THE STATE OF SOUTH CAROLINA

In the Court of Appeals Court

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions
Letitia Verdin, Circuit Court Judge

Appellate Case No. 2020-001122

State of South Carolina……..Respondent,

vs.

Marquez D. Glenn……Appellant.

APPELLANT MARQUEZ D. GLENN'S INITIAL BRIEF

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STATEMENT OF ISSUES

I. Having established all elements necessary to entitle Glenn to immunity by a preponderance, the trial court abused its discretion by denying Glenn immunity under the Protection of Persons and Property Act ("PPPA" or "the Act") based on the conclusory and legally unsupported finding that Glenn was not in imminent danger or did not believe he was in imminent danger 1) because only one of Glenn's two assailants, who were acting together, violently assaulted him before he was able to defend himself, and 2) because, following Glenn's immediate reaction of retreating to the safety of his car after his act of self defense created the opportunity to do so, Glenn's brother drove Glenn's car away from the location where both he and Glenn had already been the victims of two violent assaults.

II. It was error for the trial court to find Glenn, while reasonably exercising his license as a social guest of Spring Grove tenants, was not "in [a] place where he ha[d] a right to be" when he defended himself from an unprovoked attack. S.C. Code Ann. § 16-11-440(C).

III. The trial court erred as a matter of law in finding that Glenn was a trespasser due to an alleged violation of a three year old Trespass Notice for loitering where possession of the property in question had changed at least once since the issuance of the alleged Trespass Notice

STATEMENT OF THE CASE

Following Appellant Marquez D. Glenn's ("Appellant" or "Glenn") prior successful appeal to the South Carolina Supreme Court, which remanded this case to the circuit court for further proceedings in connection with Glenn's Motion for Immunity pursuant to S.C. Code Ann. §§ 16-11-450(A) and 16-11-440, this is the second appeal from the criminal proceedings in the matter of State v. Marqeuz Devon Glenn. See generally State v. Glenn, 2013A2330203357 and 2013A2330203356 R. pp. 285-86. Specifically, this appeal concerns the circuit court again denying Glenn the immunity to which he was entitled pursuant to Sections 16-11-450(A) and 16-11-440 of the Protection of Persons and Property Act ("the Act"). The proceedings before the

Greenville County Court of General Sessions concerned charges for Attempted Murder and Possession of a Weapon During a Violent Crime.

Appellant filed a pretrial Motion for Statutory Immunity based on S.C. Code Ann. §§ 16-11-450(A) and 16-11-440(C) ("Motion"), on the grounds that Appellant was immune from prosecution because he had a legal right based on S.C. Code Ann. § 16-11-440, the common-law of self-defense, and under the facts and circumstance of this case to use a handgun to defend himself from a violent and unprovoked surprise attack by two (2) individuals while Appellant was leaving an apartment complex to which he was invited for a dinner with friends. See Motion for Immunity, pp. 5-7; see generally Immunity Hr'g Tr., pp. 59:18–222:14. The pretrial hearing was originally conducted outside of the presence of the jury and was considered and ruled upon by Judge John C. Hayes III ("Judge Hayes").

On August 4, 2015, Judge Hayes ruled from the bench, orally denying Appellant's Motion because Judge Hayes found "that the immunity argument fail[ed] solely on the issue of whether or not [Glenn] had a right to be there" at the time he acted in self-defense. Immunity Hr'g Tr. p. 221:15–17, p. 222:5-14, p. 222:2–14 (finding immunity argument failed "solely" because Appellant was not at a place he had a lawful right to be at the time of the incident, but also finding that Appellant was not engaged in any activity that would bar him "immunity but for his not being allowed on the property").

Following the trial court's denial of immunity, Appellant was tried by jury, which, after nearly eight (8) hours of deliberation resulted in the jury acquitting Appellant on the charge of Attempted Murder, but convicting Appellant of the lesser included charge of Assault and Battery

of a High and Aggravated Nature and Possession of a Weapon During a Violent Crime. See Sentencing Sheet, pp. 285-86.

Following a successful appeal to the South Carolina Supreme Court, the case was remanded on March 12, 2020 for Glenn's Motion to be reconsidered by the circuit court in light of the Supreme Court's ruling in favor of Glenn. Due to the passage of time, Judge Hayes was not able to preside over the reconsideration of Glenn's Motion, which resulted in Judge Letitia Verdin ("Judge Verdin") agreeing to hear the Motion in his stead. In addition to Judge Hayes not being able to preside, the state of the COVID-19 pandemic in March 2020 rendered it impossible to conduct a new evidentiary hearing in connection with the Motion. As such, to expedite reconsideration of the Motion, Judge Verdin, after review of the original hearing transcript and consultation with counsel for the State and Glenn, indicated that, in conjunction with argumentation by the parties, she felt able to rule from the original transcript. Thereafter, Judge Verdin filed an Order denying immunity on June 15, 2020. Appellant received written notice of entry of this order on July 6, 2020. Appellant timely filed a motion pursuant to Rule 29(a), SCRCrimP, requesting reconsideration of various points of law and fact, which was denied on July 28, 2020. Appellant received written notice of entry of this order on August 5, 2020. Appellant's Notice of Appeal was properly and timely served upon all parties of interest in this matter on August 13, 2020.

STANDARD OF REVIEW

This court reviews the trial court's pretrial determination of immunity for an abuse of discretion. State v. Curry, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013). "A trial court abuses its discretion when its ruling is based on an error of law, or when grounded in factual

conclusions, is without evidentiary support." State v. Glenn, 429 S.C. 108, 116, 838 S.E.2d 491, 495 (2019).

RELEVANT FACTS

On the evening of April 12, 2013, Glenn, along with his brother Tivarius Henderson (hereinafter "Tivarius") and two other friends, was invited to Spring Grove Apartment Complex, (hereinafter "Spring Grove" or "the Complex"), by tenants Shelricka Duncan ("Shelricka") and Kiana Grayson ("Kiana") to chill and cookout.[1] See Immunity Hr'g Tr., pp. 60:8–61:22. p. 84:21-86:2. Once there, Glenn drove one of Shelricka's friends to the store in her car, since she had been drinking and he had not. Id. pp. 60:22–62:3, pp. 85:13–89:4, pp. 151:2–152:3, p. 188:11–22.

While Glenn was at the store Kevin Bruster ("Kevin"), who was heavily and visibly intoxicated and had been put on trespass notice for the Complex less than twenty-four (24) hours prior for stealing the cell phone of and assaulting his ex-girlfriend Gloria Duncan ("Gloria"), the mother of Shelricka, showed up uninvited at Spring Grove to find Gloria.[2] See Immunity Hr'g Tr., pp. 61:23–62:3, pp. 85:13–89:20, p. 100:4–20, p. 204:10–20, p. 209:15–18. At the time Kevin was angrily and drunkenly seeking Gloria, she was in the Shelricka's apartment ("27C") with Shelricka's other guests. See id. pp. 60:22–62:3, pp. 85:13–89:4, pp. 151:2–152:3, p. 188:11–22. Discovering Gloria's presence in 27C, Kevin made forcible entry thereto yelling that

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[1] Spring Grove is a Section VIII government-subsidized housing complex located in Taylors, South Carolina, the ownership of which changed ownership "a couple of times" between 2010 and 2013. See 2010 Model Lease for Subsidized Programs, pp. 291-304; Immunity Hr'g Tr. p. 198:1–2.

