

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM SPARTANBURG COUNTY  
The Honorable Edward W. Miller, Circuit Court Judge

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Appellate Case No: 2017-002116

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MICHAEL ROGERS,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

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SUPPLEMENTAL APPENDIX

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STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal from Spartanburg County

J. Derham Cole, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

MICHAEL ANTHONY ROGERS,

APPELLANT

Appellate Case No. 2011-201326

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FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the court erred in denying appellant's Motion to Dismiss pursuant to S.C. Code §16-11-450 where the evidence showed appellant had repeatedly demanded that the decedent leave appellant's mobile home and where, instead of leaving appellant's home, the decedent attacked appellant with a knife which ultimately resulted in a struggle over the knife and injuries to appellant and a fatal wound to the decedent?

STATEMENT OF THE CASE

Appellant was indicted by the Spartanburg County grand jury for the offense of murder. R. 137. Prior to trial, appellant filed a Motion to Dismiss Pursuant to S.C. Code Section 16-11-450 on August 18, 2011, arguing he was immune from prosecution because he was justified in using deadly force under the circumstances of the case. R. 1. An evidentiary hearing on the motion was held before the Honorable J. Derham Cole on September 2, 2011. The motion was denied by Judge Cole by order dated October 3, 2011, which he referenced prior to trial. R. 132, ll. 2-11; R. 126.

Appellant's case was called to trial before Judge Cole on October 4, 2011, and a jury. Clay T. Allen represented appellant. Danny Fulmer was the assistant solicitor. R. 131. On October 6, 2011, the jury found appellant guilty of voluntary manslaughter. R. 133, ll. 8-11. Judge Cole sentenced appellant to twenty-one year imprisonment. R. 136, ll. 20-21.<sup>1</sup>

This appeal follows.

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<sup>1</sup> These citations refer to page numbers from the trial transcript dated October 4-6, 2011. All other citations are to the pre-trial hearing transcript dated September 2, 2011 unless otherwise noted.

## ARGUMENT

The court erred in denying appellant's Motion to Dismiss pursuant to S.C. Code §16-11-450 where the evidence showed appellant had repeatedly demanded that the decedent leave appellant's mobile home and where, instead of leaving appellant's home, the decedent attacked appellant with a knife which ultimately resulted in a struggle over the knife and injuries to appellant and a fatal wound to the decedent.

### **Relevant Facts**

As noted, defense counsel Allen filed a Motion to Dismiss pursuant to S.C. Code §16-11-450 on August 18, 2011. R. 1. An evidentiary hearing on the motion was held on September 2, 2011.

At the hearing, Tonya Lowery, appellant's girlfriend at the time of the incident, testified that she went to appellant's trailer at 660 Carolina Drive Extension sometime after 11:00 pm on the night of November 12, 2010. R. 15, ll. 2-17; R. 16, ll. 23-25. When she arrived, appellant, Jackie Lance, and John Ryan ("the decedent") were at the home. R. 16, ll. 4-11. The three were drinking. R. 16, ll. 14-15. Tonya testified that the decedent came up from behind her and "put his arms around below my chest. And I asked him to please take his hands off, you know, because that just wasn't appropriate, especially in front of [appellant]" R. 18, ll. 6-12.

Upon witnessing the improper and unwanted touching, appellant said, "Get your hands off my woman." R. 19, ll. 1-3. The next thing Tonya knew, appellant pushed the decedent who fell onto the stereo. R. 18, ll. 13-15. Appellant was on top of the decedent. R. 18, ll. 15-16. Tonya asked appellant to stop because "he proved his point." R. 18, ll. 16-17. Appellant got off the decedent and the two stood up. Then the decedent kicked

appellant between the legs and the two started fighting again. R. 181, ll. 18-22. Eventually, Tonya and Jackie Lance were able to separate the two. Tonya took appellant to the bathroom to clean up and try to calm him down. R. 19, ll. 15-20.

Tonya continued that all of a sudden Jackie decided that she wanted to leave to go to the store. Tonya did not want Jackie to leave because the men had been fighting, but Jackie insisted on leaving. Jackie left in the decedent's truck. R. 19, l. 21 – 20. l. 6.

After Jackie left, appellant demanded that the decedent leave his home. Tonya told appellant that the decedent could not leave because Jackie had taken the decedent's truck. Appellant "kept telling him I want you out of my house." He asked three times. R. 20, ll. 9-14; R. 33, ll. 3-14.

Tonya continued, "And then [the decedent] swung" at [appellant]. Tonya "couldn't handle the fact that they were fighting" and left through the back door of the trailer. R. 20, ll. 19-24. She walked around to the front of the trailer and entered the front door. Appellant said, "dial 911, I accidentally stabbed him." The decedent was on the floor. R. 21, ll. 1-3. She dialed 911. R. 22, ll. 8-9. Appellant tried to help the decedent by getting towels to help stop the bleeding and doing mouth to mouth when the decedent stopped breathing. R. 24, ll. 1-7. Tonya never saw a knife that night. R. 34, ll. 6-8.

Appellant was the next to testify. He testified that the decedent spent the night at appellant's trailer on November 11, 2010, the night before the incident, because he was too drunk to drive home. R. 40, ll. 9-25. When the decedent woke up the morning of November 12, 2010 he immediately began drinking and continued to drink throughout the day and that night. R. 42, ll. 3-13.

On the night of the incident, appellant, Jackie, who appellant had just met that day, the decedent, and Tonya were at appellant's trailer talking. R. 41, l. 22 – 42, l. 2. Appellant excused himself to use the bathroom. On his way out of the bathroom he noticed the decedent "leaning against Tonya from behind with his arms around her waist." The decedent was pressed up against her with his head bent towards her shoulder saying something to her. R. 42, l. 23 – 43, l. 7. "And I was angry. I said what do you think you're doing. And I pushed him against the stereo." R. 43, ll. 8-16. The men began fighting. They stopped for a moment and then began fighting again. R. 43, l. 21 – 45, l. 9. Eventually, the fighting just ended. R. 45, ll. 9-10.

