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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Dorchester County
Maite Murphy, Circuit Court Judge

Opinion No. 2020-UP-178 (S.C. Ct. App. Filed June 10, 2020,
Withdrawn, Substituted, and Refiled July 29, 2020)

2015-GS-18-1882

THE STATE,

RESPONDENT,

V.

CHRISTIAN ANTHONY HIMES,

PETITIONER

APPELLATE CASE NO. 2017-000870

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on July 29, 2020.

QUESTION PRESENTED

In construing the Protection of Persons and Property Act, whether the Court of Appeals erred in concluding the third element of self-defense (that a reasonably prudent man of ordinary firmness and courage would have believed he was in imminent danger of serious bodily injury or death) excludes the decedent's conduct and knowledge the accused had about the decedent's background?

STATEMENT OF THE CASE

Petitioner was indicted by a Dorchester County Grand Jury on September 1, 2016, for murder and possession of a weapon during the commission of a violent crime. R. 590 – 593. The indictments alleged that on November 1, 2015, Petitioner shot and killed David Ham with malice aforethought, and that he possessed a handgun during the commission of this violent crime. R. 590 – 593.

Petitioner proceeded to trial before the Honorable Maite Murphy and a jury, from April 3 – April 6, 2017. R. 1. Petitioner was represented by Michelle Williams and Pierce Wehman. R. 1. The State was represented by Donald Sorenson and Ryan Templeton. R. 1. Judge Murphy denied Petitioner's motion for immunity from prosecution following a pretrial hearing and her ruling remained unchanged when the motion was renewed during the trial. R. 184, l. 21 – 188, l. 3; R. 416, l. 18 – 417, l. 6; R. 507, ll. 14-21. Petitioner was convicted as indicted and he was sentenced to imprisonment for life without the possibility of parole for murder and a concurrent term of five years for the weapons offense. R. 570, ll. 6-11; R. 594 – 595.

On April 7, 2017, Petitioner served his notice of appeal. Laura R. Baer and undersigned counsel represented Petitioner before the Court of Appeals. Petitioner challenged the trial court's finding that he was not eligible for or entitled to immunity from prosecution under the Protection of Persons and Property Act. Petitioner also challenged the imposition of a five year sentence for possession of a weapon during the commission of a violent crime since he was sentenced to life imprisonment without parole for murder. On June 10, 2020, in an unpublished opinion, the Court of Appeals affirmed Petitioner's conviction and sentence for murder but vacated his conviction and sentence for possession of a weapon during the commission of a violent crime. *State v. Himes*, Op. No. 2020-UP-179 (S.C. Ct. App. Filed June 10, 2020).

Thereafter, Petitioner and the State both filed petitions for rehearing, which were denied on July 29, 2020. However, Op. No. 2020-UP-179 was withdrawn, substituted, and refiled on July 29, 2020, in an unpublished opinion, in which the Court of Appeals again affirmed Petitioner's conviction and sentence for murder but vacated only his sentence, rather than his conviction and sentence, for possession of a weapon during the commission of a violent crime. *State v. Himes*, Op. No. 2020-UP-179 (S.C. Ct. App. Filed June 10, 2020, Withdrawn Substituted, and Refiled July 29, 2020).

Petitioner now files this petition for writ of certiorari.

ARGUMENT

In construing the Protection of Persons and Property Act, the Court of Appeals erred in concluding the third element of self-defense (that a reasonably prudent man of ordinary firmness and courage would have believed he was in imminent danger of serious bodily injury or death) excludes the decedent's conduct and knowledge the accused had about the decedent's background.

Reasons to grant certiorari

This Court should grant the petition for writ of certiorari because the decision of the Court of Appeals is in conflict with prior decisions of this Court. See Rule 242(b)(3), SCACR.

Here, the Court of Appeals found that where self-defense was based on the defendant's reasonable belief of imminent danger rather than actual danger, the issue of reasonableness presented a "quintessential jury question," and thus immunity from prosecution under the Protection of Persons and Property Act was not warranted. *State v. Himes*, Op. No. 2020-UP-179 (S.C. Ct. App. Filed June 10, 2020, Withdrawn Substituted, and Refiled July 29, 2020). Allowing the Court of Appeals' decision to stand runs contrary to recent precedent of this Court.

In *State v. Cervantes-Pavon*, 426 S.C. 442, 827 S.E.2d 564 (2019), this Court explained that "just because conflicting evidence as to an immunity issue exists does not automatically require the court to deny immunity; the court must sit as fact-finder at this hearing, weigh the evidence presented, and reach a conclusion under the Act." Again, in *State v. Andrews*, 427 S.C. 178, 181, 830 S.E.2d 12, 13(2019), this Court explained that the excerpt from *State v. Curry*, 406 S.C. 364, 372, 752 S.E.2d 263, 267 (2013), which stated an accused's claim of self defense presented a "quintessential jury question" not warranting immunity was related to *Curry*'s "specific and unique procedural posture at trial—motion for a directed verdict—and was not intended to allow circuit courts to automatically deny immunity in cases with conflicting

evidence." This Court explained, "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."

