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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

JOHN WILLIAM MCCARTY,

APPELLANT

APPELLATE CASE NO. 2017-002377

Appeal from Pickens County

Letitia H. Verdin, Circuit Court Judge

Opinion No. 2020-UP-269

PETITION FOR REHEARING

On September 23, 2020, this Court affirmed the trial court's denial of Appellant's request for immunity from prosecution pursuant to the Protection of Persons and Property Act (the Act). State v. McCarty, 2020-UP-269 (S.C. Ct. App. filed Sept. 23, 2020). In accordance with Rule 221(a), SCACR, Appellant now files this petition for rehearing asking this Court to address the significant points overlooked and/or misapprehended in arriving at its conclusion.

Failure to resolve evidentiary conflicts

This Court found "the trial court did not err in failing to resolve evidentiary conflicts or in abdicating its role by finding whether Randy Wilson, the person [Appellant] was protecting, acted in self-defense was a jury question." State v. McCarty, 2020-UP-269 (S.C. Ct. App. filed

Sept. 23, 2020). According to this Court, "[t]he trial court recounted the correct burden of proof for a grant of immunity under the Act and stated it considered the evidence presented at the immunity hearing before finding [Appellant] failed to meet his burden of proof." Id. Additionally, this Court relied upon the trial court finding that "whether Wilson was at fault in bringing on the difficulty presented a jury question" to hold "the trial court did not abdicate its role when finding one of the elements of self-defense presented a jury question." Id. Contrary to this Court's view of the circuit court's ruling, the language used by the judge showed she abused her discretion by failing to resolve any conflicts in the evidence presented regarding Appellant's entitlement to immunity under the Act. Specifically, the circuit court judge ruled that due to conflicts in the evidence, the case presented a "quintessential jury question." This ruling was an abuse of discretion.

An examination of the circuit court's ruling reveals the court failed to resolve any conflicts in the evidence presented. Judge Verdin found that "[w]hether or not a defendant is without fault in bringing on the difficulty presents 'a quintessential jury question' which is 'not a situation warranting immunity from prosecution.'" R. 134 (quoting State v. Curry, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013)). Judge Verdin also explained that because Appellant was "only entitled to immunity if Wilson was entitled to act in self-defense," it was "a material question as to whether Wilson was at fault in bringing about the difficulty." R. 134-135. After recognizing that "one is not entitled to act in defense of others if the other person provoked the encounter and therefore would not be entitled to act in self-defense," Judge Verdin concluded the "evidence presented conflicting views as to Randy Wilson's involvement in the argument that led to the fatal encounter, and that presents a factual question that must be answered by a jury."

R. 135. Thus, the record demonstrates that Judge Verdin failed to resolve the conflicts in the evidence when she denied Appellant immunity from prosecution.

"A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard." State v. Curry, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013). During the pretrial hearing, a defendant must show "a valid case of self-defense must exist," excluding the duty to retreat prong, "and the trial court must necessarily consider the elements of self-defense in determining a defendant's entitlement to the Act's immunity." Id. at 371, 752 S.E.2d at 266.

In State v. Duncan, 392 S.C. 404, 410, 709 S.E.2d 662, 665 (2011), the South Carolina Supreme Court held that because immunity under the Act was a bar to prosecution, it "must be decided prior to trial." The Court also held "that when a party raises the question of statutory immunity prior to trial, the proper standard for the circuit court to use in determining immunity under the Act is a preponderance of the evidence." Id. at 411, 709 S.E.2d at 665. In doing so, the Court established that the circuit court must resolve the conflict in the evidence to arrive at findings of fact in order to determine if the defendant proved entitlement to immunity by a preponderance of the evidence. Id. at 410, 709 S.E.2d at 665. To rule that conflicting evidence "created a question for the jury," ignores the standard of proof the circuit court was obligated to apply. When faced with conflicting evidence, the circuit court must make credibility findings, not simply conclude at conflict creates "a jury question," and therefore rule the defendant had not carried his burden of proof.

The South Carolina Supreme Court recently made clear that circuit court judges confronted with the question of immunity must resolve conflicts in the evidence. The 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 the fact-finder at this hearing, weigh the evidence presented, and reach a conclusion under the Act." State v. Cervantes-Pavon, 426 S.C. 442, 451, 827 S.E.2d 564, 569 (2019). "Thus, the relevant inquiry is not merely whether there is a conflict in the evidence but, rather, whether the accused has proved an entitlement to immunity under the Act by a preponderance of the evidence." State v. Andrews, 427 S.C. 178, 181, 830 S.E.2d 12, 13 (2019).

This point was made clear in the South Carolina Supreme Court's recent affirmance of a grant of immunity in State v. Scott, 424 S.C. 463, 819 S.E.2d 116 (2018). The Court went through each of the elements of self-defense and detailed the circuit court's factual findings as to each element. Id. at 469-470, 819 S.E.2d at 119. Importantly, the Court emphasized "the circuit court made the necessary factual findings to support the existence of self-defense." Id. at 471, 819 S.E.2d at 119. After ensuring the record evidence supported the judge's factual findings, the Supreme Court affirmed the circuit court's findings. Id. Concerning the key issue in the case, the circuit court made credibility findings, to which the Supreme Court deferred. Id. at 472-473, 819 S.E.2d at 120.

Based on the controlling case law requiring judges to decide whether a person is entitled to immunity based upon a preponderance of the evidence standard, judges have a duty to make credibility findings to the extent there was conflicting testimony during the immunity hearing. In fact, the Supreme Court explained that "[w]hile … written orders are not always practical given the timing of the immunity hearing, the circuit court, in announcing its ruling, should at least make specific findings on the elements on the record." State v. Glenn, 429 S.C. 108, 123, 838 S.E.2d 491, 499 (2019).

This is no different than any other setting in which the judge must act as finder of fact and judge of the law, including family court cases and matters in equity. Perhaps the best analogy is a civil bench trial during which the trial judge would be required to find the facts by a preponderance of the evidence, especially when conflicting evidence exists regarding the true facts. See e.g., Brown v. Allstate Ins. Co., 344 S.C. 21, 27, 542 S.E.2d 723, 726 (2001) ("A trial judge's role in a bench trial is to admit all evidence and then evaluate it in a non-jury setting."); Rule 52 (a), SCRCP (explaining that in non-jury actions, "the court shall find the facts specially and state separately its conclusions of law thereon"). Continuing with the analogy to civil cases, the lower court appears to have applied the standard for determining whether a party is entitled to summary judgment – whether any genuine issue of material fact exists. See Rule 56, SCRCP; Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991). For the circuit court to rule that because testimony was conflicting it created a *jury question* was an abdication of the circuit court's obligation to Appellant, and the law.

