity under Protection of Persons and Property Act, a movant must show he was without fault in bringing on the difficulty, he actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, and reasonably prudent man of ordinary firmness and courage would have entertained the same belief. S.C. Code Ann. § 16-11-450.

Cases that cite this headnote

[6] **Criminal Law**

⚡ Special pleas in bar in general

To warrant immunity under Protection of Persons and Property Act, movant may show that he actually was in imminent danger and the circumstances would have warranted a man of ordinary firmness and courage to strike the fatal blow to save himself from serious harm or death. S.C. Code Ann. § 16-11-450.

Cases that cite this headnote

[7] **Criminal Law**

⚡ Special pleas in bar in general

While the fact that victim is unarmed is a relevant consideration under the Protection of Persons and Property Act, it does not automatically prohibit immunity under Act. S.C. Code Ann. § 16-11-450.

Cases that cite this headnote

[8] **Criminal Law**

⚡ Special pleas in bar in general

Fact a defendant armed himself does not, in and of itself, make him the aggressor in a given confrontation for purposes of determining if he is entitled to immunity under Protection of Persons and Property Act. S.C. Code Ann. § 16-11-450.

Cases that cite this headnote

[9] **Criminal Law**

⚡ Special pleas in bar in general

Protection of Persons and Property Act requires the circuit court to determine whether a movant is entitled to immunity. S.C. Code Ann. § 16-11-450.

Cases that cite this headnote

[10] **Criminal Law**

⚡ Special pleas in bar in general

Some cases in which a defendant seeks immunity under Protection of Persons and Property Act may present a quintessential jury question regarding self-defense. S.C. Code Ann. § 16-11-450.

Cases that cite this headnote

[11] **Criminal Law**

⚡ Special pleas in bar in general

Just because conflicting evidence as to immunity issue exists does not automatically require the court to deny immunity under Protection of Persons and Property Act, and instead, the court must sit as the fact-finder, weigh the evidence presented, and reach a conclusion under the Act. S.C. Code Ann. § 16-11-450.

1 Cases that cite this headnote

[12] **Criminal Law**

⚡ Special pleas in bar in general

At conclusion of pretrial hearing to determine whether defendant is entitled to immunity under the Protection of Persons and Property Act, if the circuit court determines defendant 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.

Cases that cite this headnote

[13] **Criminal Law**

⚡ Remand for Determination or Reconsideration of Particular Matters

Case would be remanded to circuit court for new hearing to determine whether murder defendant was entitled to immunity under Protection of Persons and Property Act; circuit court based its ruling, denying defendant immunity under Act, on the findings that parties had discarded their metal objects, defendant was armed while victim was not, and the two men were merely wrestling when the stabbing occurred, and these were erroneous bases on which to deny immunity. S.C. Code Ann. § 16-11-450.

Cases that cite this headnote

[14] **Criminal Law**

⚡ Special pleas in bar in general

Trial court erred by stating that Protection of Persons and Property Act required defendant to prove he was entitled to immunity “beyond” a preponderance of the evidence, instead of “by” a preponderance of the evidence. S.C. Code Ann. § 16-11-450.

Cases that cite this headnote

[15] **Criminal Law**

⚡ Special pleas in bar in general

While Protection of Persons and Property Act does not require a written order upon an immunity determination, specific findings of fact and conclusions of law are critical to reviewing courts, particularly given the gravity of the circumstances these cases necessarily involve. S.C. Code Ann. § 16-11-450.

Cases that cite this headnote

[16] **Criminal Law**

⚡ Special pleas in bar in general

**Criminal Law**

⚡ Deliberations in General

While trial court's pretrial immunity ruling under Protection of Persons and Property Act and jury's verdict on a claim of self-defense

may apply the same statutory justification standard, the court's ruling must be based solely on the evidence presented at a pretrial hearing, while the jury's verdict must be based solely on the evidence presented at trial, which may be considerably different. S.C. Code Ann. § 16-11-450.