Despite these explanations, the Court of Appeals misconstrued the "quintessential jury question" language from *Curry* in affirming the trial court here. Allowing this interpretation to stand means that anytime a defendant proceeds under the theory that he acted upon a reasonable belief of imminent danger rather than actual imminent danger, the situation presents a quintessential jury question, which is contrary to this Court's explanations in *Cervantes-Pavon* and *Andrews*.

Additionally, although the form of the Court of Appeals' decision—a brief, unpublished per curiam opinion—makes discerning the Court's reasoning difficult, it appears the Court of Appeals misapplied the third element of self-defense. The Court of Appeals affirmed on the basis that Petitioner did not prove the third element of self-defense and considered a verbal threat by the decedent as the only evidence presented on this factor. However, in *State v. Dickey*, 394 S.C. 491, 501, 716 S.E.2d 97, 102 (2011), this Court held that the defendant reasonably believed he was in actual danger of death or serious bodily injury because the victim was highly intoxicated, acted aggressively over the course of the conflict, began advancing toward the defendant quickly with the purpose of assaulting him and continued advancing toward the defendant after the defendant pulled the gun.

Here, like in *Dickey*, in addition to verbal threats by the decedent, the decedent's conduct and Petitioner's knowledge of facts about the decedent were evidence presented by Petitioner as to this element. The decedent was highly intoxicated and advancing at Petitioner and lunged at Petitioner even after Petitioner pulled a gun and was in retreat. The trial court's finding that a

reasonably prudent man of ordinary firmness and courage would not have believed he was in imminent danger was unsupported by the evidence under these circumstances, and the Court of Appeals' affirmance on this ground, when it misapplied the law, was error. The Court of Appeals misapplied the law when it considered only what danger a reasonable man hearing a threat would have perceived, not what danger a reasonable man who heard threats, witnessed threatening acts, and knew the decedent was violent would have perceived.

For these above-cited reasons, this Court should grant the petition for writ of certiorari.

Relevant facts

On April 3, 2017, an immunity hearing was held pursuant to the Protection of Persons and Property Act (the Act), and the following facts were established.

Heather Ham (Heather) had been separated from her abusive husband David Ham (Decedent) for approximately eighteen months before Heather became romantically involved with Petitioner, Christian Himes. R. 41, l. 20 – 42, l. 24. Heather and Decedent separated after an argument became physical when Decedent dragged her from the house in front of their young children. R. 121, l. 2-15; R. 44, ll. 16-24. At that point, Heather already had a scarred face from Decedent punching her in the face on an earlier occasion. R. 120, l. 14 – 121, l. 1; R. 45, ll. 15-16. However, they remained cordial after separating and they shared custody of their children pursuant to an informal agreement. R. 49, l. 19 – 50, l. 9.

It was undisputed that Petitioner began staying at Heather's apartment three weeks before the fatal altercation that would kill Decedent. R. 11, ll. 14-24; R. 117, l. 24 – 119, l. 9. Petitioner's clothes and toothbrush were at Heather's apartment. R. 119, ll. 10-13. Petitioner had the use of Heather's apartment key and she occasionally allowed him to drive her car. R. 119, ll. 14-22. It is notable that the apartment was not Decedent's—he never lived there. Instead, Heather had moved

there about three months prior to the shooting, more than a year after her separation from Decedent. R. 58, ll. 3-5.

Decedent was not aware of the budding romance between Heather and Petitioner. Heather feared an altercation would occur if the two men met. R. 122, ll. 1-8. On occasions when Decedent came by to pick up the children, Petitioner remained hidden in the back of the Heather's apartment. R. 129, l. 23 – 130, l. 6. Usually, exchanging the children took only five or ten minutes. R. 129, l. 20 – 130, l. 25.

However, a few days before the shooting, Decedent learned that Heather was in a romantic relationship with Petitioner. On October 30, 2015, Decedent sent Heather a text message that read, "tell your bf don't let me catch him slippin." R. 589; R. 125, ll. 7-21. Petitioner saw the text message and he found it threatening. "I thought that meant—to me it meant if he sees me, he's gonna come at me and he's gonna attack me." R. 125, ll. 22-24.

On November 1, 2015, Decedent came by to drop off the children but his stay was "a lot longer" than the usual five or ten minutes. R. 54, ll. 4-8. Decedent had been drinking heavily—it would later be determined that he had a 0.19 blood alcohol content. R. 25, ll. 5-8.