The Supreme Court's decision in In re Treatment and Care of Luckabaugh, 351 S.C. 122, 568 S.E.2d 338 (2002) is particularly instructive. The state sought to have Luckabaugh declared a sexually violent predator. Id. at 129, 568 S.E.2d at 341. The circuit court concluded Luckabaugh was not a sexually violent predator. Id. at 131, 568 S.E.2d at 342. After quoting the order, the Supreme Court explained "[t]he order did not find any facts to support its legal conclusion that the state failed to carry its burden of proof." Id. In other settings, the Supreme Court was familiar with reviewing the adequacy of orders, including in family court and administrative law decisions. Id. at 132, 568 S.E.2d at 342. Thus, the Court applied those same principles to the Luckabaugh matter. Id.

The Court explained that while it did not require a lower court to set out findings on all the myriad factual questions arising in a particular case, it did require the lower court to set out findings sufficient to allow a reviewing court "to ensure the law is faithfully executed below." Id. at 133, 568 S.E.2d at 343. Further, the Court explained that the lack of factual findings made the task of the reviewing court "impossible because the reasons underlying the decision [are] left to speculation." Id. (internal quotation omitted). Thereafter, the Court held the Luckabaugh order failed to set forth sufficient findings of fact to support the trial judge's conclusions of law. Id. Additionally, the Court held its "review of the record [could not] save the order from its deficiencies due to the contradictory testimony presented below." Id. The contradictory testimony left the appellate court to speculate if the circuit court reached its conclusion because it believed Luckabaugh's testimony or that of medical experts. Id.

Another helpful analogy is in the realm of post-conviction relief (PCR) actions in which a trial judge must decide whether an applicant has met his burden by a preponderance of the evidence. Rule 71.1(e), SCRCP. By statute, the PCR court must "make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented." S.C. Code Ann. § 17-27-80. Perhaps the best and most useful comparison is to draw a parallel between the immunity and other familiar pre-trial determinations by trial judges, such as the admissibility of statements by defendants. Trial judges frequently hear conflicting testimony in pre-trial hearings regarding the circumstances surrounding a defendant's statement to law enforcement. It is incumbent upon the trial judges to decide the facts and determine whether the state proved the

admissibility of the statement by a preponderance of the evidence. See e.g., State v. Washington, 296 S.C. 54, 55, 370 S.E.2d 611, 612 (1988).[1]

It is the duty of the circuit court judge to resolve the conflicting testimony in order to make a pre-trial determination on the request for immunity. After resolving any conflicts in the evidence that may exist, the remaining question for the circuit court judge is whether the defendant has proven entitlement to immunity by a preponderance of the evidence. The mere existence of conflicting evidence does not strip a person of his right to immunity from prosecution.

The circuit court judge abused her discretion by failing to making the findings of fact and conclusions of law necessary to determine whether Appellant proved by a preponderance of the evidence that his conduct satisfied the Act. After recognizing that the key issue in the case was whether Wilson was without fault in bringing on the difficulty, the judge stated that "[w]hether or not a defendant is without fault in bringing on the difficulty present[ed] 'a quintessential jury question' which [was] 'not a situation warranting immunity from prosecution.'" R. 134 (quoting Curry, 406 S.C. at 372 752 S.E.2d at 267). According to the judge "[t]he evidence presented conflicting views as to Randy Wilson's involvement in the argument that led to the fatal encounter, and that presents a factual question that must be answered by a jury." R. 135. Essentially, the circuit court judge refused to decide whether Appellant proved by a preponderance of the evidence that he acted in defense of others. This refusal was an abuse of discretion.

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[1] Another example of a trial judge acting as a fact finder occurs when the state seeks to admit evidence of prior bad acts. While this determination may not occur during a pre-trial hearing, the judge must first determine the state proved the occurrence of the prior bad act by clear and convincing evidence. See Rule 404(b), SCRE; State v. Fletcher, 379 S.C. 17, 23-24, 664 S.E.2d 480, 483 (2008).

The circuit court judge, as the trier of fact at the immunity hearing, had the duty to make credibility findings where she found the evidence was not consistent. Instead, the judge found that inconsistent testimony made this a "quintessential jury question." Her ruling was an abdication of her duty to exercise discretion and make credibility findings. That failure to exercise discretion was in itself an abuse of discretion that constituted reversible error because it was a refusal to exercise discretionary authority. See State v. Hawes, 411 S.C. 188, 191, 767 S.E.2d 707, 708 (2015); Samples v. Mitchell, 329 S.C. 105, 112, 495 S.E.2d 213, 216 (Ct. App. 1997). In light of this error, Appellant respectfully requests this Court rehear this matter based upon the significant points overlooked or misapprehended regarding the circuit court judge's order in which she abused her discretion by refusing to resolve conflicts in the evidence.

Entitled to immunity

Although Appellant maintained, and continues to maintain, the circuit court's failed to make findings of fact sufficient to show a ruling on the merits, Appellant alternatively requested this Court reverse the circuit court's refusal to grant immunity. This Court found "the trial court did not err in denying [Appellant]'s immunity request because [Appellant] failed to prove by a preponderance of the evidence that Wilson was not at fault in bringing on the difficulty and therefore entitled to self-defense." State v. McCarty, 2020-UP-269 (S.C. Ct. App. filed Sept. 23, 2020). The evidence in the record shows otherwise.