Cases that cite this headnote

[17] **Criminal Law**

⚡ Arraignment and plea

Supreme Court limited its review to the evidence presented at the pretrial immunity hearing when determining if murder defendant was entitled to immunity under Protection of Persons and Property Act. S.C. Code Ann. § 16-11-450.

1 Cases that cite this headnote

**ON WRIT OF CERTIORARI TO THE COURT OF APPEALS**

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

**Attorneys and Law Firms**

Appellate Defender Susan Barber Hackett, of Columbia, for Petitioner.

\*566 Attorney General Alan McCrory Wilson, Deputy Attorney General Donald J. Zelenka, Senior Assistant Deputy Attorney General Melody Jane Brown, and Assistant Attorney General Susannah Rawl Cole, all of Columbia; and Solicitor Scarlett Anne Wilson, of Charleston, all for Respondent.

**Opinion**

JUSTICE HEARN:

We granted Dennis Cervantes-Pavon's petition for a writ of certiorari to determine whether the court of appeals erred in affirming the circuit court's denial of immunity from prosecution under the Protection of Persons and Property Act, (the Act) S.C. Code Ann. §§ 16-11-410 to

450 (2015). *State v. Cervantes-Pavon*, Op. No. 2017-UP-258, 2017 WL 4641416 (S.C. Ct. App. filed June 28, 2017). We write today to clarify several points regarding the Act and remand for a new immunity hearing.

### FACTUAL BACKGROUND

Cervantes-Pavon was indicted for murdering Raymond Muniz by stabbing him with a sheetrock saw at their workplace. Both men worked on a construction project at the Belk department store in Mount Pleasant. Prior to trial, Cervantes-Pavon moved to dismiss the indictment, arguing he was immune from prosecution under the Act.

At the immunity hearing, Herbie Evans testified that on August 13, 2014, he was working as a superintendent on the Belk project and became aware of a problem between Muniz and Cervantes-Pavon. Cervantes-Pavon approached Evans and stated Muniz was picking on him. Evans spoke with Muniz and informed him that he would not tolerate any conflicts between employees and would send them home if one occurred. Evans did not witness any interactions between Muniz and Cervantes-Pavon on that day.

José Somosa, through an interpreter, testified he worked with Muniz and Cervantes-Pavon on the Belk project. Somosa recalled that the day before the stabbing, Muniz had removed his shirt and attempted to fight Cervantes-Pavon, who refused. The next day, Somosa was working as Cervantes-Pavon's helper on the project by staying on the ground while Cervantes-Pavon worked on a ladder. According to Somosa, each time Muniz walked by Cervantes-Pavon, Muniz would say the two men should fight and Cervantes-Pavon would respond that he didn't want any trouble.

Somosa testified that at the end of the workday, Muniz again wanted to fight Cervantes-Pavon. This time, Cervantes-Pavon "got angry," came down from the ladder, and "later went over to the tools and grabbed that steel thing." Somosa clarified the "steel thing" was a sheetrock saw approximately 10 inches long. Somosa stated Cervantes-Pavon "grabbed a pipe," Muniz "grabbed like a metal thing for framing," and the two "went at each other." Both men then dropped the metal objects and began to fight hand-to-hand, with Muniz, the taller man, holding Cervantes-Pavon around his neck.

Somosa then saw Cervantes-Pavon remove the saw from his waist underneath his shirt and stab Muniz once. Thereafter, both men ran outside. According to Somosa, Muniz started the fight.

The State predominantly cross-examined Somosa with two statements he had previously given to police. In those statements, Somosa reported, among other things, that he did not see the stabbing, Muniz and Cervantes-Pavon had engaged in a fist fight the week before over a broom, the fight occurred in Muniz's work area, and the two men were wrestling when Muniz was stabbed. Somosa expressed dissatisfaction with his prior statements, which were recorded in English, claiming the police "forc[ed] him to say things that [he] did not say" because the officer "spoke more English than Spanish," and Somosa told him he "wasn't understanding."