Appellant remembered that he went to the bathroom to clean up. He was bleeding from his lip and face. R. 45, ll. 11-17. While appellant was in the bathroom, the decedent asked for the keys to decedent's truck because Jackie wanted to leave. The decedent gave the keys to Jackie, who then left in the truck. R. 45, l. 24 – 46, l. 6. When appellant returned to the kitchen from the bathroom, "I told [the decedent] he had to leave. I kept telling him you gotta get out of here. I don't care if . . . Jackie got your truck, leave. You want to wait for her . . . you wait somewhere else, *but I want you out of my house.*" R. 48, ll. 1-9. (emphasis added). *Then out of nowhere, the decedent hit appellant.* "He got me right in the jaw big time." R. 48, ll. 10-14. (emphasis added). Appellant responded by hitting the decedent back and a fight ensued. "[H]e just kept coming at me and coming at me. And knowing me, I was fighting back for the simple reason to get him to stop. I wanted to get him off me." R. 48, l. 18 – 49, l. 1.

Appellant testified that he did not know where the knife came from. "I can only speculate on that, where it came from. But I had noticed it in his hand. And we fought over

it.” R. 49, ll. 3-6. Eventually, appellant got the knife out of the decedent’s hand. Appellant was in fear for his safety. R. 70, ll. 14-15.

There was blood everywhere. Appellant tried to stop the bleeding for the decedent. “I tried to save his life. I took a rag and I put it on his chest.” He told Tonya to call 911. R. 72, ll. 13-25. Appellant got cut on his left and right forearm and also had cuts on his knuckles and bruising to his face. He also broke a tooth from being punched in the jaw. R. 49, l. 19 – 51, l. 23. Appellant does not remember stabbing the decedent. “It wasn’t an intentional thing.” R. 54, ll. 19-24.

The knife belonged to appellant. He uses it to open mail and must have left it on the table where he keeps his mail. Appellant does not know how the decedent got ahold of the knife. R. 52, ll. 12-22; R. 56, l. 17 – 57, l. 6.

Jackie Lance was the next to testify. She stated that she had never met appellant or the decedent prior to the day of the incident. She knew Tonya from the neighborhood. R. 77, l. 25 – 78, ll. 9.

Jackie was at appellant’s trailer that night. Appellant and the decedent were drinking. Appellant poured Jackie a drink, but she didn’t drink it. Tonya was also present. R. 78, l. 15 – 79, l. 11. Jackie was only at the trailer for ten to fifteen minutes before the altercation broke out. The decedent was very intoxicated. He walked up and “it looked like he leaned on [Tonya] to catch his balance. He was not trying to touch her in any kind of way.” R. 79, l. 12 – 80, l. 3. Appellant came around the corner in a rage and jumped on the decedent. “[Appellant] threw him to the ground, [the decedent’s] whole head bounced off of a stereo system.” Appellant was on top of the decedent and kept hitting him and hitting him. Appellant was “yelling: ‘You M.F. ‘r this, you disrespecting my woman.’” R. 80, ll. 4-

14. Appellant eventually got off the decedent and the fight broke up. When the men stood up, the decedent kicked appellant between the legs and the fight ensued further. The decedent was staggering and could not defend himself. He had been drinking and taking nerve medication. R. 81, l. 6 – 82, l. 19.

Jackie remembered there being three episodes of fighting before she “couldn’t take it anymore.” The decedent did not want her to walk so he let her borrow his truck. R. 82, l. 20 – 83, l. 4. She went home and smoked a cigarette and then told her roommate she was going to go back to return the truck. When she arrived back at the trailer “there were police everywhere” so she returned back home. R. 83, ll. 5-17. She never saw a knife that night. “There was no knife on that table.”

This was the main testimony at the hearing. Judge Cole issued an Order Denying the Motion for Dismissal dated October 3, 2010. The Order concluded:

After a consideration of the evidence presented this Court finds that the defendant has failed to carry his burden of proof. He has failed to establish by a preponderance of the evidence that he was acting lawfully as it may be reasonably determined that he engaged in an unlawful assault and battery upon Ryan. He has failed to establish by the preponderance of evidence that he was the victim of an unprovoked attack in his home by one who was not an invited guest. He has failed to establish by the preponderance of evidence that he reasonably believed the use of deadly force was necessary to prevent death or great bodily injury to himself or another person or to prevent the commission of a violent crime.

Order at 4-5. R. 129-130.

Judge Cole briefly mentioned at the beginning of appellant’s trial that he denied appellant’s notion to dismiss by written order. Counsel Allen responded that he was notified by email that day and had discussed it with his client. R. 132, ll. 2-13.<sup>2</sup>

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<sup>2</sup> This citation refers to page numbers from the trial transcript dated October 4-6, 2011.

## Discussion

Pursuant to S.C. Code §16-11-450(A), “a person who uses deadly force as permitted by the provision of this article or another applicable law is justified in using deadly force and is *immune from criminal prosecution* . . . for the use of deadly force, unless the person against whom deadly force was used is a law enforcement officer . . .” The proper standard in determining immunity under the act is a preponderance of the evidence. State v. Duncan, 392 S.C. 404, 411, 709 S.E.2d 662, 665 (2011).

Appellant was permitted to use deadly force in this case under the defense of habitation, and the judge abused his discretion by ruling otherwise. “As the defense of habitation provides, defending one’s home or premises means ending an unwarranted intrusion though the use of reasonably necessary means of ejection.” State v. Rye, 375 S.C. 119, 123, 651 S.E.2d 321, 323 (2007) (citing State v. Bradley, 126 S.C. 528, 533, 120 S.E. 240, 242 (1923)). “For the defense of habitation to apply, a defendant need only establish that a trespass has occurred and that his chosen means of ejection were reasonable under the circumstances.” Id. at 124, 651 S.E.2d at 323. “The defense of habitation does not require that a defendant reasonably believe that he or his property was in imminent danger sustaining serious injury or damage.” Id.