[2] Kevin was dropped off at Spring Grove by a car driven by an unknown individual. See Immunity Hr'g Tr., pp. 186:22–24.

he was going to kill Gloria. See id. p. 86:3–18, p. 87:11–12, pp. 89:23–90:16, pp. 151:7–152:14. When Shelricka attempted to stop Kevin, he hit her, and Tivarius intervened. Kevin then pulled a razor blade from his mouth, cutting Tivarious across the eye. Tivarious and another friend managed to get Kevin outside, where he ran off. See id. pp. 61:23–62:20, p. 86:3–20. In response to Kevin having forcibly entered 27C and struck Shelricka and assaulted Tivarius with a razor blade, law enforcement was at some point contacted and dispatched to Spring Grove. See id. p. 63:2–10, pp. 91:21–94:4, p. 152:9–14.

Seeking reinforcements Kevin went to the apartment of his nephew, Elfonzo Bruster ("Elfonso"), where he begged Elfonzo to go back with him to Shelricka's to do something about "somebody jump[ing]" him. See id. pp. 89:5–97:8, p. 99:4-8, p. 108:2–20 ("[Kevin] had blood on his shoes and looked like a black eye. And [Kevin] said, somebody jumped me, you [Elfonso] not gonna do nothing?…And [Kevin] keep telling [Elfonso], come on, let's go, come on, let's go. We didn't pay attention until [Elfonso] walked with [Kevin towards Shelricka's]."), p. 109:3-13, p. 115:1-7, p. 118:15-21, p. 108:7-9, pp. 186:22-187:9, pp. 204:10–205:7, pp. 208:20-209:5. Around the same time Kevin was recruiting and urging Elfonzo to join him in attacking Tivarius and his family, Glenn returned to Spring Grove with a bag from the convenience store to see Kiana Grayson ("Kiana"), Shelricka's across-the-parking-lot-neighbor, waiving him over to her apartment. Glenn, expecting to get change back from money he had given Kiana earlier to buy a pizza, walked up to Kiana to find her warning him of what had happened in his absence. See id. pp. 151:9–153:24, pp. 187:10–188:22. Prior to being approached by the police officers who had reported to the scene as a result of Kevin's earlier assault of Tivarius, Glenn, while being warned by Kiana set his convenience store bag down

inside the door of Kiana's apartment. See id. p. 67:2–9, p. 69:3-22; p. 92:9–16, p. 152:1–14, p. 153:1–21, pp. 154:20–155:5; p. 187:10–20, p. 193:11–13. The police officers inquired as to Glenn's knowledge of the events that had transpired at the Complex involving Kevin, to which Glenn responded that he had no knowledge of any such events as he had been away from the Complex at the time the assault in question transpired. See id. pp. 152:9–153:21. At that time, Tivarius got into Glenn's car and parked it in front of the sidewalk leading to Kiana's apartment.

While Glenn was assisting and cooperating with the police in their investigation, he noticed, but did not think anything of, Kevin and Elfonso lurking in the shadows of a nearby apartment building. See id. p. 153:10–24. Upon concluding his conversation with the police and the police departing the scene, Glenn, out of concern over what the police and Kiana had just told him transpired in his absence, retrieved his belongings from Kiana's apartment to depart from Spring Grove. See id. pp. 153:10–156:7. While Glenn was walking to his car, Kevin and Elfonzo, seeing Glenn alone, abruptly and intentionally blocked Mr. Glenn's access to his car and began threatening Glenn.[3] See id. pp. 88:12-94:4. pp. 110:22–112:16, pp. 187:10-190:14. Upon Kevin and Elfonzo's approach of Glenn and throughout escalation of the confrontation, Elfonzo had his hand in his waistband as one would do when concealing a handgun. See id. pp. 75:1–77:13, pp. 124:8–126:16, pp. 161:11–162:15.

Immediately upon accosting Mr. Glenn, both Kevin and Elfonso aggressively began threatening and interrogating Mr. Glenn about the prior altercation instigated by Kevin with

[3]At the time of the events in question, Glenn, who is small of stature, was approximately 5'7" and 130 lbs. In contrast, Kevin and Elfonso were substantially larger than Glenn, being approximately 6'00" and 175 lbs. and 6'4" and 265 lbs., respectively. See Immunity Hr'g Tr., pp. 97:24–98:8; p. 180:2–12.

Tivarius in 27C, with Elfonso menacingly demanding to know "who jumped my mother fucking uncle?".[4] See id. at p. 63:16-22, p. 65:8-20, p. 71:14-21, p. 92:12-16, pp. 93:9–94:9, p. 95:1–7, p. 99:19-25, p. 105:13-17, p. 108:7-18, p. 118:3-21, pp. 124:6-125:3, p. 153:22–24, pp. 155:11–156:7, p. 160:9–19, pp. 188:25-189:3, p. 205:1-7, p. 206:1-3. Having been at the store during the time of the prior assault perpetrated by Kevin, Glenn denied any involvement or knowledge of the subject about which Kevin and Elfonzo were berating him. See id. p. 93:11–23, p. 153:17-24, pp. 155:11-156:7, p. 160:3–24. Contemporaneous with Glenn responding to Kevin and Elfonzo in an attempt to extricate himself from what was now clearly a dangerous situation, Kevin verbally threatened Glenn's life, stating, "Man, fuck that, [Elfonso], let's do what we said —-what you just said what we came to do. You said we gonna get one of these niggers in this white Lincoln right here, we gonna get all these niggers right here, so let's do what we came to do." Id. p. 156:2–6; see also id. 65:13–18, p. 93:11-23. The car to which Kevin was referring, the white Lincoln, was Glenn's vehicle. See id. p. 68:12–14.