Cervantes-Pavon also testified through an interpreter. He stated his problems with Muniz started when Muniz snatched a broom from him and continued when he attempted to tell his boss about the incident. Muniz continued to verbally assault Cervantes-Pavon by using homophobic slurs and threatening to kill him. On August 13, Muniz threatened him throughout the day, including with a pipe. According to Cervantes-Pavon, he also picked up a pipe to defend himself, but Muniz struck him in the stomach and jaw. He lost possession of the pipe; Muniz dropped his pipe, and Muniz held him around the neck, strangling him. Cervantes-Pavon stated \*567 he grabbed his saw and stabbed Muniz once in an attempt to stop him.

Cervantes-Pavon argued he was entitled to immunity because he was in his place of business, was not at fault in bringing about the conflict, and he had a reasonable fear of imminent death or bodily harm. He contended he picked up the pipe to defend himself and was unsuccessful, as he was injured. Cervantes-Pavon asserted Muniz, the larger man, wrapped his arm around Cervantes-Pavon's neck, and Cervantes-Pavon stabbed Muniz in order to be able to extricate himself from the situation. Cervantes-Pavon pointed to the prior incidents between the two men as contributing to his reasonable fear of death or bodily harm.

The State argued the issue was a "clear question of fact" regarding self-defense, noting Cervantes-Pavon stabbed Muniz when Muniz was unarmed. The State contended

the evidence presented did not rise to a preponderance of the evidence that Cervantes-Pavon acted in self-defense.

The circuit court denied Cervantes-Pavon's motion. The court noted the Act grants immunity if a movant proves the factors by a preponderance of the evidence. The circuit court then determined:

Based upon the testimony presented today I deny the defendant's request for immunity based upon the Protection of Persons and Property Act. The intent of the Act is for defensive not offensive protections. There must be an absence of aggression. The testimony that has been presented today is that the boss Mr. Evans had told both of them to cut it out, that there had been a mutual confrontation. 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 the witness believed that the victim and defendant were merely wrestling.<sup>1</sup>

The issue of self-defense presents itself as a jury question. I am denying your motion. I do not believe the testimony rises to a level beyond a preponderance of the evidence to grant the immunity designed by the legislature to protect someone from criminal prosecution. I'll note your exception to my ruling.

After a three-day jury trial, Cervantes-Pavon was convicted of murder, and the circuit court sentenced him to 30 years' imprisonment. Cervantes-Pavon appealed, challenging the circuit court's denial of immunity because the circuit judge applied the wrong legal standard and reached the wrong conclusion. The court of appeals affirmed in an unpublished opinion pursuant to Rule 220(b), SCACR. We granted Cervantes-Pavon's petition for a writ of certiorari to review the decision.

### ISSUE

Did the court of appeals err in affirming the circuit court's denial of immunity under the Act?

### STANDARD OF REVIEW

[1] [2] [3] Circuit courts utilize pretrial hearings to determine whether a defendant is entitled to immunity

under the Act, employing a preponderance of the evidence standard. *State v. Manning*, 418 S.C. 38, 43, 791 S.E.2d 148, 150 (2016). This Court reviews an immunity determination for abuse of discretion. *Id.* at 45, 791 S.E.2d at 151. A circuit court abuses its discretion when its ruling is based on an error of law, or when grounded in factual conclusions, is without evidentiary support. *State v. Jones*, 416 S.C. 283, 290, 786 S.E.2d 132, 136 (2016).