Petitioner had borrowed Heather's car and arrived home late with the car, which necessitated that Decedent bring the children to Heather's apartment, rather than Heather picking them up. R. 127, l. 18 – 128, l. 1; R. 77, l. 7 – 79, l. 23. When Petitioner arrived home, Heather met him at the door and told him to leave because Decedent was still there. R. 128, ll. 10-14.

Petitioner was aware of Heather's past physical abuse by Decedent. R. 120, l. 4 – 121, l. 1. However, Petitioner left and went to a gas station, and he remained there for thirty or forty-five minutes. R. 129, ll. 11-16. When he thought more than enough time had elapsed for Decedent to be gone, Petitioner drove back to Heather's apartment and again walked towards the door. R. 129,

l. 17-24. However, Decedent was coming out of the apartment at that moment and waylaid Petitioner, asking him, "You Chris?" R. 586. Petitioner tried to walk past Decedent into the apartment but Decedent blocked his entry. R. 132, ll. 21-22. Petitioner noticed that Decedent was taller than him. R. 132, l. 18.

A verbal altercation ensued.

> When he came out, he asked me if I was crazy. And I told him, yeah. I told him that I didn't want to do this here and now because his kids was in the house. And he was upset. He was throwing his arms. And he told me that I needed to leave. And he said he didn't want me to be a father to his kids. He wasn't going to allow his kids to call me daddy . . .
>
> Initially, I told him I was going inside. And he blocked me off. And he started walking towards me. And at that time he was stating that he wasn't going to allow me to be a father to his kids. And he kept coming towards me.

R. 132, ll. 3-24.

Petitioner believed he backed up about fifty feet from the apartment door, and police officers confirmed the fatal encounter took place about thirty-three to thirty-nine feet from the breezeway that led to the apartment. R. 98, l. 19 – 99, l. 4; R. 133, ll. 13-19. At that point, Petitioner pulled out a gun. R. 133, ll. 1-19. Petitioner had bought the gun because Heather was raped by an acquaintance on October 26, 2015. R. 126, l. 5 – 127, l. 14. Petitioner tried to continue backing away towards Heather's car, but said Decedent, "was yelling at me. He said I'm not scared of your punk ass gun." R. 134, ll. 6-12. Petitioner told Decedent to leave and said he was going into the apartment, but Decedent told Petitioner he was not going in the apartment. R. 134, ll. 14-17. Decedent began reaching in his pocket. R. 156, ll. 4-5; R. 586; R. 135, ll. 6-8.

"When he told me that he wasn't going to let me in the apartment, he started walking towards me aggressively. And I told him to backup." R. 134, ll. 20-22. "I told him to back up a

few times and he charged at me." R. 134, l. 24. Heather, who was listening at the door, confirmed that she heard Petitioner tell Decedent to back up three times. R. 90, ll. 12-16. However, instead of backing up, Decedent lunged at Petitioner. "He went to lung[e] at me, and I stumbled back. And I shot him." R. 135, ll. 1-2. "I was trying to back up to my car and he started charging at me." R. 158, ll. 1-2.

Petitioner's testimony was uncontradicted in this regard. No eyewitness saw and heard the entirety of the confrontation, although various witnesses corroborated portions of Petitioner's account of events. Petitioner explained in his testimony at the immunity hearing that, from the time he saw Decedent at the door to the time he shot Decedent after backing up a significant distance, "I was thinking he was going to hurt me." R. 136, ll. 6-12.

Petitioner gave a written statement to Detective Weaver, which was admitted at the immunity hearing. The statement, which was written by Detective Weaver, stated "I was just thinking how much he hurt Heather. And I went back to thinking of how my dad treated my family." R. 586. Petitioner also said, "I was scared, my father hurt me so much in the past mentally, physically, and emotionally. And I was going through it all over again." R. 587.

Petitioner explained that when Detective Weaver wrote that Petitioner said he did not think Decedent had a gun, that was only after being at the police station and reflecting back on what happened. "In this statement, I had time to reflect back on everything that happened. And reflecting back, there was more than enough opportunity to pull a gun before I pulled mine if he had one." R. 135, l. 15 – 136, l. 5. "I didn't say I knew for a fact that he wasn't [armed]. I said that I don't think he was after the fact when I was reflecting back on what actually happened." R. 155, ll. 10-12. Petitioner would go on to testify at trial that although he continued to back away towards his car, he was afraid to turn his back on the Decedent. R. 500, ll. 21-22.

The immunity hearing proceeded under subsection (C) of the Act. R. 176, ll. 15-16. S.C. Code Ann. § 16-11-440(C) provides that

> 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.

The trial court ruled that Petitioner was not entitled to immunity because he did not prove the elements of self-defense by a preponderance of the evidence. R. 185, ll. 5-13.

The trial judge found that Petitioner was at fault in bringing on the difficulty because he "was sleeping with the victim's spouse and was around his minor children" and showed a "complete disregard of [Heather's] car and her timing and her requirement that she pick up her children on time," which resulted in Decedent bringing the children to Heather's that night. R. 185, ll. 14-21; R. 186, ll. 7-11; R. 185, l. 22 – 186, l. 9.