In 2015, Randy Wilson and Appellant were partners for almost thirty years. R. 10, ll. 3-12; R. 74, ll. 13-22. The two lived in a trailer in Liberty. R. 4, ll. 17-24; R. 5, ll. 11-23. Around 2013, Jacob Kirk was down on his luck with nowhere to go when Wilson and Appellant agreed to allow him to live with them. R. 4, ll. 15-19; R. 8, ll. 8-12; R. 85, ll. 8-13. The arrangement worked well for a time because Kirk, who did not pay rent, assisted Wilson with household

chores that Wilson was no longer able to do as a result of an old injury to his neck. R. 8, l. 13 – R. 9, l. 8; R. 9, ll. 20-24; R. 85, ll. 17-21. When Wilson was sixteen-years old, he was riding a bicycle after an interview for his first job. R. 6, ll. 6-7. Suddenly, a car going sixty-five miles per hour hit him. R. 6, ll. 7-8. Wilson suffered a broken neck as a result. R. 6, ll. 8-10. Over the years, Wilson's neck pain intensified greatly limiting his functioning and abilities. R. 7, ll. 14-23.

On July 15, 2015, Kirk's brother, Mitchell Bradley, was visiting Kirk at Wilson and Appellant's home. R. 4, ll. 15-16; R. 49, ll. 14-19; R. 84, l. 25 – R. 85, l. 2; R. 86, ll. 2-5. Appellant arrived home from work between 5:30 p.m. and 6:30 p.m. R. 49, ll. 1-7. Wilson arrived home from running errands around 7 p.m. R. 11, ll. 20-22; R. 49, l. 19. Wilson prepared dinner for the foursome upon his arrival home. R. 12, ll. 2-4. Wilson and Appellant ate their dinner. R. 12, l. 4; R. 49, ll. 20-23. Wilson put two plates of food in the microwave for Kirk and Bradley. R. 12, ll. 4-6. Wilson then spoke to his niece on the phone, and Appellant went to bed. R. 12, ll. 8-9; R. 50, l. 1 – R. 51, l. 20; R. 66, ll. 16-19.

While Wilson was on the phone, Kirk interrupted him about the food. R. 12, ll. 9-10; R. 87, ll. 5-9. Wilson admonished him for interrupting, which angered Kirk. R. 12, ll. 11-13. Kirk then hit Wilson in the shoulder. R. 12, ll. 14-15. When Wilson told Kirk, he was being rude, Kirk grew incensed. R. 12, ll. 16-17; R. 88, ll. 18-19. Wilson then called the police because Kirk was "out of control." R. 12, l. 19; R. 89, ll. 2-13. On the call with 911, Kirk can be heard threatening to slice Wilson. R. 31, ll. 12-15.

Wilson told Kirk and Bradley that he wanted them to leave. R. 12, l. 22 – R. 13, l. 3; R. 87, ll. 11-12. Kirk readily agreed to leave and began packing his belongings. R. 13, ll. 1-3; R. 42, ll. 12-15; R. 88, ll. 21-22. Bradley, however, refused to go. R. 13, ll. 19-20; R. 14, ll. 4-6.

In response to Wilson's call, two police officers arrived. R. 13, ll. 13-14; R. 78, l. 18 – R. 79, l. 1. According to one of the officers, Wilson, Kirk, and Bradley were "grossly intoxicated." R. 79, ll. 6-24; see also R. 56, ll. 10-11; R. 88, ll. 2-11; R. 105, ll. 6-13. While the police were at the residence, Appellant remained in his bedroom. R. 80, ll. 1-14; R. 50, l. 21 – R. 51, l. 4. According to Appellant, when the officer looked into the bedroom, the officer told him there was no reason for him to get up because the situation was under control. R. 50, l. 21 – R. 51, l. 2; R. 51, ll. 16-17; R. 68, ll. 2-3. Appellant went back to sleep. R. 51, ll. 2-4; R. 51, l. 18.

Wilson asked the officers to make Bradley leave. R. 15, ll. 3-9; R. 80, ll. 15-24. However, the officers refused to make Bradley leave. R. 15, ll. 15-21; R. 81, ll. 21-25; R. 90, ll. 10-14. According to the officers, Bradley was invited by Kirk, who was a resident; therefore, Wilson could not expel him. R. 15, ll. 15-17; R. 80, ll. 22-24; R. 81, ll. 15-20. Wilson pleaded with the officers "to do something" because he feared Kirk and Bradley would "get onto [him] again." R. 15, ll. 21-23. Nevertheless, the police left. R. 82, ll. 1-7. Kirk then walked to Wilson and said, "[S]ee, just because it's your property doesn't mean that you get to control everything that goes on here." R. 92, ll. 2-6.

To facilitate Kirk's leaving, Wilson began fixing his truck. R. 15, ll. 8-13. Bradley walked over to the truck and placed his beer can on the radiator. R. 14, ll. 14-16. While Wilson was reaching for a tool, he knocked over Bradley's beer. R. 14, ll. 16-19. Bradley flew into a rage, grabbing Wilson by his arm and slinging him around. R. 14, ll. 19-2. When Wilson explained he did not intentionally knock over the beer, Bradley left him alone. R. 14, l. 24 – R. 15, l. 1.

When Wilson finished working on the truck, he started walking up the steps to reach the porch where Bradley was. R. 16, ll. 3-4. Bradley stood at the steps and hit Wilson's headlamp

to turn it off and asked what he was going to do about it. R. 16, ll. 4-9. Bradley's position on the steps would not permit Wilson to get up to the porch so Wilson pushed him to the side. R. 16, ll. 10-12.[2] According to Kirk, Wilson was "shuffling through [Bradley]'s stuff" "like cigarette tubes where he rolls his own cigarettes," "just making a mess of things, throwing his stuff around." R. 92, ll. 8-13. Kirk explained that he knew "those all aren't things to get upset about. But to some people, it's an attack to their character." R. 106, ll. 15-17. He analogized messing with cigarettes to someone messing with "another person's mother." R. 106, ll. 17-19. He explained that even though it was not to that person directly, the person would retaliate. R. 106, ll. 17-20.