[4] [5] [6] "Section 16-11-450 provides immunity from prosecution if a person is found to be justified in using deadly force under the \*568 Act." *State v. Curry*, 406 S.C. 364, 371, 752 S.E.2d 263, 266 (2013). To warrant immunity, a movant must show he was without fault in bringing on the difficulty, he actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, and a reasonably prudent man of ordinary firmness and courage would have entertained the same belief. *Id.* n.4. He may also show that he actually was in imminent danger and the circumstances would have warranted a man of ordinary firmness and courage to strike the fatal blow to save himself from serious harm or death. *Id.* Section 16-11-440(C) provides the movant has no duty to retreat if, at the time of the attack, he was in a place where he has a legal right to be.

### DISCUSSION

Cervantes-Pavon first argues the circuit court erred in denying him immunity under the Act by applying the wrong legal standard. He contends the court required him to prove his immunity "beyond a preponderance of the evidence," which warrants reversal. Cervantes-Pavon further asserts that, viewing the evidence presented under the proper standard, he should have been granted immunity. He argues he was not at fault in bringing about the difficulty, had no duty to retreat in his place of business, and feared losing his life or imminent serious injury because Muniz was choking him.

The State responds, contending first the circuit court merely misspoke in stating the evidence did not rise beyond a preponderance. The State further argues the circuit court did not abuse its discretion in denying immunity because Cervantes-Pavon was the armed initial aggressor against an unarmed Muniz in mutual combat.

The State notes Somosa testified that Cervantes-Pavon became angry with Muniz's comments, armed himself with a pipe and saw, and engaged in deadly combat with Muniz. According to the State, even if Cervantes-Pavon was not the aggressor, the combat was at least mutual, which makes a plea of self-defense unavailable. The State argues the fact that Muniz was unarmed when Cervantes-Pavon stabbed him is sufficient by itself to uphold the denial of immunity, citing *Manning*. The State contends Cervantes-Pavon did not have a reasonable fear of death or great bodily injury because he was not harmed during his prior fight with Muniz, had refused Muniz's invitations to fight previously, and testimony demonstrated the two were merely wrestling when the stabbing occurred.

[7] [8] In denying immunity, the circuit court relied on the fact that Muniz was not armed when Cervantes-Pavon stabbed him. The State relies on our decision in *Manning* to argue this is sufficient to uphold the court's decision. While we did ultimately affirm a denial of immunity in *Manning* and noted the victim was unarmed, the issue before us was only whether the court of appeals erred in requiring the trial court to conduct a complete testimonial evidentiary hearing before ruling on immunity. See *Manning*, 418 S.C. at 43, 791 S.E.2d at 150. Moreover, *Manning* is distinguishable because there was no contact between the victim and the defendant in that case, whereas here, Cervantes-Pavon alleged Muniz was strangling him. See *id.* at 45, 791 S.E.2d at 151. Further still, both parties here were armed with metal pipes at the outset of the fight that ultimately resulted in the stabbing, removing it from the realm of their past encounters that ended with no serious injuries. Accordingly, while the fact a victim is unarmed is a relevant consideration under the Act, it does not automatically prohibit immunity, as the State contends. Similarly, the fact a defendant armed himself does not, in and of itself, make him the aggressor in a given confrontation. See *Jones*, 416 S.C. 283, 786 S.E.2d 132 (affirming a circuit court's grant of immunity where movant armed herself with a knife for protection before victim grabbed and shook her).

[9] [10] [11] [12] We next turn to the circuit court's finding that the immunity issue presented a jury question. The Act requires the circuit court to determine whether

a movant is entitled to immunity. See *State v. Duncan*, 392 S.C. 404, 709 S.E.2d 662 (2011) (setting forth the procedure, burden of proof, and standard of review for an immunity determination). Some cases in which a defendant seeks immunity under the Act may present a "quintessential jury question" regarding self-defense. \*569 Such was the case in *Curry*, where the circuit court denied immunity<sup>2</sup> because testimony of the victim's and defendant's witness varied substantially, the defendant testified he pulled a gun because he believed victim was lunging at him but the evidence showed victim was shot six times in the back, and defendant told investigators he "blacked out" during the shooting. *Curry*, 406 S.C. at 369, 752 S.E.2d at 265. But just because conflicting evidence as to an immunity issue exists does not automatically require the court to deny immunity; the court must sit as the fact-finder at this hearing, weigh the evidence presented, and reach a conclusion under the Act. 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.