At that point Kevin suddenly and violently attacked Glenn, punching him full-force in the throat and neck, knocking Glenn off-balance and to the ground and splashing Glenn's alcoholic drink into Glenn's eyes, thereby blinding him temporarily. See id. pp. 92:9-94:9, pp. 111:24-112:11, p. 189:2–16, p. 205:5-7, p. 206:1-3., pp. 124:8-125:17, p. 156:11–19, p. 169:11-20, p. 205:8–9. As Glenn was reeling from the violent punch to the throat and struggled to regain his vision by wiping his drink from his eyes, a female witnessing Kevin and Elfonso's

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[4] Elfonso's own testimony, in which he admits that as soon as he and Kevin "walked up on [Glenn]" he demanded to know "what happened down here, man?", is consistent with Glenn's testimony, as well as that of numerous other witnesses, including Ms. Delni Nunez, who was a friend of and hanging out with Elfonso when Kevin ran up. See Immunity Hr'g Tr., p. 65:13–15, p. 93:13–14, p. 99:22–25, p. 108:16–18, p. 155:16-19.

attack of Glenn yelled "GUN!" just in time for Glenn to see Elfonso, who as indicated by his hand positioning and movements near his waistband was carrying a gun and who is known to do so by Glenn and others, pulling a handgun from his waistband. See id. p. 76:6–25, p. 125:8–18, pp. 157:13–158:20, pp. 161:11–162:15. Glenn, in response to being threatened, violently attacked by two larger assailants, hearing a female yell "GUN!", and seeing Elfonso pulling a handgun, and in reasonable fear for his life and that of his family, pulled a handgun of his own, which until that moment had been concealed and known only to Glenn, and fired three (3) almost simultaneous shots in self-defense. See id. pp. 64:24–65:2, p. 94:12-20, pp. 125:14–126:1, pp. 155:11–157:6, pp. 159:4-160:2. Due to Kevin and Elfonso blocking and refusing Glenn access to his vehicle and the violent and surprise nature of the physical attack of which Glenn was the victim, Glenn neither had opportunity to retreat, nor any other probable means of avoiding the danger of losing his life or sustaining serious bodily injury than to act as he did. See id. pp. 96:24-97:8, p. 112:14-16, p. 190:6-14.

After Glenn's shots fired in self-defense created the opportunity for Glenn to escape his attackers, Glenn retreated to the safety of his car, at which point Tivarius, who was driving Glenn's car, understandably decided to leave the location where both he and Glenn had just been the victims of unprovoked and violent assaults. Before exiting the Complex, Tivarius pulled up to a nearby officer, and Glenn indicated an altercation had occurred with two guys and that one of the guys was bleeding and needed help.

ARGUMENT

I. The trial court abused its discretion by denying Glenn immunity under the PPPA based on the conclusory and legally unsupported finding that Glenn failed to establish the second and third elements of common law self-defense concerning imminent danger of serious bodily harm or death

Reversal of the the trial court's denial of immunity is essential not only to ensure justice for Glenn, but more importantly to give proper interpretation to the PPPA and effect to the Legislature's intent that "no person or victim of crime should be required to surrender his personal safety to a criminal." S.C. Code Ann. § 16-11-420(E). The trial court's denial of immunity to Glenn is an abuse of discretion and is in direct contravention of the Legislature's clear intent to enlarge both the right of self-defense and the shield of immunity provided by the PPPA to better "protect persons in South Carolina from violence being perpetrated upon them" by criminals. State v. Jones 416 S.C. 283, 298, 786 S.E.2d 132, 140 (2016). Accordingly, reversal of the trial court's denial of immunity is dictated by the consistent and undisputed facts of this case, the Legislature's "clearly enunciated" intent and reasons for promulgating the PPPA, the sound shift in public policy towards protecting innocent citizens and victims of crime and away from the protection of criminals, as well as the well-settled common law of self-defense and the Supreme Court's recent PPPA jurisprudence.

A. Pursuant to subsection 16-11-450(A) of the Act, Glenn, as a matter of law established each of the elements of common law self-defense by a preponderance of the evidence and is thus entitled to immunity

As the Supreme Court illuminated in State v. Scott and confirmed in the first appeal of this case, "[s]elf-defense is the classic provision of law that justifies the use of deadly force," such that "[i]t was clearly the Legislature's intent that if a person seeking immunity under subsection 16-11-450(A) could prove the elements of self-defense in an immunity hearing,

immunity must be granted." State v. Scott, 424 S.C. 463, 473, 819 S.E.2d 116, 120-21 (2018); Glenn, 429 S.C. at 117, 838 S.E.2d at 495-96.

For purposes of determining statutory immunity on the grounds of the common law doctrine of self-defense, the elements are:

> First, the defendant must be without fault in bringing on the difficulty. Second, the defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger. Third, 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. If the defendant actually was 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. Fourth, 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.

Glenn, 429 S.C. at 116, 838 S.E.2d at 495 (quoting State v. Dickey, 394 S.C. 491, 499, 716 S.E.2d 97, 101 (2011)). Importantly, by satisfying the above elements "[a] person is justified in using deadly force in self-defense…." State v. Smith, 425 S.C. 20, 30, 819 S.E.2d 187, 192 (Ct. App. 2018) (quoting Dickey, 394 S.C. at 499, 716 S.E.2d at 101) (emphasis in original).

As to the first element of self-defense, the trial court properly concluded that Glenn was without fault in bringing on the difficulty. Despite clear direction from the Supreme Court to "make specific findings on the elements," the trial court failed to make a specific finding as to whether Glenn had 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. Glenn, 429 S.C. at 123, 838 S.E.2d at 499. The failure to make a specific finding as the Glenn's duty to retreat is presumably the result of the trial court properly concluding that Glenn was absolved of the duty to retreat pursuant to S.C. Code Ann. § 16-11-440(C) because his presence at Spring Grove had

no proximate connection to the difficulty that arose. Although the trial court's findings with regard to the first and fourth elements of self-defense establish that Glenn was the innocent victim of an unprovoked and violent assault, as a result of the trial court's legally and factually unsupported conclusions regarding the second and third elements of common law self-defense, the trial court, in direct opposition to the expressly stated legislative intent of the PPPA, concluded that Glenn did not have the right to protect himself from his attackers and was required to surrender his personal safety to criminals. S.C. Code Ann. §§ 16-11-420(B), (E) (stating expressly that the intent of the General Assembly in passing the PPPA was to (1) codify the right of "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" and (2) ensure "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") (emphasis added).

Regardless of whether the applicable analysis is that Glenn was in imminent danger or that he actually believed that he was in imminent danger, the testimony presented at the immunity hearing plainly established the second and third elements of common law self-defense as a matter of law. Even the testimony most adverse to Glenn, Elfonso's testimony and that of Delni Nunez ("Delni") who was hanging out with Elfonso when Kevin ran up screaming and was good friends with Elfonso's baby mama, establishes that after a bloody, irate, and aggressively intoxicated Kevin had already broken into Shelricka's apartment, hit her, and slashed Tivarius' eye with a razor blade, he recruited Elfonso, who agreed to go with Kevin because "somebody jumped" Kevin, which culminated in both Kevin and Elfonso waiting until

the police left to jointly accost Glenn in a threatening manner, and in so doing blocking Glenn from reaching the safety of his car and giving Kevin the opportunity to do something about getting "jumped" by commencing a vicious attack on Glenn through a surprise punch to the throat that knocked Glenn off his feet and to the ground.[5] See id. at pp. 102:5–110:8, p. 112:4-8, p. 108:2–20 ("[Kevin] had blood on his shoes and looked like a black eye. And [Kevin] said, somebody jumped me, you [Elfonso] not gonna do nothing?…And [Kevin] keep telling [Elfonso], come on, let's go, come on, let's go. We didn't pay attention until [Elfonso] walked with [Kevin towards Shelricka's]. And like everybody else, trying to be nosy, I walked with them."), p. 109:3-13, p. 115:1-7, p. 118:15-21, p.118:15-21, p. 128:1–7, pp. 186:22-187:9, pp. 204:10–205:7, pp. 208:20-209:5 (Elfonso admitting that Kevin "obviously" [] had other intentions [to engage in violence] when we [Kevin and Elfonso] got down there [to Shelricka's]") (emphasis added).