The evidence in this case demonstrates that the decedent was trespassing at the time of the deadly altercation and that appellant was trying to protect himself from attack. Appellant had demanded that the decedent leave his mobile home and the decedent refused.

The facts of this case are similar to the facts in Duncan. In Duncan, the victim was a guest in Duncan’s home. The victim made improper comments about a photograph of Duncan’s daughter in a cheerleading outfit and, as a result, Duncan asked the victim and his

girlfriend to leave his home. The decedent left as requested, but returned a few minutes later he returned. It was rational inference that the decedent attempted to enter the home through a screened porch door. Duncan was cursing at the decedent to get away, and Duncan shot the decedent in the face. Id. at 406-407, 709 S.E.2d at 663. The trial court granted Duncan's motion to dismiss pursuant to S.C. Code §16-11-450, and our Supreme Court affirmed holding that Duncan was immune from prosecution under the Act. The same result should have occurred in this case.

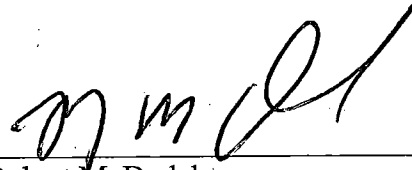
The evidence shows that an altercation broke out between appellant and the decedent because the decedent inappropriately touched appellant's girlfriend. During a break in the altercation, appellant repeatedly demanded that the decedent leave his home. Unfortunately, the decedent refused and instead attacked appellant inside appellant's kitchen. According to appellant, the decedent had a knife, which the two struggled over, ultimately ending in injuries to appellant and fatal wound to the decedent. Appellant was "fighting back for the simple reason to get him to stop. I wanted to get him off me."

The only difference between the facts in this case and the facts in Duncan are that the decedent in Duncan heeded Duncan's request to leave his home, where the decedent in this case failed to do so. Appellant should not be penalized because the decedent contemptuously refused a legitimate direction to leave. While the decedent was originally an invited guest, appellant made it clear that the decedent was no longer welcome on the property and thus was a trespasser. Appellant was defending himself from attack within his own home after he had asked the decedent to leave. Appellant should have been found immune under the Act.

CONCLUSION

Based on the foregoing arguments, appellant's conviction should be overturned and his motion to dismiss granted.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R M Dudek', written over a horizontal line.

Robert M. Dudek  
Chief Appellate Defender

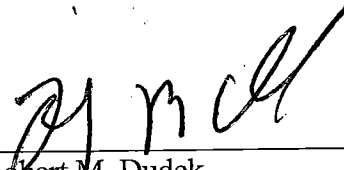
ATTORNEY FOR APPELLANT

This 15th day of April, 2013.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR.

April 15<sup>th</sup>, 2013



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STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

Appeal from Spartanburg County  
J. Derham Cole, Circuit Court Judge

THE STATE,

RESPONDENT,

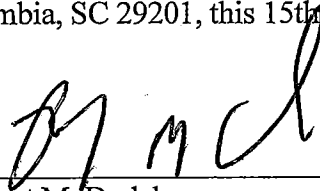
V.

MICHAEL ANTHONY ROGERS,

APPELLANT

CERTIFICATE OF SERVICE

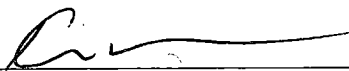
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 15th day of April, 2013.



Robert M. Dudek  
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
this 15th day of April, 2013.

 (L.S.)  
Notary Public for South Carolina

My Commission Expires: October 2, 2013.

STATE OF SOUTH CAROLINA  
In The Court of Appeals

---

APPEAL FROM SPARTANBURG COUNTY  
J. Derham Cole, Circuit Court Judge

---

Appellate Case No. 2011-201326

THE STATE, .....RESPONDENT

v.

MICHAEL ANTHONY ROGERS, .....APPELLANT.

---

**FINAL BRIEF OF RESPONDENT**

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**RESPONDENT'S STATEMENT OF ISSUE ON APPEAL**

**The issue Appellant presents on appeal was waived when Appellant failed to immediately appeal from the denial of his motion for immunity and is also unavailable for appellate review because it was not raised to and ruled upon by the trial court; nevertheless, the trial court properly determined that S.C. Code Ann. § 16-11-450 did not provide Appellant immunity from prosecution when the victim was not unlawfully or forcibly entering Appellant's home, when Appellant was not removing or attempting to remove the victim from his home, and when Appellant was not acting lawfully but was engaged in an unlawful assault and battery.**

**STATEMENT OF THE CASE**

In March 2011, Appellant was indicted in Spartanburg County for murder. By motion dated August 18, 2011, Appellant moved to dismiss the murder charge asserting that he was immune from prosecution pursuant to S.C. Code Ann. Section 16-11-450 and State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011). A pre-trial hearing on the motion was convened before the Honorable J. Durham Cole on September 2, 2011, during which testimony was presented on the issue of Appellant's motion to dismiss the murder charge on the ground he was immune from prosecution. The motion was denied by written order and the matter proceeded to trial on October 4 – 6, 2011, before the Honorable J. Durham Cole, and a jury. Appellant was found guilty of voluntary manslaughter. He was sentenced by Judge Cole to imprisonment for twenty-one (21) years. Appellant filed and served notice of appeal after the conviction and sentence. This appeal follows.