Bradley then shoved Wilson down the steps. R. 16, ll. 12-13; R. 92, ll. 15-19; R. 93, ll. 9-12. Wilson's fall broke his leg and two of the steps. R. 16, ll. 13-15; R. 25, ll. 2-19; R. 92, l. 19. According to Kirk, Wilson began yelling for Appellant while he was on the ground with his injuries from the fall. R. 93, ll. 13-17

Wilson then used the handrailing to get up from the concrete pad to which he had fallen. R. 16, ll. 19-21; R. 94, ll. 5-10. As Wilson scrabbled up the steps, he knocked over another beer that was on the handrailing. R. 16, ll. 21-23; R. 37, ll. 9-10. Kirk claimed Wilson intentionally knocked the beer off the railing. R. 94, ll. 12-14. Wilson then reached for the door to enter his home, but he was shoved from behind by Bradley before he could enter. R. 16, l. 23 – R. 17, l. 1; R. 35, ll. 1-7; R. 37, ll. 9-12. It was undisputed that when Wilson was trying to get back into the house, he was retreating. R. 108, ll. 1-6; R. 109, ll. 12-16. Kirk agreed that Wilson "was

[2] The prosecutor impeached Wilson with a statement to law enforcement that he was pouring out Bradley's beers, but Wilson explained that what he meant was that he spilled Bradley's beer. R. 32, ll. 11-16. The prosecutor construed Wilson's statement to police to mean that Wilson was "egging them on by pouring out their beers." R. 32, ll. 19-22.

trying to get away, trying to get back in the house and [Bradley] wasn't letting him do that." R. 109, ll. 12-16.

According to Kirk, Wilson knocking the beer over "incited [Bradley] to grab [Wilson] and push him into the corner." R. 94, ll. 17-19. Frightened and in fear for his life, Wilson screamed for Appellant. R. 17, ll. 1-2; R. 17, ll. 17-24; R. 19, ll. 11-15; R. 95, ll. 2-3. Appellant heard Wilson's screams – "a help cry of life-or death." R. 51, ll. 18-20; R. 56, ll. 2-6.

Bradley was holding and shoving Wilson. R. 17, ll. 6-8.[3] Bradley was pushing Wilson over the bannister. R. 37, ll. 17-25. Kirk claimed Bradley was "popping" Wilson in the face with an open hand. R. 95, ll. 4-9. Kirk believed Bradley was trying to "incite him to throw the first punch." R. 95, ll. 12-13. While Bradley popped Wilson in the face, Bradley repeatedly asked why he was "hollering for [Appellant]." R. 95, ll. 16-18.

Wilson saw Bradley draw back to punch him, but Bradley did not because Appellant appeared and fired a warning shot into the floor – hoping to diffuse the situation. R. 17, ll. 8-14; R. 39, ll. 13-14; R. 110, l. 25 – R. 111, l. 4; R. 52, ll. 17-21; R. 55, ll. 19-24; R. 56, ll. 7-10; R. 96, ll. 11-13. Kirk claimed that when Appellant walked up, Wilson "threw a punch." R. 96, ll. 16-17. Appellant had tried, desperately, to open the door to get to the porch, but he was unable to do so because Bradley and Wilson were blocking the door. R. 39, ll. 8-12; R. 53, ll. 13-24; R. 60, ll. 21-23; R. 62, ll. 17-23; R. 97, ll. 8-19. Despite the warning shot, Bradley's attack against Wilson continued. R. 20, ll. 10-18; R. 53, ll. 2-4. Then, Appellant shot Bradley. R. 20, l. 19 – R. 21, l. 3; R. 39, ll. 15-22. Kirk claimed that after the warning shot, Wilson pushed Bradley off

[3] Wilson was 5'8" and between 145 and 180 pounds. R. 44, ll. 11-13; R. 103, ll. 7-8. Bradley was 5'11" and 150 pounds. R. 102, l. 25 – R. 103, l. 1. Bradley was approximately twenty-three years old at the time. R. 45, ll. 7-12. Bradley was considerably stronger than Wilson. R. 45, ll. 13-14.

of him, which was when Appellant shot Bradley. R. 96, ll. 23-25. Appellant made clear that he shot Bradley because he feared for Wilson would suffer serious bodily injury or death. R. 54, ll. 6-14; R. 15-18. Wilson performed CPR on Bradley while Kirk called 911. R. 21, ll. 4-12; R. 21, ll. 16-22; R. 82, ll. 16-23.

At the conclusion of the pre-trial hearing, Judge Verdin heard argument from counsel. Defense counsel pointed to the undisputed fact that Wilson asked Bradley to leave, but Bradley refused. R. 112, ll. 18-23; R. 112, ll. 12-17. Additionally, defense counsel argued "the facts [were] quite clear that [Wilson] was outside trying to get back into the house, trying to avoid a physical altercation." R. 113, ll. 3-6. Despite Wilson's obvious attempt to enter his home for safety, Bradley "pursued him, attacked him, and was physically assaulting him right outside the door so that [Appellant] could not open the door afterwards." R. 113, ll. 6-9. As defense counsel summarized, the evidence showed "this was no fault of [Appellant]'s, certainly, and no fault of [Wilson]." R. 113, ll. 13-16.

Next, defense counsel emphasized the undisputed evidence of Wilson's "weak condition, weak neck from an automobile accident in 1980." R. 113, ll. 17-19. Defense counsel explained the evidence showed Wilson "was in clear peril of having suffered great bodily injury, serious bodily injury." R. 113, ll. 19-21. Appellant was aware of Wilson's "weakened condition" and of the danger posed to Wilson by Bradley. R. 113, ll. 23-24. Further, counsel argued "[t]here was no other reasonable alternative that [Appellant] could have taken, under the circumstances, to avoid Randy Wilson sustaining, at least, serious bodily injury, and perhaps his life." R. 113, l. 25 – R. 114, l. 4. Thus, Appellant was entitled to immunity – he had "[t]he right to use, if necessary, deadly force in order to prevent serious bodily injuries to someone else." R. 114, ll. 4-8.

After reading the statute, the prosecutor argued there were "a couple of key words in there that raise the jury questions." R. 116, ll. 22-24. Nevertheless, the prosecutor consented the facts were not controverted. R. 116, ll. 24-25. The only controversy concerned how the facts were being argued. R. 116, l. 25 – R. 117, l. 2. Incredibly, the state argued that Wilson was engaged in unlawful activity by "not only destroying the property of another," which was "something to egg this situation on." R. 117, ll. 3-7. Additionally, according to the prosecutor, "that also plays into self-defense with him not being without fault for bringing about the difficulty." R. 117, ll. 7-9.

Next, the state argued the statute permitted "meeting force with force," but the circumstances presented two "grossly intoxicated individuals engaged in a fist fight from which no injuries [were] there that no gross threat came from. Yet, [Appellant] jumped straight to using deadly force." R. 117, ll. 10-18.