The trial court found that Petitioner failed to prove he actually believed he was in imminent danger of sustaining serious bodily injury, noting that Decedent never came out and said to Petitioner: "I'm going to shoot you. I'm going to stab you. I'm going to kill you." R. 186, ll. 11-17. The trial judge further noted that Petitioner "did not think that the victim was armed with a weapon, that he never saw a weapon, and had he had a weapon, he would've had enough time to pull it out." R. 186, 11. 18-22.

In finding that the circumstances were not such that a reasonably prudent man of ordinary firmness and courage would have been warranted in striking the fatal blow, the trial judge noted the similarity in size between the men, that Decedent was not armed, and that it was Petitioner who pointed a gun at Decedent. With respect to the text message, the court found that it could be viewed

and interpreted "in many different ways," including the view taken by Heather, which was that it was not a threat. R. 186, l. 23 – 187, l. 17.

Inexplicably, the trial judge then discussed the duty to retreat, finding that Petitioner did not prove that he had no other probable means of avoiding the danger.[1] R. 187, l. 17 – 188, l. 2.

Accordingly, the trial court found that Appellant had not established he was entitled to immunity.[2] R. 188, l. 2-3. The court maintained its ruling upon renewal of the motion. R. 416, l. 18 – 417, l. 6; R. 507, ll. 14-21.

Discussion

The intent of the General Assembly in enacting the Protection of Persons and Property Act (the Act) was to codify and extend the common law Castle Doctrine. S.C. Code Ann. 16-11-420(A). Here, defense counsel argued that Petitioner fell under subsection (C) of the Act, which deals with the use of force by one who is attacked in another place where he has a right to be. S.C. Code Ann. § 16-11-440(C).

Our Courts have determined that, in order to be granted immunity from prosecution under the Act, a defendant must also prove all the elements of self-defense, except the duty to retreat, by a preponderance of the evidence. *State v. Curry*, 406 S.C. 364, 371–72, 752 S.E.2d 263, 266–67 (2013); *State v. Duncan*, 392 S.C. 404, 709 S.E.2d 662 (2011); *State v. Douglas*, 411 S.C. 307, 318, 768 S.E.2d 232, 238-39 (Ct. App. 2014). Thus, the defense was also required to prove: (1)

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[1] However, the duty to retreat need not be proven to establish immunity under the Act. S.C. Code Ann. § 16-11-440(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 . . ."); *see State v. Curry*, 406 S.C. 364, 752 S.E.2d 263 (2013).

[2] Although the hearing proceeded under subsection (C) of the Act, which provides immunity when one is attacked in "another place" where he has the right to be, the trial court also ruled Petitioner was ineligible for immunity on the basis that Petitioner was not "on his own premises" since the altercation occurred outside. R. 184, l. 22 – 185, l. 5.

the defendant was without fault in bringing on the difficulty; (2) the defendant was in actual imminent danger of losing his life or sustaining serious bodily injury, or he must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; and (3) if the defense is based upon the belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief. *State v. Curry*, 406 S.C. 364, 752 S.E.2d 263 (2013); S.C. Code Ann. §§ 16-11-440 and -450.

Immunity under the Act

Petitioner was eligible for immunity under the Act and proved the elements required under subsection (C). He was not engaged in unlawful activity, he was attacked in another place he had the right to be, and he reasonably believed the use of deadly force was necessary.

First Petitioner was not engaged in unlawful activity. The solicitor argued, without any specificity, "it's my position [Petitioner is] engaged in an unlawful activity." R. 176, ll. 16-18. The trial court did not make a specific finding regarding this element of the Act. To the extent that the solicitor contended Petitioner was acting unlawfully because he was not in lawful possession of the gun, "a person can be acting lawfully, even if he is in unlawful possession of a weapon, if he was entitled to arm himself in self-defense at the time of the shooting." *State v. Burriss*, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999). *See also State v. Glenn*, 429 S.C. 108, 838 S.E.2d 491 (2019). The gun remained in Petitioner's pocket until after Decedent followed Petitioner about fifty feet and began reaching in his own pockets. Petitioner did not discharge the gun until Decedent lunged at him.

Second, Petitioner was attacked in another place where he had the right to be. The solicitor argued the Act was inapplicable because the two men were in "the common areas of an apartment that neither of them are residing in." R. 169, ll. 14-18. The defense relied upon Petitioner's status

as, at the very least, an invited guest and our courts' past application of the Castle doctrine to outdoor areas. R. 177, ll. 6-19. In finding the Act inapplicable, the trial court found there was a question as to whether Petitioner "had to be there." R. 185, ll. 5-11.