## ARGUMENT

**The issue Appellant presents on appeal was waived when Appellant failed to immediately appeal from the denial of his motion for immunity and is also unavailable for appellate review because it was not raised to and ruled upon by the trial court; nevertheless, the trial court properly determined that S.C. Code Ann. § 16-11-450 did not provide Appellant immunity from prosecution when the victim was not unlawfully or forcibly entering Appellant's home, when Appellant was not removing or attempting to remove the victim from his home, and when Appellant was not acting lawfully but was engaged in an unlawful assault and battery.**

By written motion, Appellant moved pursuant to S.C. Code Ann. § 16-11-450 and *State v. Duncan*, 392 S.C. 404, 709, S.E.2d 662 (2011), for a pre-trial determination of immunity from prosecution and dismissal of the charge on the grounds that Appellant was in his dwelling, asked the victim to leave, was at all times engaged in lawful activity, was attempting to remove the deceased from his home, had reason to believe an unlawful and forcible act had or was occurring, was attacked by the victim, had no duty to retreat, had the right to stand his ground, had the right to meet force with force, and believed his actions were necessary to prevent death or serious bodily injury or to prevent the commission of a crime. (R. p. 1). A pre-trial hearing regarding Appellant's motion was held on September 2, 2011 during which witness testimony and documentary evidence were presented. Following the hearing, the trial judge issued an order denying Appellant's motion to dismiss, finding that immunity created by S.C. Code Ann. Section 16-11-450 was not applicable. (R. p.126).

Relying on *State v. Rye*, 375 S.C. 119, 651 S.E.2d 321 (2007), Appellant now argues on appeal that he was permitted to use deadly force pursuant to the defense of habitation and, therefore, was not required to reasonably believe that he was in eminent danger of sustaining serious bodily injury or that his property was in danger of damage. The State submits that this Court need not consider the issue presented on appeal because

Appellant waived the right to challenge the denial of immunity when he proceeded to trial without taking an immediate appeal from the ruling. The State also submits that the issue presented on appeal was not preserved for appellate review because it was not raised to and ruled upon by the trial court. Alternatively, the State submits the trial court properly determined Appellant failed to establish that he was immune from prosecution and correctly denied the motion to dismiss.

First, the State notes Appellant moved pursuant to S.C. Code Ann. Section 16-11-450 and State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011), for a pre-trial determination of immunity from prosecution. The motion was denied after a full pre-trial hearing. The case was called for trial. Prior to proceeding with the trial and upon inquiry from the trial court, Appellant acknowledged receipt of the order denying the motion. After acknowledging the court's denial of immunity, Appellant thereafter remained silent when the trial court asked if there were any matters for consideration prior to proceeding with trial. (R. p. 132 lines 2 - 16). Appellant thereafter proceeded to trial and was convicted of voluntary manslaughter.

The State submits that it was incumbent upon Appellant to directly appeal from the denial of his motion for immunity from prosecution and that his failure to do so bars appellate review. The issue of immunity was rendered moot when Appellant proceeded to trial without challenging the ruling and there is no applicable remedy available to him on the issue of the trial court's denial of his request for immunity. In support of its argument, the States notes that in State v. Duncan, the South Carolina Supreme Court stated that the only means to enforce a claim of immunity from prosecution under the Protection of Persons and Property Act is to pursue the issue pre-trial. It also determined

that an order granting or denying a motion to dismiss under the Act is immediately appealable because it is in the nature of an injunction. See State v. Duncan, 392 S.C. at 407 N2, 709 S.E.2d at 663. Because Appellant failed to appeal or otherwise pursue the issue after the trial court ruled that the immunity provision of the Act did not apply, he waived any and all challenges to the order denying his request for immunity. Appellant's motion and the ruling on the motion became moot when Appellant proceeded to trial without challenging the trial court's denial of his request for immunity. The issue thereafter became a jury question pertaining to applicability of Appellant's defense and not a matter of immunity. See State v. Duncan, 392 S.C. at 410, 709 S.E.2d at 665 (stating that the legislature intended for defendants to be **shielded from trial** if they use deadly force as outlined under the immunity provisions on the Act).

Second, the State submits that Appellant failed to properly preserve the issue he now offers on appeal in support of immunity from prosecution because the issue was not presented to and ruled upon by the trial court. See State v. Hudgins, 319 S.C. 233, 460 S.E.2d 388 (1995) (stating issues not presented to and ruled upon by the trial court will not be considered on appeal). Appellant may not argue one ground in support of a motion to the trial court and then present a different ground on appeal. See Creech v. S.C. Wildlife and Marine Resources Dep't., 328 S.C. 24, 49 S.E.2d 571 (1977) (a defendant cannot argue on appeal an issue in support of a motion when the issue was not presented to the trial court). Appellant argued to the trial court that he should be immune from prosecution pursuant to S.C. Code Ann. section 16-11-450 because he was in his dwelling, asked the victim to leave, was at all times engaged in lawful activity, had no duty to retreat, had the right to stand his ground, and believed his actions were necessary

to prevent death or serious bodily injury or to prevent the commission of a crime. (R. p.1). The trial court denied the request for immunity by written order. (R. p.126). On appeal, Appellant now argues that he was permitted to use deadly force under the defense of habitation, that he was not required to establish that he reasonably believed he and/or his property were in imminent danger of sustaining injury or damage and that the trial judge abused his discretion in ruling otherwise. Appellant did not present this issue to the trial judge in support of his motion to dismiss and, in fact, argued that he believed his actions were necessary to prevent death or serious bodily injury or to prevent the commission of a crime. Appellant may not now present a new legal theory and position contrary to that argued to the trial judge. *Id.*; see also *State v. Lee*, 293 S.C. 536, 362 S.E.2d 24 (1987) (stating that although the defense of habitation and self-defense are analogous, the defenses are not identical); *State v. Bryant*, 391 S.C. 225, 705 S.E.2d 465 (Ct. App. 2010) (same). Accordingly, this Court should decline to consider the issue advanced by Appellant on appeal.

Alternatively, the State submits that the trial court properly determined Appellant was not entitled to immunity from prosecution under Protection of Persons and Property Act. See S.C. Code Ann. section 16-11-410 et seq. (Supp.2012). As noted by our Supreme Court in *State v. Duncan*, our General Assembly intended to codify the common law Castle Doctrine which recognizes that “a person’s home is his castle” and determined that it is proper for law-abiding citizens to protect themselves from intruders and attackers without fear of prosecution or civil action for acting in defense of themselves or others. *Duncan* at 407, 709 S.E. 2d at 64; see also Section 16-11-420 (B) (Supp. 2012).