In addition to these critical and undisputed facts, Elfonso and Delni's testimonies also confirm that Elfonso's purpose for accompanying Kevin back to Shelricka's was driven by Kevin's false claim that he got "jumped" and not by a search for a moped for which there is no

[5] Significantly, "[b]lows to the throat can cause potentially life-threatening complications", such that Kevin's initial act of aggression, particularly in light of the force necessary to knock Glenn to the ground, would, by itself, lead a reasonable person of ordinary firmness to entertain he was in imminent danger of losing his life or sustaining serious bodily injury. See https://www.healthline.com/health/what-happens-if-you-get-punched-in-the-throat#complications.

evidence in the record that it ever existed.[6] Significantly, both Elfonso and Delni corroborate that Elfonso was focused on and demanded Glenn tell him "who jumped my [Elfonso's] mother fucking uncle?" Immunity Hr'g Tr., p. 153:22-24, p. 155:18-19, p. 108:2-20 (confirming that Elfonso's focus in speaking with Glenn was "to see what happened [with regard to Kevin getting jumped]"), p.118:20-21 ("[Elfonso] walked with [Kevin] and [Elfonso] was insisting too much to see what was going on with his uncle."), p. 205:5-7 (admission by Elfonso that he confronted Glenn with a demand to know "what happened down here [at Shelricka's]" with regard to Kevin getting jumped). In fact, no where in Elfonso's testimony, or anywhere else in the record, is there any evidence that Elfonso actually looked for or asked anyone about the location of the alleged moped.[7] Furthermore, neither Elfonso's testimony, nor Delni's testimony rebut the testimony of any of the other witnesses to the altercation who testified that Kevin threatened Glenn by stating "Man, fuck that, [Elfonso], let's do what we said—what you [Elfonso] just said what we came to do. You [Elfonso] said we gonna get one of these niggers in this white Lincoln

[6]Further corroborating Delni's testimony that Kevin was urging Elfonso to take action because "somebody jumped" him, not because Kevin was allegedly missing a moped, is the fact that Kevin was so visibly intoxicated that he could neither have legally operated a moped, nor would anyone in their right mind have helped Kevin find and drive off on a moped. Immunity Hr'g Tr. p. 89:5–20, p. 108:4–5, p. 114:22–24, p. 209:15–17. In fact, Elfonso himself testified that just the night before he had to drive Kevin home because he was too drunk to drive. See id. at p. 204:16–20, p. 209:15–17 (testifying that Elfonso "was pretty sure" Kevin was drinking "'cause that what he do every day").

[7] Quiet to the contrary, the actions of both Kevin and Elfonso of laying in wait until the police left coupled with Elfonso's admission that he immediately confronted Glenn with a demand to know "what happened down here" completely belie any conclusion that Elfonso and Kevin were innocently and peaceably returning to the scene where Kevin had just punched Shelricka and assaulted Tivarius with a razor blade to simply look for a moped. Immunity Hr'g Tr. p. 205:1–6. It begs the question that if Kevin and Elfonso were not returning to "reset fire back to [the violence previously initiated by Kevin]", why would Elfonso, who was not being sought by the police, not use the presence of the police to ensure that he could find and retrieve the moped without the chance of further violence erupting. Immunity Hr'g Tr. p. 97:6–7.

right here, we gonna get all these niggers right here, so let's do what we came to do."[8] Immunity Hr'g Tr. p. 156:2–6 (emphasis added), p. 63:19–22 ("So [Kevin] was like, you [Elfonso] said we gonna get one of these N-word in this car, if not all of them.") (emphasis added), pp. 124:16–125:3 ("[Kevin] said we gonna get one of these N's in this white car [Glenn's vehicle]") (emphasis added), p. 93:19-21 (recalling Kevin's threat to Mr. Glenn as something close to "I know we didn't come up here for no reason, I know we gonna get somebody") (emphasis added).

1. Given that Glenn was unlawfully attacked by way of a violent sucker-punch to the throat that knocked him off his feet and temporarily blinded him, he was actually in imminent danger of of losing his life or sustaining serious bodily injury and the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow

Turning to the application of these uncontroverted facts, including the "indisputable" fact that Glenn was attacked before acting to defend himself (see Order Denying Immunity, p. 2), to the question of whether Glenn was actually in "imminent danger", the Supreme Court has recently held that the "term imminent danger means an immediate or present danger and not a past or future danger." State v. Marin, 415 S.C. 475, 479, 783 S.E.2d 808, 811 (2016); see also Black's Law Dictionary (10th ed. 2014) (defining "imminent danger" in the context of self-defense as "[a]n immediate threat to one's safety…The danger resulting from an immediate threatened injury…"); see also Robinson v. State, 308 S.C. 74, 79, 417 S.E.2d 88, 91 (1992) (noting that when a spouse is actively being physically assaulted the spouse "actually is in

[8] Presumably based on her friendship with Elfonso and his baby mama, Delni speciously claims that, despite being one foot way from Elfonso and Kevin when they accosted Glenn, she "couldn't hear" what Kevin said to Glenn before punching Glenn full force in the throat. Immunity Hr'g Tr. p. 111:10–23. At no time during Elfonso's testimony, and despite being present in the courtroom during the testimonies of Glenn, Tivirius, Shelricka, and Jamarus Smith, did Elfonso controvert the occurrence or joint substance of Kevin's threat as testified to by the aforementioned witnesses.

imminent danger" for purposes of evaluating a claim of self-defense). As is clear from the Supreme Court's opinion in Gaffney v. Putnam, the classic case of imminent danger justifying self-defense is where an innocent party finds himself the victim of an unlawful attack at the hands of another. 197 S.C. 237, 15 S.E.2d 130, 131 (1941) ("One acting in self-defense to repel an unlawful attack is not guilty of assault; he may repel force with force and continue his self defense as long as the danger apparently continues."); see State v. Harris, 382 S.C. 107, 674 S.E.2d 532, 536 (Ct. App. 2009) (discussing imminent danger element and noting that the defendant "did not have to wait until he was actually under attack in order to employ force to defend his life," which by way of logical extension confirms that the state of actually being under attack constitutes "imminent danger") (emphasis added); State v. Andrews, 424 S.C. 304, 314-16, 818 S.E.2d 227, 233-34 (Ct. App. 2018) (holding implicitly that a defendant establishing that he was attacked would establish the imminent danger/belief of imminent danger element of the self-defense analysis), aff'd as modified, 427 S.C. 178, 830 S.E.2d 12 (2019). Put simply, if an innocent individual such as Glenn being accosted, interrogated, and threatened by multiple adversaries of substantially larger stature, and then violently punched in the throat by one of those adversaries, who was belligerent, intoxicated, and blood-covered, does not constitute an immediate threat to one's safety, nothing does.