In the present case, Petitioner had been staying in the apartment with Heather and had his belongings inside. R. 69, ll. 13-16; R. 119, ll. 3-22; R. 241, ll. 2-5; R. 290, ll. 8-17. Because Decedent was arguably an invited guest to the apartment that night, Petitioner claimed immunity under subsection (C) of the Act rather than under subsection (A). *See State v. Jones*, 416 S.C. at 297, 283, 786 S.E.2d 132, 139-40 (2016); *State v. Curry*, 406 S.C. at 370, 752 S.E.2d at 266.

In *State v. Jones*, 416 S.C. at 296-97, 786 S.E.2d 1at 139, our Supreme Court clarified the scope of subsection (C) of the Act, finding that it is "broadly worded" and that the Legislature intended its protection "to apply to incidents, provided the other requirements are met, **without a geographical restriction**." (emphasis added). *See also State v. Douglas*, 411 S.C. 307, 330-31, 768 S.E.2d 232, 245 (Ct. App. 2014). Petitioner was in a place where he had a right to be: he was an invited guest, expected by Heather to come back.

The fact that Petitioner was walking up to the apartment rather than inside of it does not render the Act inapplicable. Our Courts have followed the general rule that the absence of a duty to retreat also extends to the curtilage of a home. *See State v. Wiggins*, 330 S.C. 538, 548 n. 15, 500 S.E.2d 489, 494 n. 15 (1998); *State v. Quick*, 138 S.C. 147, 135 S.E. 800, 800–01 (1926).

As to the third element of immunity under subsection (C) of the Act, Petitioner reasonably believed the use of deadly force was necessary. There is some overlap between the third element of the Act and the second and third elements of self-defense, the latter of which were the focus of the trial court's ruling and will be discussed *infra*. The trial judge ruled that Petitioner failed to prove that he actually believed he was in imminent danger of serious bodily injury because she

found that Decedent never said to Petitioner that he was going to shoot, stab, or kill him. Thus, the trial court erroneously imposed a requirement, which is not found anywhere in our jurisprudence, that the assailant must contemporaneously verbalize his intent to kill or seriously injure. R. 228, ll. 11-17. The trial judge further mischaracterized Petitioner's testimony as having been: "[H]e did not think that the victim was armed with a weapon, that he never saw a weapon, and had he had a weapon, he would've had enough time to pull it out." R. 228, ll. 18-22. Not surprisingly, the trial court also ruled that a reasonable person would not have struck the fatal blow. R. 186, l. 23 – 187, l. 17.

As will be discussed more fully *infra*, the trial judge's rulings are inconsistent with our case law. "A defendant, in a self-defense case, has the right to act on appearances." *State v. Fuller*, 297 S.C. 440, 443, 377 S.E.2d 328, 331 (1989). "The right to act on appearances is not limited to the situation where the defendant testifies he mistakenly thought he saw a weapon in the victim's hand. While an appearance charge is appropriate when the defendant erroneously believes he sees the victim with a weapon, it has been applied elsewhere." *State v. Starnes*, 340 S.C. 312, 321, 531 S.E.2d 907, 912 (2000). "Once the right to fire in self-defense arises, a defendant is not required to wait until his adversary is on equal terms or until he has fired or aimed his weapon in order to act." *Id.* at 322, 531 S.E.2d at 913 (citing *State v. Hendrix*, 270 S.C. 653, 244 S.E.2d 503 (1978)). "Similarly, the accused doesn't have to wait until his assailant gets the drop on him, he has the right to act under the law of self-preservation and prevent his assailant [from] getting the drop on him." *Id.* (citing *State v. Rash*, 182 S.C. 42, 50, 188 S.E. 435, 438 (1936)).

Though Petitioner did not see a weapon in Decedent's hand, he saw Decedent reach into his pocket and was concerned that he may have had a gun at the time. Contrary to the trial court's finding, it was only upon further reflection after the event that Petitioner reasoned that Decedent

probably did not have a gun at the time because he would have pulled it out. R. 38, l. 9 – 39, l. 21; R. 135, l. 3 – 136, l. 12; R. 155, l. 4 – 156, l. 15; R. 412, l. 19 – 414, l. 4; R. 503, l. 25 – 504, l. 7; R. 586-589. Further, Decedent's bare hands could have been used as a weapon. *See State v. Bennett*, 328 S.C. 251, 262, 493 S.E.2d 845, 851 (1997). Thus, Petitioner reasonably believed that deadly force was necessary to prevent great bodily injury to himself.

Self-defense

In addition to establishing he was eligible for immunity under the Act, Petitioner established a valid case of self-defense. Petitioner was not at fault in bringing on the difficulty. He believed he was in imminent danger of serious bodily injury and a reasonably prudent man of ordinary firmness and courage would have believed the same. Moreover, Petitioner was not required to retreat.