Additionally, section 16-11-440 of the Protection of Persons and Property Act provides in pertinent part that:

(A) A person is presumed to have a reasonable fear of imminent peril of death or great bodily injury to himself or another person when using deadly force that is intended or likely to cause death or great bodily injury to another person if the person:

(1) against whom the deadly force is used is in the process of unlawfully and forcefully entering, or has unlawfully and forcibly entered a dwelling, residence, or occupied vehicle, or if he removes or is attempting to remove another person against his will from the dwelling, residence, or occupied vehicle; and

(2) who uses deadly force knows or has reason to believe that an unlawful and forcible entry or unlawful and forcible act is occurring or has occurred.

(B) The presumption provided in subsection A does not apply if the person:

(1) against whom the deadly force is used has the right to be in or is a lawful resident of the dwelling . . . ;

\*\*\*\*\*

(3) who uses deadly force is engaged in an unlawful activity or is using the dwelling . . . to further an unlawful activity . . .

Additionally, the immunity provision offered by Appellant in support of his motion provides:

(A) 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 . . . .

The record before this Court reflects that Tonya Lowery was called as a witness at the hearing in support of Appellant's motion to dismiss the murder indictment. Ms. Lowery testified that she and Appellant were romantically involved and that she and the victim were close friends. (R. p.13, line 18- p. 17, line 24; p. 26, lines 8 - 15). She testified that the victim had been with Appellant since the previous day drinking and that

the victim spent the previous night at Appellant's home but did not live with Appellant. (R. p. 26, line 16 – p. 27, line 14). Lowery testified that she was present at Appellant's mobile home on November 12 and that Appellant, the victim, and Jackie Lance were present and had been drinking alcohol when she arrived at approximately 11:00 p.m. (R. p.15, line 2-p. 16, line 15). Lowery testified that the victim approached her from behind as she spoke with Appellant over the kitchen bar. Lowery stated that the victim put his arms around her below her chest and she asked the victim to remove his hands. (R. p.18, lines 4-15). She testified that Appellant said "get your hands off my woman" and then pushed the victim causing the victim to fall into Appellant's stereo. Appellant got on top of the victim and began punching the victim in the face. Lowery asked them to stop and Appellant did. (R. p. 18, lines 11- p. 19, line 6; p. 28, lines 3 - 20). Lowery stated that this fight lasted a few minutes. (R. p. 29, lines 2-14). However, the victim then kicked Appellant between the legs and they began fighting again. (R. p.18, lines 11- p. 19, line 6; p. 28, lines 3 - 20). Lowery and Jackie were able to separate Appellant and the victim, and Lowery walked Appellant to the bathroom to remove blood and for Appellant to cool down. (R. p. 19, lines 4 – 20; p. 29, line 18 – p. 30, line 18). Lowery testified that this second fight was really a continuation of the first fight. (R. p. 30, lines 3 – 5). Lowery also testified that she did not see any cuts on Appellant when she took him to the bathroom after the second fight and that Appellant did not complain of cuts. (R. p. 29, line 18 – p. 30, line 16).

Lowery testified that Jackie then left for the store in the victim's truck. (R. p.19, line 15-p. 20, line 6; p. 30, line 17 - 25). She stated that Appellant had the keys. (R. p. 31, lines 4-11). When Lowery and Appellant exited the bathroom and returned to the

kitchen, Appellant asked the victim three times to leave the home. (R. p. 20, lines 9-14; p. 32, line 18 – p. 33, line 14). The victim was in the kitchen at the time. (R. p. 32, lines 7 – 25). Lowery informed Appellant that the victim could not leave because Jackie had the victim's truck. (R. p. 20, lines 9-14). Lowery testified that the victim hit Appellant in the face with his fist and the two began fist fighting. Lowery left the home through the back door. Lowery circled the home and returned through the front door. (R. p.20, line 15 - p. 22, line 4; p. 25, lines 6 –12; p. 33, lines 6 – 22; p.34, lines 16 - 35). When she entered the front door of the home, she found the victim on the floor in a pool of blood with Appellant standing over him. Appellant directed Lowery to dial 911 and advised her that he “accidentally stabbed” the victim (R. p. 20, line 25 - p. 21, line 3; p.22, lines 4-10; p. 34, lines 6 – 12; p. 35, line 25 – p. 36, line 4). Lowery did not see a knife. (R. p. 36, lines 5 – 6). After Lowery dialed 911, the victim stood up and walked toward the bar but fell. Lowery observed stab wounds on the victim and a lot of blood. (R. p. 22, lines 7 – p. 23, line 11; p. 25, line 3). She stated that Appellant placed a towel over the victim's wounds and attempted to resuscitate the victim. (R. p. 24, lines 1-7).

Appellant testified during the pre-trial hearing that he was renting the mobile home in which the incident occurred and that he lived alone (R. p. 37, lines 1-6). He testified that the victim had been in his home for twenty-four hours, having spent the previous night because the victim was too intoxicated to drive. (R. p. 40, lines 7-25; p. 57, line 7 – p. 58, line 18). Appellant stated that he met the victim through Lowery the day before the incident. He also stated that he had a romantic relationship with Lowery. (R. p. 41, lines 1-17). Pertaining to the day of the incident, Appellant testified that he and the victim had been drinking since that morning and that Lowery and Jackie was present