When the judge questioned whether the statute required consideration of what Appellant reasonably believed, the prosecutor then changed tactics and argued that it was for the jury to say if Appellant's belief was reasonable. R. 117, l. 19 – R. 118, ll. 2-8. When the judge honed in on the fact that such an argument would mean that immunity would never be available during a pre-trial setting, the state changed tactics again, arguing "immunity is available at this stage if they proved that fact *beyond* a preponderance of the evidence." R. 118, ll. 11-13 (emphasis added). According to the state, "it could be completely reasonable to say that two people watching two drunks having a fight is not reasonable to pull a gun and shoot and kill the one they wanted to lose the fight." R. 118, ll. 19-23. Using hyperbole, the state argued "using that logic, [Appellant] could follow Mr. Wilson around anywhere and let Mr. Wilson pick fights and egg on

people. And as soon as they swung a punch at him, because of his weak neck, whether they knew about it or not, he could shoot and kill them." R. 118, l. 23 – R. 119, l. 3.

Additionally, and incorrectly, the state argued that Appellant was required to prove that his conduct was "necessary" and that he had "no other means of doing it." R. 119, ll. 5-11. According to the state, the fact that Appellant first fired a warning shot was evidence that it was not a "life-or-death situation." R. 119, ll. 12-19. The state theorized that "[i]f it [were] a perilous life-or-death situation, the reasonable thing would be to … diffuse it immediately. You don't need to fire a warning shot. There's no duty in self-defense or defense of others to warn upon the use of deadly force if it is rightfully used." R. 119, ll. 19-25. While the state conceded the warning shot was "an attempt to diffuse the situation," the state argued "the law requires that his use of deadly force be the necessary means to do it." R. 120, ll. 12-21.

Returning to its incorrect argument on necessity, the state argued "there's plenty of room, factually, based on upon the testimony, that there's other things he could have done, that killing Mitchell Bradley was not necessary." R. 120, ll. 21-24. To this point, the state argued as follows:

> Maybe he could have gotten out the door. It appears from Jacob Kirk's testimony that he didn't really struggle to try to get out the door. Maybe he could have run around and done it. Obviously, nobody was severely injured in the fist fight or slap fight or whatever was happening on the porch portion of this fight. The only injury that Mr. Wilson indicated was when he was pushed down the stairs. He got back up, and there's testimony that he re-engaged, even after suffering this bad injury.

R. 120, l. 25 – R. 121, l. 10. Thereafter, the state transitioned to its argument that Wilson was at fault in bringing on the difficulty.

Explaining that "what the law allows is that an accused that provokes or initiates an assault cannot claim self-defense unless he both withdraws from the conflict and communicates

his withdraw by word or adversary." R. 123, l. 21 – R. 124, l. 1. The state opined Wilson did not withdraw. R. 125, ll. 1-5.

After noting that one who claims defense of others has the right to kill the assailant only if the one being defended had the right to do so, the state argued there was "testimony that [Wilson] provoked the situation and because he is at fault with bringing about the difficulty, then that element of self-defense is not satisfied, and therefore, is not available to him." R. 124, ll. 7-12. Thus, according to the prosecutor, self-defense was not available to Appellant. R. 124, ll. 12-13. The law, in the prosecutor's estimation, "requires a little more diligence on someone who is willing to act on appearances and use deadly force to kill somebody." R. 124, ll. 13-16.

The prosecutor concluded that "because there is a conflicting account of what happened that night, that there is evidence that [Wilson was the aggressor in this situation], then immunity [did] not apply and it's a question of defense of others that should be submitted to the jury." R. 125, ll. 16-21; see also, R. 77, ll. 4-10. Again incorrectly, the state argued Appellant was required to prove "*beyond* a preponderance of the evidence that self-defense did apply, that [Wilson] was not at fault," which had not been done because there was conflicting evidence. R. 125, ll. 22-24 (emphasis added). The case presented "the word of two witnesses" and "because it's essentially word versus word, that that is a determination that the jury should make and they haven't proven it to the standard that is required in this case law as the self-defense and defense of others standard." R. 126, ll. 1-6.

Defense counsel first directly refuted the solicitor's claim that because there was conflicting testimony, the judge could not grant immunity to Appellant. Counsel explained:

> [I]n any civil case, the standard is preponderance of the evidence. Further, there's conflicting testimony on both sides all the time. The testimony on both sides does not have to be [unanimous], it's simply who has shown their case to be more like true than not. That's what preponderance of the evidence means.

R. 126, ll. 9-16. Next, defense counsel successfully rebutted the state's contention that Wilson was at fault and had to withdraw. Defense counsel explained that nothing Wilson did "was legal provocation to be assaulted," but even assuming it were, then Wilson "was trying to withdraw," "[h]e was trying to retreat, even calling out for help while he was [o]n his own [property]." R. 126, ll. 18-24.

In her order, Judge Verdin determined Appellant "failed to meet the burden of proof" and denied his request for immunity. R. 132. Judge Verdin concluded "the core facts" were "largely uncontested. R. 132. After detailing what she considered the uncontested facts, Judge Verdin posited that "there was some dispute as to the cause and nature of the argument between Wilson, Kirk, and Bradley." R. 133. According to Judge Verdin, those facts were as follows:

> Wilson testified that he had not had much to drink that night, and that Kirk and Bradley had acted aggressively toward him. Wilson also testified that due to a previous neck injury, he feared for his life as Bradley had him pinned in the corner of the porch. Kirk testified that it was Wilson that incited the argument, specifically indicating that Wilson destroyed some of Bradley's property that was outside on the porch, angering Bradley enough to shove Wilson down the stairs. When Wilson came back on the porch, he slapped Bradley's beer away, which provoked Bradley to push him in the corner. Kirk also testified that he did not perceive the fight to be serious, and knowing of Wilson's previous injuries, he would not have allowed the fight to continue if Bradley was seriously injuring Wilson.

R. 133.

Thereafter, Judge Verdin cited the Act and controlling case law, including defense of others. R. 133-134. Judge Verdin correctly noted that in order to determine whether Appellant had a right to act in defense of others, it was necessary to determine whether Wilson had a right to act in self-defense. R. 134. Without any findings of fact to support her conclusion, Judge Verdin determined Appellant "failed to meet his burden because he did not prove that Wilson was without fault in bringing about the difficulty." R. 134. As previously discussed, Judge

Verdin determined the case presented "a factual question that must be answered by a jury" because "the evidence presented conflicting views as to Randy Wilson's involvement in the argument that led to the fatal encounter." R. 135.