[13] [14] [15] We believe the circuit court's immunity ruling was controlled by multiple errors of law<sup>3</sup>, and combined with the court's erroneous characterization of Somosa's testimony, this amounted to an abuse of discretion. While the State contends there is evidence from the immunity hearing to support the court's ruling, we are unable to discern a legally correct basis on which the court relied. For example, the circuit court correctly noted that a movant must demonstrate an absence of aggression, but the record contains no evidence that Cervantes-Pavon initiated the fight. The issue of mutual combat presents a closer question. However, it is not clear this was a basis for the ruling, as the court merely noted there had been a "mutual confrontation" and gave no further factual findings or conclusions of law on this issue.<sup>4</sup> The circuit court appears to have based its ruling on the findings that the parties had discarded their metal objects, Cervantes-Pavon was armed while Muniz was not, and the two men were merely wrestling when the stabbing occurred. Because these were erroneous bases on which to deny immunity, we reverse the circuit court's decision on this issue and remand for a new hearing.

[16] [17] To be clear, we are not ordering a new trial, only a new hearing to determine whether Cervantes-Pavon is entitled to immunity under the Act. In addition, although the State cited to trial testimony to support the court's rulings in its brief, we agree with our sister state of Georgia that, "while the trial court's pretrial immunity ruling and the jury's verdict on a claim of self-defense may apply the same statutory justification standard, the court's ruling must be based solely on the evidence presented at a pretrial hearing, while the jury's verdict must be based solely on the evidence presented at trial, which may be considerably different." *Sifuentes v. State*, 293 Ga. 441, 444, 746 S.E.2d 127, 131 n.3 (2013). Consequently, we have limited our

review to the evidence presented at the immunity hearing. Likewise, the circuit court is to rely only upon evidence presented at the new hearing on remand.

**REVERSED AND REMANDED.**

BEATTY, C.J., FEW, JAMES, JJ., and Acting Justice Paul E. Short, concur.

**All Citations**

827 S.E.2d 564

**Footnotes**

- 1 Although our review today is limited primarily to legal issues, we note that this characterization of Somosa's testimony is not supported by the record. Somosa never stated he believed the parties were "merely wrestling." Rather, he acknowledged he told authorities in a previous statement that Muniz and Cervantes-Pavon began wrestling after the pipes were discarded and that they were wrestling when Muniz was stabbed. Somosa never opined on the level of combat this wrestling presented in his prior statement, and he testified during the immunity hearing that Muniz's arms were around Cervantes-Pavon's neck when the two men were fighting hand-to-hand.
- 2 The defendant in *Curry* moved for immunity under the Act at the directed verdict stage. *Curry*, 406 S.C. at 369, 752 S.E.2d at 265.
- 3 We also note the court's error in stating the Act required Cervantes-Pavon to prove he was entitled to immunity "beyond" a preponderance of the evidence, instead of "by" a preponderance of the evidence. While we readily understand the court may have simply misspoken given its correct recitation of the standard immediately before the erroneous statement, this is one of several errors of law that contribute to our ultimate conclusion.
- 4 While the Act does not require a written order upon an immunity determination, specific findings of fact and conclusions of law are critical to reviewing courts, particularly given the gravity of the circumstances these cases necessarily involve.

2019 WL 2519043  
Only the Westlaw citation is currently available.  
Supreme Court of South Carolina.

The STATE, Petitioner,  
v.  
Jeffrey Dana ANDREWS, Respondent.