in the home that evening when the events in question began. (R. p. 41, line 8-p. 42, line 16). Appellant testified that he saw the victim lean against Lowery from behind and place his arms around her waist, pressing against Lowery. Appellant stated that the victim's actions made him angry and that he asked the victim what he was doing and pushed the victim, causing the victim to fall against the stereo speakers. (R. p. 42, line 19 - p.43, line 19). Appellant testified that he became angry about the stereo speakers and tried to get the victim off and the victim swung at Appellant. Appellant testified that he and the victim "got into it." (R. p. 43, lines 18-22). Lowery asked them to stop, Appellant thought it was over, and allowed the victim to get up. The victim then "came back at Appellant" and Appellant protected himself and "went back" at the victim. (R. p.44, lines 1-25). He stated that this second altercation lasted 40-60 seconds. (R. p.44, line 16- p. 45, line 10). Appellant stated that his lip was bleeding when he went to the bathroom with Lowery and that he was upset. (R. p.45, lines 10-14; p. 46, lines 1-12). Appellant testified that he asked the victim to leave but the victim did not respond. (R. p.46, lines 9-21). He testified that when he came out of the bathroom, he repeatedly asked the victim to leave even though he knew Jackie had the victim's truck. Appellant said he wanted the victim to wait somewhere else. (R. p.46, lines 1-12; p. 48, lines 1-9; p.52, line 23- p. 43, line 3). Appellant testified that the victim then "sockered" him in the jaw with his fist. Appellant hit the victim with his hand because he wanted the victim to stop. He testified that they started fighting, the victim kept coming at him and Appellant stated that he was fighting to get the victim to stop. (R. p.48, line 17-p. 49, line 1). Appellant testified that he did not know how the knife was introduced into the fight but stated he noticed it in the victim's hand and they fought over it. (R. p. 49, lines 3-6). Appellant

stated that the next thing he knew, there was blood and the victim was wounded. He did not remember cutting the victim. He removed the knife from the victim's hand. (R. p. 49, lines 7-18). Appellant also stated that his left forearm was cut and that he suffered other injuries including bruises and cuts on his knuckles as well a broken tooth. (R. p. 49, lines 6-24; p. 50, lines 1-11; p. 51, lines 1-14; p. 51, lines 18-20). Appellant testified that the knife in question belonged to him and he thought the knife was in his pocket. He testified that he uses it to open mail and stated that there was mail on the kitchen table. (R. p.52, lines 12-22). He testified that the victim kicked him in the groin after Appellant pushed the victim into the stereo and that the kick was painful because he was recovering from prostate surgery. (R. p.53, lines 4-19). He also testified that the victim is a larger and younger individual. (R. p. 53, line 18- p. 54, line 7; p. 55, line 8-12).

On cross-examination Appellant testified that he did remember stabbing the victim. Appellant stated that the stabbing was not intentional. (R. p. 54, lines 19-24). Appellant admitted that the victim had wounds and assumed it was the result of the altercation and fight with the knife; however, Appellant denied he purposely had the knife in his hand to stab the victim. (R. p.55, lines 1-24). He testified that the only time he had the knife in his hand was when he could overpower the victim and take the knife. (R. p. 55, line 22- p. 56, line 3). Appellant denied that the victim put his hand in Appellant's pocket for the knife and stated that he thought he put the knife on the table. (R. p. 56, line 23- p.57, line 6). Appellant admitted that he does not own an automobile or possess a driver's license and that he struck the victim with his fist. (R. p. 60, line 3- p. 61, line 14). He testified that the first fight lasted only a couple of minutes and that the victim stopped fighting when Appellant let him up. (R. p. 61, lines 6-21). Appellant

testified that after the victim stood up, words were exchanged and another altercation ensued with the victim kicking Appellant. (R. p. 62, line 11 - p.63, line 12). He denied telling law enforcement officers that he had the knife in his hands when he exited the bathroom to confront the victim. (R. p. 65, lines 13-25). He also denied that he washed the blade but admitted the blade was not covered with blood when found under the dryer. (R. p. 65, line 13- p.69, line 7; p. 60, lines 12 – 25; p. 67, lines 16 - 17). He denied that he put the knife under the dryer. (R. p. 60, line 12 – p. 69, line 7). Appellant admitted the victim had been drinking all day and was unsteady on his feet at times. (R. p. 69- lines 14 - 25). He also stated “got the best of” the victim in the first altercation but also stated that he feared for his safety. He could not explain how the victim received knife wounds but admitted he still had the knife in his hand when Lowery re-entered the home through the front door. (R. p.70, lines 1-24; p.72, lines 7 - 12). Appellant admitted the victim was cut in the altercation with Appellant and that the knife belonged to Appellant. (R. p.72, line 7- p. 73, line 10).

Jackie Lance was called as a witness by the State and testified that she was in Appellant’s home when the altercation began. She stated that Appellant and the victim were drinking, that she was seated at the kitchen table and did not see a knife. (R. p.77, lines 20-23; p. 97, line 23 – p. 98, line 22). She testified that she knew Lowery but only knew who Appellant was “from the neighborhood.” (R. p.77, line 24- p. 78, line 19). She stated that the altercation between Appellant and the victim began 10-15 minutes after her arrival and that Lowery was present at the time. (R. p.79, lines 12-16). She testified that the victim was “too messed up” to defend himself and described Appellant as being in a rage. (R. p.79, lines 17-20). She stated that she saw the victim lean on Lowery to

catch his balance. Jackie did not believe the victim was trying to touch Lowery. (R. p. 80, lines 1-13). She described that Appellant was in a rage and jumped on and threw the victim to the ground causing the victim's head to bounce off the stereo. (R. p.80, lines 4-7; see also p. 91, lines 10 - 20). Thereafter, Jackie observed Appellant jump on top of the victim and repeatedly hit the victim causing the victim's head to bounce from the impact. She stated that Lowery grabbed Appellant's pants to stop him. She described Appellant as violent and stated that the victim did not fight back. (R. p.80, lines 8-25; p.81, lines, 6-11; p. 92, lines 10 - 15 ). She testified that when the victim was permitted to get up, the victim kicked Appellant in the groin and Appellant jumped on the victim again and was "steady beating" the victim and calling the victim names. (R. p. 81, lines 12-25). Thereafter, Appellant and Lowery went down the hall. However, Appellant returned with "force and rage" and jumped on the victim again. Jackie stated that the victim was not "swinging" and or attempting to defend himself because he was too intoxicated. She described the victim as staggering. (R. p. 82, line 1-19). Jackie stated that the victim provided the keys to his truck and asked her to return in 10-15 minutes. (R. p. 82, line 22-p.83, line 4). When Jackie returned, law enforcement officers were present and motioned her around. (R. p. 83, lines 11-17). Jackie never saw a knife and, stated there was a "break" in the action when she left. (R. p. 84, lines 3-16). She testified that Appellant became angry when the victim provided his keys to Jackie and she did not observe the victim make any contact with Appellant except the kick to the groin. (R. p. 84, line 17-p.85, lines 15). Lowery testified on cross-examination that she believed the Appellant had the knife and killed the victim in cold blood and that Lowery was an accessory. (R. p.