In 2006, the South Carolina General Assembly adopted the Protection of Persons and Property Act. S.C. Code Ann. § 16-11-410, et seq. The General Assembly explained its intent was to "codify the common law Castle Doctrine which recognizes that a person's home is his castle and to extend the doctrine to include an occupied vehicle and the person's place of business." S.C. Code Ann. § 16-11-420(A). The General Assembly found it "proper for law-abiding citizens to protect themselves, their families, *and others* from intruders and attackers without fear of prosecution or civil action for acting in defense of themselves *and others*." S.C. Code Ann. § 16-11-420(B) (emphasis added). The General Assembly recognized "that persons residing in or visiting this State have a right to expect to remain unmolested and safe within their homes, businesses, and vehicles." S.C. Code Ann. § 16-11-420(D). Finally, the General Assembly explained "that no person or victim of crime should be required to surrender his personal safety to a criminal, nor should a person or victim be required to needlessly retreat in the face of intrusion or attack." S.C. Code Ann. § 16-11-420(E).

To effectuate this intent, the General Assembly created a statute providing for immunity from prosecution to "[a] person who uses deadly force as permitted by the provisions of this article or another applicable provision of law." S.C. Code Ann. § 16-11-450(A). Specifically, the Act provides two presumptions for the immunity determination. For purposes of this case, the second presumption is applicable. The Act provides:

> A person who is not engaged in an unlawful activity and who is attacked in another place where he has a right to be, including, but not limited to, his place of business, has no duty to retreat and has the right to stand his ground and meet force with force, including deadly force, if he reasonably believes it is necessary

> to prevent death or great bodily injury to himself or another person or to prevent the commission of a violent crime as defined in Section 16-1-60.

S.C. Code Ann. § 16-11-440(C). Additionally, "[a] claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard." State v. Curry, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013). The Court explained that "another applicable provision of law" found within the Act "includes the common law of self-defense." State v. Glenn, 429 S.C. 108, 117, 838 S.E.2d 491, 496 (2019).

During the pretrial hearing, a defendant must show "a valid case of self-defense must exist," excluding the duty to retreat prong, "and the trial court must necessarily consider the elements of self-defense in determining a defendant's entitlement to the Act's immunity." Curry, 406 S.C. at 371, 752 S.E.2d at 266. The Court held "a trial court should first consider whether the defendant has proved the elements of self-defense by a preponderance of the evidence." Glenn, 429 S.C. at 118, 838 S.E.2d at 496. "If the defendant has failed to meet the elements of reasonable fear or the duty to retreat, the court should then determine whether section 16-11-440(A) or (C) is applicable." Id.

The South Carolina Supreme Court affirmed a grant of immunity in State v. Jones, 416 S.C. 283, 786 S.E.2d 132 (2016). Jones and her boyfriend, Eric Lee, shared a residence. Id. at 287, 786 S.E.2d at 134. On the evening of November 1, 2012, Jones and Lee were involved in a physical altercation. Id. Jones left the residence and returned when she had "cooled down." Id. at 288, 786 S.E.2d at 134. While Jones gathered her things, Lee yelled at her and followed her around. Id. at 288, 786 S.E.2d at 135. Jones grabbed a knife for protection. Id. Lee grabbed Jones, shook her, and told her it was over. Id. Believing Lee was going to hit her again, Jones grabbed the knife out of her shirt and stabbed him once in the chest. Id. Although Jones Finally left Lee, she and a friend

shortly returned to the residence and took Lee for help. Id. However, Lee later died at the hospital. Id.

The Court found there was "nothing in the record to suggest that Jones was at fault in bringing on the difficulty" because she attempted to leave the apartment before the first altercation, returned to the apartment to gather her belongings, and called her friends to pick her up. Id. at 301-302, 786 S.E.2d at 142. Jones told police that she believed Lee "was going to hit her again and that had she not acted as she did, then she would have been killed." Id. at 302, 786 S.E.2d at 142. Next, the Court held Jones' belief that she was in imminent danger of losing her life or sustaining great bodily injury was reasonable in light of Lee having punched her earlier in the night and Lee grabbing Jones and shaking her immediately prior to the stabbing. Id. Finally, the Court held that Jones had no duty to retreat pursuant to the Act because she was attacked in her home. Id.

This Court affirmed a grant of immunity in State v. Douglas, 411 S.C. 307, 768 S.E.2d 232 (Ct. App. 2014).[4] Douglas and his friend, Charles Smith, had spent the day on the golf course drinking. Id. at 312, 768 S.E.2d at 236. After leaving the golf course, the two went to Douglas' home and continued drinking. Id. at 313, 768 S.E.2d at 236. Smith found a bottle of Douglas' anti-anxiety medicine and began teasing Douglas about it. Id. When Douglas grew angry, Smith "snapped" and "went crazy." Id. Smith grabbed Douglas by his arms and threw him against the refrigerator. Id. When Douglas fell to the floor, Smith got on top of him and struck him in the eye. Id. at 314, 768 S.E.2d at 236. Although Douglas told Smith to leave, Smith refused, but did go into another room. Id. Douglas crawled to his bed and got a pistol from the nightstand. Id. Douglas, returning to the kitchen, again told Smith to leave. Id. Instead, Smith advanced toward Douglas.

[4] The South Carolina Supreme Court granted certiorari on November 5, 2015. However, on July 13, 2016, the Court dismissed the petition as improvidently granted. State v. Douglas, 416 S.C. 427, 788 S.E.2d 686 (2016).

Id. Douglas lifted the pistol to scare Smith. Id. When Smith was two feet away, Douglas fired the pistol. Id. A bullet hit Smith, and he died within minutes. Id.