The conclusion that being accosted and attacked in a manner similar to Glenn constitutes imminent danger is further supported by the decisions in State v. Jones, 416 S.C. 283, 302, 786 S.E.2d 132, 142 (2016) and State v. Douglas, 411 S.C. 307, 313-14, 319, 768 S.E.2d 232, 236, 239 (Ct. App. 2014). In Jones the Court affirmed a grant of immunity under the Act, holding that the fear of and/or actual existence of "imminent danger" element was established where the

victim "grabbed" and "began shaking" defendant while the defendant was trying to leave the scene and the defendant testified that "she believed [the victim] was going to hit her again and that had she not acted as she did, then she would have been killed." 416 S.C. at 302, 786 S.E.2d at 142. Similarly, in Douglas the Court of Appeals also affirmed a grant of immunity based on the holding that defendant reasonably believed that shooting his friend was necessary to prevent great bodily injury where the friend, who was intoxicated and had minutes before the fatal shot shoved defendant, knocked the defendant to the floor, and punched defendant in the eye, moved aggressively towards the defendant after defendant had retreated to arm himself. In light of Jones and Douglas it is clear that physically aggressive acts by an assailant of similar or even lesser severity than the sucker punch to the throat that Glenn received constitute imminent danger for purposes of establishing entitlement to immunity under the Act. Accordingly, the trial court's conclusion that Glenn was not in imminent danger despite the commencement of a violent physical attack upon him is an abuse of discretion both as a matter of law and fact.

Moreover, given the trial court's trivialization of the surprise attack launched by Kevin as merely "a single punch" in concluding that Glenn, while actually being physically assaulted, was not in imminent danger and that the circumstances were not such that would warrant a man of ordinary firmness to strike in self-defense, the trial court would apparently require Glenn and other assault victims to allow a beating to continue for some indeterminate time before earning the right to respond in self-defense. Fortunately, this is not the law in South Carolina. S.C. Code Ann. § 16-11-420(E) ("[N]o 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") (emphasis added); State v. Rivera, 389 S.C. 399, 699 S.E.2d 157,

161 (2010) (Beatty, J. dissenting) ("What a person believes to be the threat level of bodily harm is irrelevant if the actual threat of imminent serious bodily harm is present. It is axiomatic that circumstances indicative of serious bodily harm or the imminent threat thereof yields the right to self defense and the right to arm oneself accordingly. The law does not require a person to submit to a physical beating and to refrain from defending himself until the beating results in serious injury.") (emphasis added). In fact, the law in South Carolina is quite to the contrary, "[the defendant] doesn't have to wait until his assailant gets the drop on him, he has a right to act under the law of self-preservation and prevent his assailant getting the drop on him; if it is apparent, or reasonably apparent his assailant is taking steps to get the drop on him, he must take steps first to prevent such assailant from getting the drop on him." State v. Harris, 382 S.C. 107, 674 S.E.2d 532, 536 (Ct. App. 2009) (quoting State v. Rash, 182 S.C. 42, 50, 188 S.E. 435, 438 (1936) and expounding further that "[t]his language has been interpreted to mean a defendant does not have to wait until actually fired upon to use force to defend his life."). The trial court's apparent desire for Glenn to refrain from defending himself until his beating resulted in serious enough injury appears to be based on the nonsensical conclusion that because Glenn was only punched in the throat once, Kevin, who was belligerent, highly intoxicated, and blood covered and who had already hit a woman and slashed Tivirius' eye with a razor blade he hid in his mouth, must have intended no further violence to Glenn after he leveled Glenn with the initial sucker-punch to the throat. State v. Hendrix, 270 S.C. 653, 660, 244 S.E.2d 503, 507 (1978) ("The deceased was under the influence of alcohol, and his conduct evidenced no intent other than that he intended to do battle."). The trial court's conclusion on this point is not merely unsupported by the record, it is directly contrary to all eyewitness testimony, including that of Elfonso himself, who admitted

Kevin "obviously [] had other [violent] intentions when we [Kevin and Elfonso] got down there [to Shelricka's]". Id. at p. 209:4–5 (emphasis added). Further contradicting the trial court's conclusory finding that Glenn was not in imminent danger, even Delni, Elfonso's friend, confirmed that Glenn had no way to avoid being attacked and suffering serious injury other than to act as he did in self-defense. See Immunity Hr'g Tr. p. 112:3-16; see also Immunity Hr'g Tr. p. 96:24-97:8, p. 126:13-20, p. 190:6-14. Furthermore, the completely unprovoked and surprise nature of the initial attack upon Glenn, particularly in light of Kevin's earlier acts of violence of which Glenn had just been warned by the police and Kiana, confirms a motivation of revenge and a desire to get the drop on Glenn and to render him defenseless by immediately inflicting as much damage as possible on him while he was unsuspecting and unprepared. W. LaFave & A. Scott, Criminal Law, at 456-57 (2d ed. 1986) ("[A]ccount must be taken of the respective sizes and sex of the assailant and defendant, of the presence of multiple assailants, and of the especially violent nature of the unarmed attack. Past violent conduct of the assailant known by the defendant is also relevant in assessing what the defendant reasonably believed was the quantum of risk to him."). Fortunately, Glenn was able to react quickly to exercise his "right to act under the law of self-preservation and prevent his assailant [from] getting the drop on him" any further. Harris, 382 S.C. 107, 674 S.E.2d at 536 (quoting Rash, 182 S.C.at 50, 188 S.E. at 438). For the trial court to punish Glenn and deny him immunity for quickly responding to the imminent danger in which he was placed by the physical assault on his person is an error of law.