103, lines 1-7). She also testified that she never heard Appellant ask the victim to leave. (R. p. 103, lines 23 – 24).

Officer Nix was asked to search for a second knife but only found knives stored in a kitchen drawer without the appearance of blood or recent washing. He also recalled seeing papers like mail on the kitchen table. (R. p. 105, line 16 – p. 106, line 13; p. 107, lines 1 – 6).

The victim's mother also testified that she tried to locate the victim and his truck the night before the incident but that Lowery and Appellant refused to provide the location so that she could pick up the victim and his truck. (R. p. 108, line 4 – p.109, line 7). She stated that the victim was an alcoholic and used alcohol to calm tremors. (R. p. 109, line 23 – p.110, line 15).

Officer Gary testified that Appellant gave verbal statements with three different versions of events. In the first statement, Appellant said he saw the victim put his arms around Lowery and Appellant did not like it so he pushed the victim down, got on top of the victim and “got the best of him.” Appellant related that he got up but the victim hit Appellant twice. Appellant then realized he had a cut on his arm and he had no choice but to pull the knife out of his pocket and stab the victim. Appellant said he then asked Lowery to call 911. (R. p. 116, line 4 – p. 117, line 9). When questioned about going into the bathroom, Appellant said he went into the bathroom after the first fight to clean up and that the victim hit his face as Appellant returned to the kitchen, Appellant saw that he was cut and pulled out the knife and stabbed the victim. (R. p.117, line 10 - p. 118, line 1). When asked how he was cut, Appellant admitted he never saw the victim with a

knife or anything that could have cut him. He then stated that he saw the cut on his arm when he went into the bathroom and not when he entered the kitchen but still admitted he did not see the victim with anything that could be used to administer the cut. Appellant said that he pulled the knife out of his pocket while in the bathroom, concealed the blade in his hand, and confronted the victim with it. (R. p. 114, line 23 – p.120, line 12).

Appellant did not respond when asked why he confronted the victim with the knife. (R. p. 119, line 13 – 19).

The trial judge in this case determined that the victim was an invited guest in Appellant's home and was physically assaulted by Appellant without lawful basis and that the victim's physical response was provoked by Appellant's assault. The judge concluded that Appellant failed to establish that he reasonably believed the use of deadly force was necessary to prevent death or great bodily harm and, in fact, admitted he did not know how the victim. The trial court concluded Appellant failed to establish by a preponderance of the evidence that he was acting lawfully but, instead, was engaged in an unlawful assault upon the victim.

The testimony presented during the pre-trial hearing as outlined above supports the trial court's denial of immunity. The victim was an invited guest in Appellant's home and was not and had not unlawfully or forcibly entered Appellant's home. In fact, Appellant and Lowery prevented the victim's mother from locating the victim and taking him home the night before. Although Appellant testified that he asked the victim to leave, Appellant was told that the victim could not leave because Jackie had his truck. Appellant also asked the victim to leave as he was engaged in an unlawful attack upon the victim and out of anger because the victim put his arms around Appellant's girlfriend

and not because Appellant reasonably feared for his safety or was attempting to eject the victim from the premises. Instead, the evidence reflects that Appellant physically attacked the greatly intoxicated victim in a rage over Appellant's girlfriend and stereo. The victim was merely defending against Appellant's unlawful physical attacks. Appellant admitted he got "the best" of the victim in the altercation and never testified that he stabbed the victim to defend himself against intrusion, to force the victim from the home or because the victim posed a danger. In fact, Appellant stated he never saw the victim with a weapon, claimed he did not know where the knife came from, and stated that the stabbing of the victim was unintentional or accidental. Appellant clearly was not without fault in bringing about the altercation that led to the victim's stabbing death. Appellant's immunity claim is simply not supported by the evidence and was properly denied.

Although the defense of habitation is not preserved for appellate review because it was not raised to or ruled upon by the trial court, the State submits that the defense of habitation is not applicable to the issue of Appellant's immunity. Immunity is statutorily created and governed. The defense of habitation cannot be relied upon to require dismissal of a charge before trial on the ground of immunity from prosecution. Nevertheless, defense of habitation does not provide immunity because Appellant was not without fault in bringing on the incident and never claimed that he was attempting to remove the deceased from his home. He stated that he did not know how the deceased was stabbed and also claimed the stabbing was accidental. The defense of habitation is simply inapplicable to the facts of the case. See State v. Bryant, 391 S.C. 225, 705 S.E.2d 465 (Ct.App. 2010); State v. Sullivan, 345 S.C. 169, 547 S.e.2d 183 (2001); State

v. Rye, 375 S.C. 119, 651 S.E.2d 321(2007); State v. Lee, 293 S.C. 536, 362 S.E.2d 24 (1987); State v. Moultrie, 273 S.C. 532, 257 S.E.2d 730 (1979); State v. Bradley, 126 S.C. 528, 120 S.E. 240 (1923).

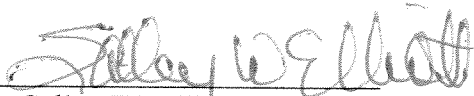
**CONCLUSION**

For all of the foregoing reasons, the State respectfully requests that the judgment, conviction, and sentence of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON  
Attorney General

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BY:   
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ATTORNEYS FOR RESPONDENT

Columbia, South Carolina  
April 10, 2013

STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY  
J. Derham Cole, Circuit Court Judge

Appellate Case No. 2011-201326

THE STATE, .....RESPONDENT

v.