Appellate Case No. 2018-001765

Opinion No. 27894

Submitted May 7, 2019

Filed June 19, 2019

**Synopsis**

**Background:** Following denial of pretrial motion for immunity from prosecution on theory of self defense, defendant was convicted in the Circuit Court, Sumter County, W. Jeffrey Young, J., of murder and possession of weapon during commission of violent crime. Defendant appealed. The Court of Appeals affirmed denial of motion for immunity, but reversed convictions on other grounds. Defendant petitioned for writ of certiorari.

**[Holding:]** The Supreme Court held that District Court applied appropriate legal standard in determining that defendant failed to prove entitlement to immunity from prosecution by preponderance of evidence.

Affirmed as modified.

**Procedural Posture(s):** Appellate Review; Pre-Trial Hearing Motion.

West Headnotes (2)

**[1] Criminal Law**

The relevant inquiry at a pretrial hearing on a motion for immunity from criminal prosecution is not merely whether there is a conflict in the evidence, but, rather, whether the accused has proved an entitlement to

immunity, under the Protection of Persons and Property Act, by a preponderance of the evidence. S.C. Code Ann. § 16-11-410 et seq.

Cases that cite this headnote

**[2] Criminal Law**

District court applied correct legal standard on defendant's pretrial motion for immunity from prosecution, under the Protection of Persons and Property Act, on charges for murder and possession of weapon during commission of violent crime, which motion was based on defendant's assertion that he shot victim in self-defense; although it noted inconsistencies in eyewitnesses' testimony as to what they saw at time of shooting, such inconsistency did not necessarily issue question for jury, and district court concluded that defendant had not demonstrated entitlement to immunity by preponderance of evidence. S.C. Code Ann. § 16-11-410 et seq.

Cases that cite this headnote

**ON WRIT OF CERTIORARI TO THE COURT OF APPEALS**

Appeal From Sumter County, W. Jeffrey Young, Circuit Court Judge

**Attorneys and Law Firms**

Attorney General Alan McCrory Wilson and Assistant Attorney General Scott Matthews, both of Columbia, and Solicitor Ernest A. Finney, III, of Sumter, all for Petitioner.

Chief Appellate Defender Robert Michael Dudek, of Columbia, for Respondent.

**Opinion**

PER CURIAM:

\*1 The State of South Carolina has filed a petition for a writ of certiorari asking this Court to review the Court

of Appeals' decision in *State v. Andrews*, 424 S.C. 304, 818 S.E.2d 227 (Ct. App. 2018). We grant the petition, dispense with further briefing, and affirm as modified.

## I.

The facts in this case are fully and accurately set forth in the Court of Appeals' opinion. After a fatal shooting at Respondent's home, Respondent was indicted for murder and possession of a weapon during the commission of a violent crime. Respondent moved to dismiss the charges pursuant to the Protection of Persons and Property Act<sup>1</sup> (the Act) on the ground he shot the victim in self-defense.

During the pre-trial immunity hearing, Respondent claimed that, after an altercation and being threatened by the victim, Respondent shot the victim in the threshold of the front door as the victim attempted to reenter his home. Respondent's father corroborated Respondent's version of events. However, another eyewitness, the victim's girlfriend and Respondent's cousin, testified the victim was attempting to peacefully leave Respondent's home and that Respondent followed the victim out of the home, shooting him on the porch. Additional forensic evidence was presented at the hearing, but it did not conclusively support either version of events.

At the conclusion of the immunity hearing, the circuit court rejected Respondent's argument. Relying on *State v. Douglas*, 411 S.C. 307, 768 S.E.2d 232 (Ct. App. 2014), the circuit court held:

The burden clearly is by the preponderance of the evidence. Not the normal criminal case law beyond a reasonable doubt. ... The testimony in this case from the witnesses and from the defendant have been at least very inconsistent. The testimony has been conflicting as to what the different witnesses saw and what happened on the night in question. And therefore, I find that the defendant has not met [his] burden of proving to me by a preponderance of the evidence, and

therefore a request for immunity is hereby denied.