First, Petitioner did not bring about the difficulty. In *State v. Bryant*, 336 S.C. 340, 345, 520 S.E.2d 319, 322 (1999), this Court stated, "any act of the accused in violation of law and reasonably calculated to produce the occasion amounts to bringing on the difficulty and bars his right to assert self-defense." Here, the trial judge found that Petitioner was at fault in bringing on the difficulty because he was in a romantic relationship with Heather, who was a married woman and mother. R. 185, ll. 14-21; R. 186, ll. 7-11. Additionally, the trial judge found that Petitioner was at fault because if he had returned Heather's car in a timely fashion so that she could pick up the children, Decedent would not have been at the apartment that night. R. 185, l. 22 – 186, l. 9.

The trial court's overly moralistic conclusion that Petitioner brought about the difficulty because he was in a relationship with Heather did not take into consideration the fact that Decedent and Heather had been separated for eighteen months (due to Decedent's physical violence against her) and lived in different residences, and Petitioner was staying with Heather. Petitioner was

returning back to his girlfriend's apartment and did not expect to see Decedent. When Petitioner returned, Heather told him that Decedent was there and he needed to go, and Petitioner left. R. 249, l. 9 – 250, l. 2. Petitioner stayed away for at least twenty minutes but perhaps for as long as forty-five minutes. Both Petitioner and Heather acknowledged that all other custody exchanges had been five to fifteen minutes. R. 20, l. 17 – 21, l. 10; R. 53, l. 11 – 54, l. 10; R. 129, l. 9 – 131, l. 7; R. 250, l. 6 – 251, l. 7; R. 294, l. 10 – 295, l. 13; R. 449, l. 20 – 450, l. 16; R. 458, l. 25 – 459, l. 9.

Notably, Decedent spent an inordinately long time in Heather's apartment that night and even returned, purportedly to find his keys, entering the room where Petitioner was known to hide during past custody exchanges. Further, it was Decedent who initiated contact with Petitioner, blocked his entry into the apartment, and was acting both angry and aggressive. Under these circumstances, Petitioner's relationship with Heather did not warrant a physical attack from Decedent that made him legally at fault in bringing on the difficulty.

As to Petitioner's having been late returning Heather's car, while Petitioner's arriving home late was inconsiderate, it was not responsible for bringing about the difficulty. It was the Decedent's conduct in confronting Petitioner and continuing to force Petitioner backward and ignoring his pleas to stop, culminating in Decedent's decision to charge at and lunge at Petitioner that brought about the difficulty here.[3]

[3] Assuming *arguendo* that Petitioner was at fault in bringing on the difficulty, "[i]f, after commencing the assault, the aggressor withdraws in good faith from the conflict and announces in some way to his adversary his intention to retire, he is restored to his right of self-defense." *Bryant*, 336 S.C. at 345, 520 S.E.2d at 322. "One's right to self-defense is restored after a withdrawal from the initial difficulty with the victim if that withdrawal is communicated to the victim by word or act." *Id.* (citing *State v. Graham*, 260 S.C. 449, 196 S.E.2d 495 (1973)). Petitioner believed he had backed up about fifty feet by then, and police officers would estimate the fatal encounter took place about thirty-three to thirty-nine feet from the breezeway that led to the apartment. Petitioner's

As to the second element of self-defense, Petitioner believed he was in imminent danger of sustaining serious bodily injury or death. The trial judge ruled that Petitioner failed to prove that he actually believed he was in imminent danger of serious bodily injury or death because Decedent never specifically threatened to shoot, stab, or kill Petitioner, and because Decedent did not have a weapon. R. 228, ll. 11-22. No such explicit verbal threat is required to establish this element of self-defense, nor is the actual possession of a weapon by the decedent.

"A person has the right to act on appearances, even if the person's belief is ultimately mistaken." *State v. Dickey*, 394 S.C. 491, 501, 716 S.E.2d 97, 102 (2011); *see also State v. Gandy*, 113 S.C. 147, 148, 101 S.E. 644 (1919). Thus, in establishing the second prong of self-defense, "[a] defendant must show that he believed he was in imminent danger, not that he was actually in such danger, because he had the right to act on appearances . . ." *State v. Fuller*, 297 S.C. 440, 443–44, 377 S.E.2d 328, 331 (1989) (quoting *State v. Jackson*, 277 S.C. 271, 87 S.E.2d 681, 684-685 (1955)). Importantly, once the right to fire in self-defense arises, a person is not required to wait until his adversary "on equal terms" with him or "gets the drop on him." *State v. Starnes*, 340 S.C. 312, 322, 531 S.E.2d 907, 913 (2000); *State v. Hendrix*, 270 S.C. 653, 660–61, 244 S.E.2d 503, 507 (1978); *State v. Rash*, 182 S.C. 42, 50, 188 S.E. 435, 438 (1936)).