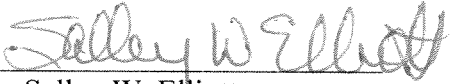
MICHAEL ANTHONY ROGERS, .....APPELLANT.

**CERTIFICATE OF COUNSEL**

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.

ALAN WILSON  
Attorney General

SALLEY W. ELLIOTT  
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BY:   
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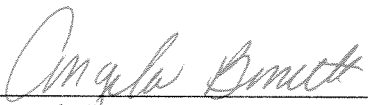
MICHAEL ANTHONY ROGERS, .....APPELLANT.

**PROOF OF SERVICE**

I, Angela Bennett, Legal Assistant, hereby certify that I have served the within *Final Brief of Respondent*, dated April 10, 2013, on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

Robert M. Dudek, Appellate Defender  
S.C. Commission on Indigent Defense  
Division of Appellate Defense  
Post Office Box 11589  
Columbia, SC 29211-1589

I further certified that all parties required by Rule to be served have been served. This 10th day of April, 2013.

  
\_\_\_\_\_  
Angela Bennett  
Administrative Assistant

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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE  
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING  
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA  
In The Court of Appeals**

The State, Respondent,

v.

Michael Rogers, Appellant.

Appellate Case No. 2011-201326

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Appeal From Spartanburg County  
J. Derham Cole, Circuit Court Judge

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Unpublished Opinion No. 2014-UP-332  
Heard January 7, 2014 – Filed September 17, 2014

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**AFFIRMED**

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

Attorney General Alan Wilson and Senior Assistant  
Deputy Attorney General Salley W. Elliott, both of  
Columbia, for Respondent.

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**PER CURIAM:** Michael Rogers appeals his conviction for voluntary  
manslaughter, arguing the circuit court erred in denying his motion to dismiss

under the defense of habitation and the Protection of Persons and Property Act ("the Act").<sup>1</sup> We affirm.

We find Rogers did not preserve the defense of habitation argument for appellate review because he never argued he was immune from prosecution pursuant to defense of habitation in either his pretrial motion to dismiss or at any time during his trial. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the [circuit court]. Issues not raised and ruled upon in the [circuit] court will not be considered on appeal."); *State v. Prioleau*, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001) ("[A] party may not argue one ground at trial and an alternate ground on appeal."); *Dunbar*, 356 S.C. at 142, 587 S.E.2d at 694 ("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.").

Additionally, Rogers argues he was immune from prosecution by referencing the Act and comparing the instant case to *State v. Duncan*, 392 S.C. 404, 411, 709 S.E.2d 662, 665 (2011).<sup>2</sup> We disagree and find the circuit court properly denied Rogers' motion to dismiss because Rogers failed to carry his burden of proof and establish by a preponderance of the evidence that he was permitted to use deadly force under any section of the Act or other applicable provision of law. *See* S.C. Code Ann. § 16-11-450(A) (Supp. 2013) ("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 . . ."); S.C. Code Ann. § 16-11-440(A) (Supp. 2013) ("A person is presumed to have a reasonable fear of imminent peril of death or great bodily injury to himself or another person when using deadly force that is intended or likely to cause death or great bodily injury to another person if the person: (1) against whom the deadly force is used is in the process of unlawfully and forcefully entering, or has unlawfully and forcibly entered a dwelling, residence, or occupied vehicle, or if he removes or is attempting to remove another person against his will from the dwelling, residence, or occupied vehicle; and (2)

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<sup>1</sup> *See* S.C. Code Ann. §§ 16-11-410 to -450 (Supp. 2013).

<sup>2</sup> In *Duncan*, our supreme court held a defendant is immune from prosecution under the Act when he is justified in using deadly force to prevent the victim from unlawfully and forcibly entering his home. 392 S.C. at 411, 709 S.E.2d at 665.

who uses deadly force knows or has reason to believe that an unlawful and forcible entry or unlawful and forcible act is occurring or has occurred."); S.C. Code Ann. § 16-11-440(C) (Supp. 2013) ("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 . . . ."); *State v. Curry*, 406 S.C. 364, 371, 752 S.E.2d 263, 266 (2013) (stating that for a defendant to be entitled to immunity under the Act, "[c]onsistent with the Castle Doctrine and the text of the Act, a valid case of self-defense must exist . . . ."); *State v. Dickey*, 394 S.C. 491, 499, 716 S.E.2d 97, 101 (2011) ("A person is justified in using deadly force in self-defense when: (1) The defendant was without fault in bringing on the difficulty; (2) The defendant . . . actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger; (3) If the defense is based upon the defendant's actual belief of imminent danger, a reasonable prudent man of ordinary firmness and courage would have entertained the same belief . . . ; and (4) The defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance." (citation omitted)); *State v. Hewitt*, 205 S.C. 207, 212, 31 S.E.2d 257, 258 (1944) ("[O]ne attacked, *without fault on his own part*, on his own premises, has the right in establishing his plea of self-defense, to claim immunity from the law of retreat, which ordinarily is an essential element of that defense." (emphasis added)).

**AFFIRMED.**

**SHORT, WILLIAMS, and THOMAS, JJ., concur.**



# The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS  
CLERK

V. CLAIRE ALLEN  
DEPUTY CLERK

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January 29, 2015

The Honorable M. Hope Blackley  
PO Box 3483  
Spartanburg SC 29304-3483

## REMITTITUR

Re: The State v. Michael Rogers  
Lower Court Case No. 2010GS4201933  
Appellate Case No. 2011-201326

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

*V. Claire Allen, Deputy*

CLERK

Enclosure

cc: Salley W. Elliott, Esquire  
Robert Michael Dudek, Esquire  
Alan McCrory Wilson, Esquire

SC Attorney General  
**RECEIVED**

JAN 30 2015

Referred to EMOHA/RM  
Answered \_\_\_\_\_