2. Assuming an unlawful and violent physical attack does not constitute immediate danger, given the undisputed circumstances Glenn nonetheless actually believed he was in imminent danger and a reasonable person of ordinary firmness would have entertained the same belief

Even assuming that actually being subject to a violent and surprise attack that commenced with a sucker-punch to the throat with sufficient force to knock Glenn off his feet does not constitute an imminent danger, the undisputed facts also establish that Glenn actually believed he was in imminent danger upon being accosted by Kevin and Elfonso. As to the initial question as to Glenn's actual belief, the Supreme Court held in Jones that the element concerning a defendant's actual belief of imminent danger was satisfied where the defendant "claimed in her statement that she believed [the victim] was going to hit her again and that had she not acted as she did, then she would have been killed." 416 S.C. at 302, 786 S.E.2d at 142; see also State v. Hill, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993) (holding that for purposes of a request for a self-defense jury charge that standing "alone" a "struggle" in which the defendant was "attack[ed]" and "grabbed by [] the throat" is "evidence that [a defendant] was in fear of imminent danger of losing her life or sustaining serious bodily injury"). To this effect the unrebutted testimony of Glenn, as well as that of Shelricka, Kiana, Tivarius, Jamarus, and even Elfonso's friend, Delni, clearly establishes that Glenn believed Kevin and Elfonso intended to cause him serious bodily injury or death by way of continuing the assault launched by Kevin. Immunity Hr'g Tr. p. 155:15-157:4, p.160:9-162:14. Further establishing Glenn's actual fear of imminent danger and the reasonableness thereof, and regardless of whether or not Elfonso actually had a gun, there is no evidence or testimony rebutting that Elfonso was known by Glenn and others to carry a gun, that Glenn and others saw Elfonso keep his hand under his shirt near

his waistband in a manner making it appear that Elfonso was gripping a pistol when Kevin and Elfonso accosted Glenn, or that Glenn and others heard a female witnessing Kevin and Elfonso's attack of Glenn yell "GUN!" just in time for Glenn to partially clear his eyes and see Elfonso pulling a handgun or what appeared to Glenn to be a handgun from his waistband. Disregarding this evidence and the fact that "[a] person has the right to act on appearances, even if the person's belief is ultimately mistaken," the trial court summarily and incorrectly concludes without legal support that because a gun was not found on the scene and testimony was "inconsistent" as to whether Elfonso was "seen holding a gun", Glenn did not have an actual fear of imminent danger and that, even if he did, such fear was not reasonable.[9] Dickey, 394 S.C. at 501, 716 S.E.2d at 102. This conclusion is in direct contravention to the Supreme Court's holding in Dickey, in which the Court held that the defendant actually believed he was in imminent danger and that such fear was reasonable where the "State did not disprove Petitioner's testimony that [victim] reached for something under his shirt as he continued toward Petitioner." Dickey, 394 S.C. at 503, 716 S.E.2d at 103; cf. State v. Nix, 288 S.C. 492, 494, 343 S.E.2d 627, 628 (Ct.App.1986) (affirming defendants' armed robbery convictions where defendant pointed something under his shirt at store clerk and demanded money despite clerk's admission "she did not see a gun").

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[9] In addition to the other errors of law the trial court also erred in stating that to the extent Glenn's claim of self-defense was based on a belief of imminent danger, Glenn was required to prove that "a reasonably prudent man of ordinary firmness and courage would have held the same belief and acted in kind in inflicting great bodily injury to the Victim," instead of simply that "a reasonably prudent man of ordinary firmness and courage would have held the same belief." Order Denying Immunity p. 3; State v. Cervantes-Pavon, 426 S.C. 442, 827 S.E.2d 564 (2019) ("We also note the court's error in stating the Act required Cervantes-Pavon to prove he was entitled to immunity 'beyond' a preponderance of the evidence, instead of 'by' a preponderance of the evidence. While we readily understand the court may have simply misspoken given its correct recitation of the standard immediately before the erroneous statement, this is one of several errors of law that contribute to our ultimate conclusion.")

Furthermore, "while it is well-settled that mere words, however, 'abusive, insulting, vexatious or threatening,' will not in themselves justify the use of a deadly weapon, such words if 'accompanied by an actual offer of physical violence' reasonably warranting fear of serious bodily harm, may be an integral part of a plea of self-defense…." Silas v. Bowen, 277 F. Supp. 314, 318 (D.S.C. 1967) (quoting Putnam, 197 S.C. 237, 15 S.E.2d at 131); State v. Dickey, 394 S.C. 491, 716 S.E.2d 97, 102 (2011) ("Words accompanied by hostile acts may, depending on the circumstances, establish a plea of self-defense"). "Moreover, in determining whether there was a reasonable cause for the apprehension of serious bodily harm, the difference in age, size, and relative physical strength of the parties to the controversy is a proper matter for consideration." Bowen, 277 F. Supp. At 318 (citing State v. Self, 225 S.C. 267, 271, 82 S.E.2d 63, 67 (1954)); Hendrix, 270 S.C. at 661, 244 S.E.2d at 507 ("The difference in age; the fact of the prior bad blood between the two men; the heavy consumption of alcohol by deceased; and the prior threat of the deceased are all factors which would give appellant the right to judge the conduct of his adversary more harshly than otherwise.") (emphasis added); see also W. LaFave & A. Scott, Criminal Law, at 456-57 (2d ed. 1986) (noting that in addition to differing physical characteristics, the presence of multiple assailants, the violent nature of an unarmed attack, and past violent conduct of the assailant known by the defendant is also relevant in assessing what the defendant reasonably believed was the quantum of risk to him).

Applying these well-settled principles to the factually similar case of Dickey, the Supreme Court held that the "uncontroverted" facts "established as a matter of law that Petitioner actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, and that a reasonable person of ordinary firmness would have entertained the same belief" where

"[the victim] was highly intoxicated, acted aggressively over the course of the conflict, that he began advancing toward Petitioner quickly with the purpose of assaulting him, that he continued advancing toward Petitioner after Petitioner pulled the gun, and there was great disparity in the physical stature and capabilities of [the victim] and Petitioner." Dickey, 394 S.C. 491, 716 S.E.2d at 102. Just as in Dickey, the consistent and uncontroverted facts establish that Glenn was significantly smaller than either Kevin or Elfonso, that Glenn had just been informed of a violent attack occurring in his absence, that Glenn was accosted and aggressively interrogated by two men of larger stature who had hidden in the shadows until the police left, that Glenn's assailants blocked Glenn from reaching the safety of his car, that Elfonso kept his hand under his shirt at his waistband as if he was gripping a handgun as he and Kevin accosted Glenn, and that Kevin, who was belligerent, heavily intoxicated and already covered in blood, ultimately threatened Glenn before violently sucker-punching Glenn in the throat with enough force to knock Glenn off his feet. In light of Dickey, these facts on their own are sufficient to establish as a matter of law that Glenn was actually in fear of imminent danger and that such fear was reasonable, however, the facts of this case present the additional circumstance that Glenn was temporarily blinded by the unlawful attack to which he was subjected. It is axiomatic that being rendered blind at the outset of a violent surprise attack, a condition that would secure one's attacker a marked and continuing advantage from which to inflict further and more serious injury in short order, would undoubtedly place even a man of the strongest constitution and resolve in reasonable and justified fear of imminent danger of serious bodily injury or death. As with the question of Glenn being in imminent danger, here again the trail court conclusory finding as to

Glenn's fear of imminent danger and the reasonableness thereof is supported by neither the law or the record and as such constitutes an abuse of discretion.