Here, Heather had shared with Petitioner a text message that Decedent sent two days prior, which read: "Tell your bf don't let me catch him slipping." R. 12, l. 7 – 13, l. 2; R. 50, l. 10 – 52, l. 2; R. 69, l. 2 – 73, l. 12; R. 125, l. 7 – 126, l. 4; R. 231, l. 8 – 234, l. 15; R. 589. Petitioner took the message as a threat, meaning that Decedent was going to "come at [him]" and "attack him." R. 52, ll. 13-18; R. 125, ll. 7-24; R. 236, l. 6 – 237, l. 17; R. 451, l. 8 – 452, l. 22. The Urban

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conduct in backing away from the apartment communicated his intent to leave and restored his right to self-defense when Decedent continued to pursue him.

Dictionary provides serval definitions of "slippin," including "being caught off guard." *See* Urban Dictionary, *available at* http://www.urbandictionary.com. *See also People v. Arellano*, 23 Cal. Rptr. 3d 172, 174 (Cal. Ct. App. 2004); *Boddie v. State*, 494 S.E.2d 651, 652 (Ga. 1998). Given Decedent's use of the words: "don't let me catch him slipping," Petitioner quite reasonably feared being assaulted by an angry and violent Decedent, when he was caught by Decedent slipping—alone, at night, heading into Heather's apartment after he thought Decedent had gone. This text message must also be considered in the context that Petitioner went out of his way to hide from and avoid Decedent on previous occasions and on the night in question.

Petitioner knew Decedent was a violent man because he had physically abused his own wife. When Decedent came out of the apartment, he was drunk and aggressive, blocking Petitioner from going inside. While the men were of similar thin builds, Decedent was taller than Petitioner. Petitioner backed away and even moved into the grass, yielding the walkway to Decedent but Decedent continued to follow Petitioner, argue and reached into his pocket. Petitioner was unsure at the time whether Decedent had a weapon in his pocket, so Petitioner drew (but did not yet fire) his own weapon. Decedent said that he was not scared of Petitioner's gun and then lunged at him. Given their height difference, the downward path of the bullet was consistent with Petitioner's testimony. *See State v. Hendrix*, 270 S.C. 653, 661, 244 S.E.2d 503, 507 (1978) ("The difference in age; the fact of the prior bad blood between the two men; the heavy consumption of alcohol by Cherry; and the prior threat of the deceased are all factors which would give appellant the right to judge the conduct of his adversary more harshly than otherwise.").

As to the third element of self-defense, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief of imminent danger as Petitioner. In addition to Petitioner's subjective belief, he was also required to prove that "a reasonable prudent man of

ordinary firmness and courage would have entertained the same belief." *State v. Fuller*, 297 S.C. 440, 443–44, 377 S.E.2d 328, 331 (1989) (quoting *Jackson*, *supra*). In ruling Petitioner failed to establish this element of self-defense, the trial judge noted the similarity in size between the men, that Decedent was not armed, that it was Petitioner who pointed a gun at Decedent, and what the judge perceived as an ambiguity in the language of the text message. R. 186, l. 23 – 187, l. 17. However, just because a fact could be viewed in several ways does not relieve the trial court from responsibility for determining immunity. *State v. Cervantes-Pavon*, 426 S.C. at 451, 827 S.E.2d at 569; *State v, Andrews*, 427 S.C. at 181, 830 S.E.2d at 13.

The Court of Appeals did not address the multiple errors of law by the trial court as to other elements of self-defense and immunity, and instead affirmed based on this lone element of self-defense. The Court of Appeals found that "a reasonably prudent man of ordinary firmness and courage would not have entertained the same belief that he was in imminent danger of serious bodily injury or death." *State v. Himes*, Op. No. 2020-UP-179 (S.C. Ct. App. Filed June 10, 2020, Withdrawn, Substituted, and Refiled July 29, 2020).

The Court of Appeals wrote that,

> The evidence indicates the victim's primary goal was to prevent Himes from entering the victim's ex-wife's apartment, not to attack Himes. Himes agreed **the only threatening thing the victim said to him the night of the fatal shooting was "you're not going into that apartment where my two kids are.**" Himes stated he shot the victim because he was scared. The night of the incident, he told police officers he shot out of fear because "My father hurt me so much in the past mentally, physically and emotionally and I was going through it all over again."

State v. Himes, Op. No. 2020-UP-179 (S.C. Ct. App. Filed June 10, 2020, Withdrawn, Substituted, and Refiled July 29, 2020) (emphasis added). The Court of Appeals thus held the only evidence relevant to a determination of whether a reasonably prudent man of ordinary firmness and courage

would have believed he was in imminent danger was a single comment by Decedent. This was error because that night Decedent also verbally threatened Petitioner when he repeatedly told Petitioner, "He wasn't going to allow his kids to call me daddy," and "he wasn't going to allow me to be a father to his kids." R. 132, ll. 3-24.