This Court held Douglas proved by a preponderance of the evidence that he reasonably believed shooting Smith was necessary to prevent great bodily injury to himself, and that he acted in self-defense. Id. at 319, 768 S.E.2d at 239. The physical evidence was consistent with Douglas' testimony, showing that Smith was in close proximity when the pistol was fired. Id. at 319-320, 768 S.E.2d at 239. This Court noted that Douglas was injured in the altercation prior to the fatal shot, and that in light of Smith's lack of serious injury, Douglas' believe that Smith was about to inflict serious bodily injury upon him if he did not act to protect himself was reasonable. Id. at 320, 768 S.E.2d at 240. This Court also considered evidence that several years prior to the shooting, Smith assaulted Douglas by slamming him against a wall and choking him. Id. According to this Court, Douglas was not at fault in bringing on the difficulty where "Smith's violent behavior was an unreasonable reaction to a reasonable demand for Smith to return [Douglas]'s medicine." Id. at 321, 768 S.E.2d at 240. Further, this Court found that after Smith attacked Douglas and Douglas retreated to his bedroom, his "reappearance at the kitchen's threshold with a loaded pistol by his side was lawful, as he had a right to defend his home and demand that Smith leave." Id.

Self-defense

To establish self-defense, four elements must be present: (1) the defendant must be without fault in bringing on the difficulty; (2) the defendant must have been 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; (3) if his defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief, or if the defendant was actually in imminent danger, the

circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life; 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 the particular instance. State v. Hendrix, 270 S.C. 653, 657-658, 244 S.E.2d 503, 505-506 (1978); see also State v. Davis, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984).

An individual who provokes or initiates an assault may not assert self-defense. State v. Bryant, 336 S.C. 340, 345, 520 S.E.2d 319, 322 (1999). "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 as a justification or excuse for a homicide." Id. Along these lines, "[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." Id. (internal quotation omitted). "One's right to self-defense is restored after a withdrawal from the Final 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)); see also State v. Hendrix, 270 S.C. 653, 659 n.3, 244 S.E.2d 503, 506 n.3 (1978) (explaining that Hendrix's "act of ordering deceased away would have constituted a withdrawal after aggression which was communicated to the deceased and which would have restored [Hendrix]'s right of self-defense").

In State v. Light, 378 S.C. 641, 650, 664 S.E.2d 465, 469 (2008), the South Carolina Supreme Court held a defendant's statement that it was either "her or me" after the defendant took the gun from the victim established that the defendant believed he was in imminent danger. The Court determined this belief was reasonable in light of the defendant's testimony that in the

preceding weeks the victim had been acting jealous, had followed him, and told him that if she caught him with another woman it was "going to be messy." Id.

An individual has the right to act on appearances. State v. Starnes, 340 S.C. 312, 531 S.E.2d 907 (2000); see also State v. Jackson, 277 S.C. 271, 87 S.E.2d 681 (1955). The South Carolina Supreme Court held the trial judge erred in failing to instruct the jury that the defendant had the right to act on appearances concerning one of the shootings. Starnes, 340 S.C. at 320, 531 S.E.2d at 912. In Starnes, one of the potential drug buyers, Wellborn, pointed a gun at the defendant, cursed him, and questioned where he was going. Id. The Court held the defendant was not entitled to a charge on the right to act on appearances concerning Wellborn because his claim to self-defense arose from an *actual* threat. Id. However, concerning the shooting of the other potential buyer, Champlin, the Court held the defendant was entitled to an appearances charge. Id. at 321, 531 S.E.2d at 912. The pertinent fact noted by the Court was that "[i]mmediately prior to the shooting, [the defendant] observed Champlin hold a gun to [another]'s head and threaten to shoot him, apparently because the intended drug deal, which [the defendant] had arranged, had gone awry." Id. The Court held the defendant was entitled to an appearances charge even though the defendant did not testify that he thought he saw a weapon in Champlin's hand at the time of the shooting. Id.

Additionally, "words accompanied by hostile acts, may, depending on the circumstances, establish a plea of self-defense." State v. Harvey, 220 S.C. 506, 68 S.E.2d 409 (1951). Furthermore, "when a person is justified in firing the first shot, he is justified in continuing to shoot until it is apparent that the danger to his life and body has ceased." Hendrix, 270 S.C. at 661, 244 S.E.2d at 507. In Douglas v. State, 332 S.C. 67, 72-73, 504 S.E.2d 307, 309-10 (1998), the Supreme Court noted the judge had charged that if the defendant was justified in firing the first shot he was justified in continuing to shoot until any danger to his life and body had ceased.

Defense of others

"Under the theory of defense of others, one is not guilty of taking the life of an assailant who assaults a friend, relative, or bystander if that friend, relative, or bystander would likewise have the right to take the life of the assailant in self-defense." State v. Long, 325 S.C. 59, 64, 480 S.E.2d 62, 64 (1997); see also State v. Starnes, 340 S.C. 312, 322-323, 531 S.E.2d 907, 913 (2000); Mack v. State, 348 So.2d 524, 527 (Ala. Crim. App. 1977) (holding the defendant could not assert defense of others where the person being defended was the Final aggressor and therefore at fault in bringing on the difficulty). Additionally, in order for the trial judge to give a defense of others instruction, there must be "some evidence adduced at trial that the defendant was indeed lawfully defending others." Starnes, 340 S.C. at 323, 531 S.E.2d at 913; see also Douglas v. State, 332 S.C. 67, 73, 504 S.E.2d 307, 310 (1998); State v. Long, 325 S.C. 59, 64, 480 S.E.2d 62, 64 (1997); Bozeman v. State, 307 S.C. 172, 414 S.E.2d 144 (1992); State v. Alford, 264 S.C. 26, 212 S.E.2d 252 (1975), overruled on other grounds State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009).

When a person acts in defense of another, the person "is in the same situation and upon the same plane as those who act in defense of themselves." State v. Hewitt, 205 S.C. 207, 31 S.E.2d 257, 258 (1944). Only those facts "which excuse the killing in defense of self likewise excuse a killing in defense of [another]." Id.; see also, State v. Harvey, 110 S.C. 274, 96 S.E. 399, 400 (1918) (noting that "[w]hile a man may take life in defense of himself or another, yet the slayer, or the person in whose behalf the slayer strikes, must not only be without fault in provoking the difficulty, but there must be a necessity to kill"); State v. Norris, 253 S.C. 31, 38, 168 S.E.2d 564, 567 (1969) (holding "[t]he right of the father to defend his daughter is coextensive with the right of the daughter to defend herself").

> The right of one to justify a slaying on the ground that it was necessary in defense of another person stands upon the same plane or footing as, and is coextensive with, the right of the person to whose aid he or she goes, under the existing circumstances of the particular occasion; or as is sometimes stated, the right to justify killing in defense of another depends upon the same conditions as would be necessary to excuse such other person under the plea of self-defense.