3. With regard to the right of self-defense, where several persons are acting together aggressively toward an individual, the individual can defend himself against any of such persons or all of them if it reasonably appears necessary to protect himself from death or great bodily injury

Despite the admissions of Elfonso and Delni and the other evidence above-noted that establishes that Elfonso went with Kevin back to Shelricka's in response to Kevin "begging" Elfonso to do something about Kevin's false claim that he was "jumped" and "beat [] down like a rag doll", the trail court appears to adopt the argument proposed by the State, and expressly rejected by the Supreme Court in the Scott case, that "even if [Glenn] was entitled to use deadly force against [Kevin] under the law of self-defense, he was not entitled to use deadly force against [Elfonso]." Scott, 424 S.C. at 471, 819 S.E.2d at 119 (affirming a grant of immunity under the PPPA to a defendant, who in the exercise of self-defense shot an unassociated third party, and rejecting the State's argument that the defendant was not reasonable in his fear of a third party that appeared in the heat of the moment to be acting in concert with the main aggressor). Underpinning the propriety of the Supreme Court's rejection of the State's argument in Scott is the longstanding principal that:

> Where several persons are acting together aggressively toward another, and, because of their acts or the acts of either of them, it reasonably appears to him that his life is in danger, or he is in danger of great bodily harm, he may slay any of such persons or all of them, if it reasonably appears to him to be necessary so to do to protect himself from death or great bodily harm. And when a person is called upon to act under such circumstances, he is not bound to decide as to which one of the persons made the actual hostile demonstrations and refrain from injuring the others.'

Corbin v. State, 614 A.2d 1329, 1332 (Md. App. 1992) (quoting Francis Wharton, The Law of Homicide § 240 at 396-97 (Frank H. Bowlby ed., 3d ed.1907)) (footnotes omitted). Despite the Scott decision and its commonsense foundations, the trial court, similar to the distance between the cars in Scott, incorrectly concludes that Elfonso was not an aggressor or threat to Mr. Glenn because Elfonso did not "take part in any direct physical altercation with [Glenn]" (Order Denying Immunity p. 2), and instead only aggressively demanded that Glenn tell him "who jumped [his] mother fucking uncle?" Immunity Hr'g Tr., p. 153:22-24, p. 93:13-14, p. 99:22-25, p. 155:18-19, p. 108:2-20, p. 205:5-7. However, this argument is equally unavailing as it was in Scott because Elfonso and Kevin were acting and appeared to be acting in concert as they hid in the shadows together waiting for the police to leave before walking together to jointly block Glenn's path to his vehicle, and then commencing to jointly interrogate and threaten Glenn. Scott, 424 S.C. at 472, 819 S.E.2d at 120 (holding defendant reasonably feared that a third party unassociated with an aggressor posed an imminent danger to defendant and his family where the third party followed the aggressor who was following defendant's daughter to defendant's home, appeared to be driving in tandem with the aggressor, and the third party "never identified himself to [defendant] and in doing so left [defendant] to reasonably believe that [the third party] too was an imminent threat"). Moreover, Elfonso exchanged no pleasantries upon confronting Glenn, and inquired nothing about a moped, but instead proceeded immediately to menacingly demanding to know "who jumped [his] mother fucking uncle?" Immunity Hr'g Tr., p. 153:22-24, p. 155:18-19, p. 108:2-20, p. 205:5-7. Put simply, Elfonso's behaviors did not evidence a party intent on keeping the peace, but instead one who was ready "reset fire back to [the violence previously initiated by Kevin]". Immunity Hr'g Tr. p. 97:6–7. Had Elfonso not been aiding

Kevin in some unlawful purpose, or at a minimum desired to not appear as if he was adding Kevin in an unlawful purpose, Elfonso certainly could have approached the police to help in the search for the alleged moped or, had he actually believed his uncle had been the victim of an assault, he could have reported the alleged assault to the police as opposed to aiding Kevin in "doing something about it" himself. As such, if Elfonso "was present merely to observe these events or even to [find a moped], the credible evidence presented simply fails to support such a finding." Scott, 424 S.C. at 472, 819 S.E.2d at 120. The Scott court highlighted the absurdity of the such a "innocent bystander" argument noting that:

> At oral argument, Justice James asked the State, "Does [Scott] have to interview, I'm not being facetious, does he have to interview the perpetrators and ask 'which one of you fired that shot so I can fire my shot accordingly?' "The answer is, "No," because, "A person has the right to act on appearances, even if the person's belief is ultimately mistaken."

Id. (quoting Dickey , 394 S.C. at 501, 716 S.E.2d at 102). Accordingly, the evidence of Kevin and Elfonso acting in concert clearly establishes that Glenn reasonably believed both Kevin and Elfonso were aggressors and posed an imminent danger to Glenn losing his life or sustaining serious bodily injury, and that a reasonably prudent man of ordinary firmness and courage would have entertained the same belief. See Immunity Hr'g Tr., p. 189:2-3 (stating that "[b]oth [Kevin and Elfonso] looked like they was going towards [Glenn after Kevin initially hit Glenn], p. 190:6-14 (confirming that "[b]ased on [Kiana's] perception of the event [] Mr. Glenn's life [was] in jeopardy at the time he was attacked"), p. 192:24-193:5 (confirming that both Kevin and Elfonso "were a threat to Mr. Glenn" once the attack commenced).

Moreover, and though not directly applicable to the prosecution of the present case, the "hand of one is the hand of all" doctrine as recently discussed in State v. Young is illuminating

with regard to the question of whether Kevin and Elfonso were acting in concert. 429 S.C. 155, 838 S.E.2d 516 (2020). As in Young, the argument that Elfonso was not acting in concert with Kevin for purposes of determining whether he was also a threat to Glenn, "rests heavily on [Elfonso] disassociating himself from [Kevin's actions] and from the particular [punch] that [struck]" Glenn. Young, 429 S.C. at 164-65, 838 S.E.2d at 520-21 (quoting Alston v. State, 339 Md. 306, 662 A.2d 247, 247–48 (Md. 1995), aff'g 101 Md.App. 47, 643 A.2d 468 (Md. Ct. Spec. App. 1994). Although "[Kevin] may have been the man who…formally [attacked] [Glenn], he would not have [thrown that sucker-punch] had it not been for the 'aid' and 'encouragement' of [Elfonso]." Id. (explaining that under the 'hand of one is the hand of all' doctrine, one who joins with another to accomplish an illegal purpose—whether by encouraging or aiding and abetting —is guilty as a principal) (citing State v. Harry, 420 S.C. 290, 299, 803 S.E.2d 272, 276–77 (2017)). Therefore, the relevant frame of reference is Elfonso going with Kevin back to Shelricka's and thereby encouraging and aiding Kevin in his clearly stated desire for revenge. Id.; see also State v. Ward, 374 S.C. 606, 649 S.E.2d 145, 149 (Ct. App. 2007) (holding that there was evidence of a "common plan or scheme between Ward and his co-defendant where both defendants were with the group of men who "confronted" the victim at his truck, the co-defendant and Ward chased after the victim's car in the same truck, and as the victim "attempted to run away from the mob, a witness testified that Ward's co-defendant said, 'some bitch is going to die tonight,' and 'we will handle that'"). As evidenced by Kevin's continued begging for Elfonso to go with him to do something about him "getting jumped," but for Elfonso agreeing to go with Kevin back to Shelricka's Kevin never would have accosted, threatened, or attacked Glenn. In light of these facts and the applicable legal principles, it is clear that Elfonso, through