More importantly, however, the Court of Appeals' decision misconstrued this element of self-defense by apparently finding that Decedent's physical actions, in addition to his verbal threats, should not be considered. Decedent's actions of continuously coming towards Petitioner while Petitioner retreated conveyed a serious threat—Decedent's intent to act to ensure Petitioner never became a father to the children. Petitioner backed away towards Heather's car, but Decedent, "was yelling at me. He said I'm not scared of your punk ass gun." R. 134, ll. 6-12. Decedent then reached for his pocket, ignored multiple pleas from Petitioner to back up, and lunged at Petitioner. Decedent was larger, highly intoxicated, undeterred by the mere threat of the gun, and he kept advancing on Petitioner despite being repeatedly exhorted to back up. It was only when Decedent finally lunged at Petitioner that he fired a single shot, and it was only upon further reflection at the police station that Petitioner stated he did not think that Decedent had a weapon. Petitioner did not draw his own weapon until after he saw Decedent reaching for his own pocket.

The Court of Appeals also erred when it apparently found Petitioner's background knowledge of Decedent's violent character was not evidence as to whether a reasonably prudent man of ordinary courage would have believed he was in imminent danger. Petitioner's background knowledge that Decedent was violent (Decedent had physically abused Heather at least twice and his abuse was so severe it left her with permanent facial scarring) was relevant evidence about this factor. Heather was so concerned that violence would erupt if Decedent saw Petitioner that on prior occasions, Petitioner hid when Decedent came over.

A reasonably prudent man of ordinary firmness and courage who saw what Petitioner saw and knew what he knew would also have been fearful of an imminent attack because it appeared the Decedent had lain in wait for Petitioner on this night. Although dropping the children off normally took only five or ten minutes, Decedent was hanging around for five or ten times as long this night, presumably because he had just learned Heather was seeing Petitioner several days before.

In *State v. Dickey*, 394 S.C. 491, 501, 716 S.E.2d 97, 102 (2011), this Court held that the defendant reasonably believed he was in actual danger of death or serious bodily injury because the victim was highly intoxicated, acted aggressively over the course of the conflict, began advancing toward the defendant quickly with the purpose of assaulting him and continued advancing toward the defendant after defendant pulled the gun. Like *Dickey*, Decedent "was undeterred at the sight of [the] gun" and advanced toward Petitioner. 394 S.C. at 502, 716 S.E.2d at 103; *cf. State v. Oates*, 421 S.C. 1, 16-17, 803 S.E.2d 911, 919-20 (Ct. App. 2017). It was only then that Petitioner fired his gun a single time. In light of the text message received two nights prior, Decedent's history of aggression, and his aggressive behavior at the time, a reasonable man would have acted as Petitioner did under the circumstances.

The Court of Appeals incorrectly construed this third element of self-defense as assuming a reasonably prudent man of ordinary firmness and courage who had none of Petitioner's knowledge of Decedent's background, was unaware of Decedent's recent threatening text message about Petitioner, and did not see Decedent lunge at him. But the reasonably prudent man standard must be a reasonably prudent man who knows what the accused knows and sees what the accused sees—the Decedent following, challenging, reaching for his pocket, and lunging were physical

actions that must be considered as evidence of this element. The Court of Appeals erred in affirming on this element.

Finally, the fourth element of self-defense—the duty to retreat—was inapplicable here. Petitioner had no duty to retreat since he was asserting immunity under the Act. The trial court's findings in this regard, that Petitioner should have walked away, are inexplicable. R. 187, l. 21 – 188, l. 2. *See* S.C. Code Ann. § 16-11-440(C); *State v. Curry*, 406 S.C. 364, 371-72, 752 S.E.2d 263, 266-67 (2013); *State v. Douglas*, 411 S.C. 307, 318, 768 S.E.2d 232, 239 (Ct. App. 2014); *State v. Glenn*, 429 S.C. 108, 119, 838 S.E.2d 491, 498 (2019); *State v. Scott*, 424 S.C. 463, 474, 819 S.E.2d 116, 121 (2018). Moreover, any further retreat by Petitioner could have put him in danger, since Decedent was unsatisfied with Petitioner's attempts to retreat. Decedent continued to follow Petitioner and lunged at him, even though Petitioner was retreating and had repeatedly entreated Decedent to back up.

The trial judge's ruling that Petitioner was not eligible for or entitled to immunity was controlled by multiple errors of law—erroneous bases upon which to deny immunity. The Court of Appeals failed to address those errors of law and instead misconstrued the third element of self-defense and affirmed on the basis that Petitioner did not meet that element.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on the issue presented.

Respectfully Submitted,

s/ *Joanna K. Delany*
Joanna K. Delany
Appellate Defender

ATTORNEY FOR PETITIONER

This 28th day of August, 2020.