Ultimately, the Court of Appeals affirmed the circuit court's denial of immunity, but reversed Respondent's convictions based on a separate evidentiary issue.

While we agree with the result reached by the Court of Appeals, we granted the petition for a writ of certiorari to reiterate the impact of our recent decision in *State v. Cervantes-Pavon*, — S.C. —, 827 S.E.2d 564 (2019).

## II.

When the Act was passed, the process for requesting immunity from prosecution was unclear. Therefore, in *State v. Duncan*, we interpreted the Act and provided procedural guidance, instructing that the hearing was properly held prior to trial and the burden of proof is by a preponderance of the evidence. *State v. Curry*, 392 S.C. 404, 709 S.E.2d 662 (2011).

Shortly after *Duncan* was decided, this Court heard *State v. Curry*, 406 S.C. 364, 752 S.E.2d 263 (2013).

However, at the time of the *Curry* trial, which occurred three years before the appeal to this Court, we had not yet decided *Duncan*. Thus, the parties and the circuit court did not have the benefit of the guidance provided by *Duncan* as to the proper procedure through which an immunity determination should be requested.

Consequently, in *Curry*, the defense attorney requested immunity at the directed verdict stage of trial, and the accused was ultimately denied immunity from prosecution. *Curry*, 406 S.C. at 369, 752 S.E.2d at 265. In *Curry*, we explained the accused's "claim of self-defense presented a quintessential jury question," which did not warrant immunity from prosecution, and therefore, we held the claim was properly submitted to the jury, with the claim of self-defense having been fully presented at that stage of trial. *Curry*, 406 S.C. at 372, 752 S.E.2d at 267.

This excerpt from *Curry* has been the source of much confusion for the bench and bar. We take this opportunity

to emphasize that aspect of *Curry* was related to its specific and unique procedural posture at trial—a motion for directed verdict—and was not intended to allow circuit courts to automatically deny immunity in cases with conflicting evidence.

\*2 [1] Most recently, in *Cervantes-Pavon*, we revisited the Act, ultimately reversing the circuit court's denial of immunity and remanding for a new immunity hearing. We found the circuit court's immunity hearing was controlled by multiple errors of law, including a misapplication of *Curry*. We rejected the circuit court's finding that the conflicting evidence presented a jury question, supporting a denial of immunity, and we held: “[b]ut just because conflicting evidence as to an immunity issue exists does not automatically require the court to deny immunity; the court must sit as the fact-finder at this hearing, weigh the evidence presented, and reach a conclusion under the Act.” Thus, the relevant inquiry is not merely whether there is a conflict in the evidence but, rather, whether the accused has proved an entitlement to immunity under the Act by a preponderance of the evidence.

[2] In the instant case, the circuit court correctly cited the preponderance of the evidence standard and explicitly relied on *Douglas*; a case in which the circuit court gave careful consideration to the issue of immunity,

making detailed findings of fact and conclusions of law in determining whether the accused had shown an entitlement to immunity by a preponderance of the evidence. *Curry*, 411 S.C. at 320, 768 S.E.2d at 240. Here, while the circuit court may not have set forth every detail of its analysis in the record, the record is nevertheless adequate for a reviewing court to determine that the circuit court applied the correct burden of proof and made findings that supported its denial of immunity consistent with a correct application of this Court's precedent. Thus, we find no error in the circuit court's application of the law.

To the extent the Court of Appeals relied upon the portion of *Curry* relating to the directed verdict procedural posture in affirming the circuit court's denial of immunity in this case, we vacate that portion of the Court of Appeals' opinion. Accordingly, we affirm the Court of Appeals as modified.

**AFFIRMED AS MODIFIED.**

BEATTY, C.J., KITTREDGE, HEARN, FEW and JAMES, JJ., concur.

All Citations

--- S.E.2d ----, 2019 WL 2519043

Footnotes

1 S.C. Code Ann. §§ 16–11–410 to –450 (2015 & Supp. 2017).