40 Am.Jr.2d Homicide § 168 (2014). In other words, "[t]he right is commensurate with self-defense, and every fact requisite to excuse a killing in the defense of self must be present in order to excuse a killing in defense of another." Id.

The defense of others imposes the "alter ego" rule, meaning "an intervenor who used deadly force to defend a person not entitled to use deadly force himself would be held criminally liable." Marco F. Bendinelli, James T. Edsall, Defense of Others: Origins, Requirements, Limitations and Ramifications, 5 Regent U. L. Rev. 153, 153 (Spring 1995).[5] "'[A] person is justified or excused in killing in defense of another person when, *and only when*, the circumstances are such that the latter would be justified or excused if *he* had committed the homicide in his own defense.'" Id. at 158 (quoting Lovejoy v. State, 15 So.2d 300, 301 (Ala. Ct. App. 1943)) (emphasis in the original).

In State v. Sales, 285 S.C. 113, 328 S.E.2d 619 (1985), this Court examined the defense of others instruction as it applied to the defendant in the criminal case. Sales' sister and her boyfriend were fighting in their shared home over the boyfriend's use of grocery money to buy liquor. The boyfriend hit the sister in the face with an iron poker. Sales' nieces ran to his home and begged him to help sister. Sales found sister at her home holding her face. When sister and

[5] Although many jurisdictions have abandoned a strict adherence to the alter ego rule, they have done so only to "allow exculpation based upon the intervenor's reasonable belief that his defensive action was required." Marco F. Bendinelli, James T. Edsall, Defense of Others: Origins, Requirements, Limitations and Ramifications, 5 Regent U. L. Rev. 153, 159-160 (Spring 1995).

boyfriend began to struggle over a heavy object, Sales separated the two. The boyfriend then swung the heavy object at Sales. A fight between Sales and the boyfriend ensued. The boyfriend died. This Court held the trial judge properly instructed the jury that, "under the law of self-defense, a person may not only take the life in his own defense but also in defense of a relative," and "that the right to intervene to protect the relative is subject to the same limitations as the right of self-defense." However, the judge instructed the jury on the duty to retreat, which this Court found to be in error. Instead, Sales had no duty to retreat because sister had no duty to retreat from her home and Sales assumed the rights and limitations of the person he acted to protect. Id. at 114-15, 328 S.E.2d at 619-620.

Appellant respectfully requests this Court rehear his claim that the trial judge erred in denying his request for immunity from prosecution. As demonstrated, Appellant established each of the elements of defense of others by a preponderance of the evidence. In light of Appellant acting to defend Wilson, it is Wilson's conduct and the conduct of Bradley toward Wilson that requires close scrutiny.

Despite the state's argument that Wilson was at fault in bringing on the difficulty, the evidence showed otherwise. At most, Wilson messed with Bradley's cigarettes and beers. Without question, Wilson messing with – even destroying – cigarettes and beers could not be acts "in violation of the law and reasonably calculated to produce the occasion" of Bradley shoving him down the stairs and slamming him against the door. See State v. Bryant, 336 S.C. 340, 345, 520 S.E.2d 319, 322 (1999). Wilson had not acted aggressively or engaged with Bradley physically. Instead, Wilson had asked Bradley to leave his home, and had called the police to assist him in having Bradley removed. Even Bradley's brother, Kirk, admitted that "messing" with

someone's cigarettes and beers was not something that would result in a physical confrontation for most people.

Even if Wilson's conduct of messing with the cigarettes and beers could be construed as bringing on the difficulty, then the undisputed evidence showed that Wilson withdrew from the conflict and communicated that withdrawal to Bradley. Kirk's testimony on this point was unequivocal – Wilson was trying to get into the house and away from Bradley when Bradley grabbed him and slammed him against the door. Kirk was clear that Wilson was trying to get away based on Wilson's conduct; thus, Wilson's desire to retreat was communicated by his conduct to Bradley as well. Additionally, Wilson's screams of terror for Appellant communicated his withdrawal from any conflict. Those screams were undisputed as well. In light of Wilson's withdrawal, his right to self-defense was restored to the extent it could be construed that he was at fault for bringing on the difficulty for messing with Bradley's cigarettes and beers. See State v. Bryant, 336 S.C. 340, 345, 520 S.E.2d 319, 322 (1999); see also State v. Graham, 260 S.C. 449, 196 S.E.2d 495 (1973); State v. Hendrix, 270 S.C. 653, 659 n.3, 244 S.E.2d 503, 506 n.3 (1978).

Having established that Wilson was not at fault for bringing on the difficulty, the next requirement was to show that Wilson was in actual imminent danger or believed he was in danger of losing his life or sustaining serious bodily injury. Wilson's testimony was unequivocal and undisputed – he believed he was in danger of losing his life or sustaining serious bodily injury. The testimony also indicated that Wilson suffered a broken neck years earlier and was at a high risk of sustaining another serious injury to his neck. Wilson's belief was reasonable in light of the physical attack he had suffered already at Bradley's hands, which included a broken leg. Finally, Wilson had no duty to retreat because he was within the curtilage of his home. See State v. Jones, 416 S.C. 283,

302, 786 S.E.2d 132,142 (2016); State v. Wiggins, 330 S.C. 538, 548 n.15, 500 S.E.2d 489 n. 494 n. 15 (1998); State v. Jackson, 227 S.C. 271, 279, 87 S.E.2d 681, 685 (1955).

For these reasons, Appellant respectfully requests this Court rehear this matter based upon the significant points overlooked or misapprehended by this Court in affirming the trial judge's order denying him immunity from prosecution.

Respectfully Submitted,

s/*Susan B. Hackett*
SUSAN B. HACKETT
Appellate Defender

This 8th day of October, 2020.

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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Pickens County

Letitia H. Verdin, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOHN WILLIAM MCCARTY,

APPELLANT

CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Petition for Rehearing in the above-entitled case has been served upon Michael D. Ross, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), which is mikeross@scag.gov; and John William McCarty, #374317, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 8th day of October, 2020.

s/*Susan B. Hackett*
Susan B. Hackett
Appellate Defender
ATTORNEY FOR APPELLANT