his own actions, whether intentionally or not, created the appearance that he had returned to Shelricka's with Kevin as a result of and to do something about Kevin's false allegations that he got "jumped," and in so doing made reasonable the appearance and belief that he was acting together with Kevin when Glenn was accosted, interrogated, threatened, and ultimately attacked by Kevin and Elfonso. Consequently, it was an abuse of discretion from both a standpoint of law and fact for the trial court to conclude that Glenn failed to establish the second and third elements of common law self-defense because Elfonso did not "take part in any direct physical altercation with [Glenn]." Order Denying Immunity p. 2.

4. The trial court abused its discretion in denying Glenn immunity based on 1) Glenn seizing the opportunity created by his act of self-defense to retreat to safety, and 2) Glenn's language and behavior following his act of self-defense

Although it has been stated that "the language and behavior of the defendant at the time of the shooting, or immediately afterwards, showing his attitude of aggression or of regret, clearly tended to enlighten the jury on the issue as to whether the shooting was done with malice, or in heat and passion, or in self-defense," any such words or actions must be viewed in light of the exigent circumstances. State v. Oates, 421 S.C. 1, 28 n.12, 803 S.E.2d 911, 926 n.12 (Ct. App. 2017) ("The language and behavior of the defendant at the time of the shooting, or immediately afterwards, showing his attitude of aggression or of regret, clearly tended to enlighten the jury on the issue as to whether the shooting was done with malice, or in heat and passion, or in self-defense.") (quoting State v. Martin, 94 S.C. 92, 94, 77 S.E. 721, 721 (1913)). One such exigency is the equally well-settled principle that "if one can with reasonable safety to himself retreat, and thereby avoid the necessity to strike in self-defense, then the necessity for which the law will excuse him for striking cannot be said to exist." State v. Mckellar, 85 S.C.

236, 67 S.E. 314 (1910); see also State v. Burriss, 334 S.C. 256, 268, 513 S.E.2d 104, 111 (1999) ("The law says if one can give back or step aside, or retreat without increasing his danger, and thus avoid taking human life, it is his duty to do so, and unless he has done so, it will not permit his plea of self-defense.") (Burnett, J., dissenting) (quoting State v. George , 119 S.C. 120, 121, 111 S.E. 880, 880 (1921)); State v. Washington, 424 S.C. 374, 414, 414, 818 S.E.2d 459, 480 (Ct. App. 2018) ("Washington's participation in the fight shows Washington had the opportunity, and in fact did remove himself momentarily from the fight when he came up to the stoop and pulled a gun on Coakley. Thus, he could have retreated at that moment."). Although the PPPA has recently relieved certain individuals from the legal duty to retreat in specific circumstances contemplated by the Act, from a moral standpoint and for those not covered by the Act, the duty to avoid taking a life if one can do so without increasing his danger is still very much so an obligation to which all South Carolinians are bound. Accordingly, where one seeks to comply with the moral and/or legal duty to retreat if and when he can safely do so, it is improper and an error of law for the courts of South Carolina to deny immunity on the ground that the defendant sought to remove himself from the zone of danger where the defendant's act of self-defense created the opportunity to do so. In the present case, the trial court purports to deny immunity on the ground that Glenn was not in imminent danger because after he acted in self-defense he did not "seek the assistance of Deputy Stan Whitten", but instead "jumped in a car and fled the

scene," stopping to "inform[] Deputy Hobart Lewis that 'someone got shot,' but fail[ing] to mention [his] involvement" or perception of the assault.[10] Order Denying Immunity p. 2.

As an initial point, it bears noting that the trial court's findings of fact with regard to the events following Glenn acting in self-defense are unsupported by the plain facts and, more problematically, evidence and raise issues of societal and systemic racism within the law enforcement and judicial communities. First, the trial court finds that Glenn "jumped in a car and fled the scene," in the trial court's words it sounds as if after defending himself Glenn stole the first car he saw in the parking lot and raced out of the parking lot while evading the police. Nothing could be further from the truth. Quite to the contrary, after Glenn's act of self-defense created an opportunity to remove himself from the danger zone, Glenn, as any reasonable person would do and as is morally and/or legally required of one exercising their right of self-defense, sought the relative safety of his car. Reaching his car, Glenn was not even the driver of the vehicle when it departed the scene, rather, Tivarius had occupied the driver's seat having understandably decided to further remove himself, Glenn and their friends from a location at which both he and Glenn had just been the victims of unprovoked and violent assaults. Conveniently, the trial court also ignores the fact that regardless of the momentary opportunity to

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[10] To the extent the State argued or the trial court relied on any information outside of the evidence presented during the pretrial hearing, any such information is not an appropriate basis for the trial court's ruling. State v. Cervantes-Pavon, 426 S.C. 442, 827 S.E.2d 564 (2019) ("[A]lthough the State cited to trial testimony to support the court's rulings in its brief, we agree…that, 'while the trial court's pretrial immunity ruling and the jury's verdict on a claim of self-defense may apply the same statutory justification standard, the court's ruling must be based solely on the evidence presented at a pretrial hearing, while the jury's verdict must be based solely on the evidence presented at trial, which may be considerably different.'"). Though the identities of the Deputies are not necessarily of great important in and of themselves, undersigned counsel does not believe that the Deputies names appear anywhere in the record of the immunity hearing and as such indicate that the trial court may have relied upon or based its denial of immunity on information outside the record, which would be a clear abuse of discretion.

retreat created by Glenn's act of self-defense, Kevin, who was already intoxicated, belligerent, violent before Elfonso was injured, was still on the scene and able to and undoubtedly willing and capable to perpetrate further acts of violence on Glenn, Tivarius, or the other passengers in Glenn's car had they remained at the scene.[11] Moreover, given that Glenn and Tivarius were not residents of Spring Grove, the only viable means of further removing themselves from the danger zone to an actual place of safety was to depart Spring Grove.

Further, even the trial court's own finding regarding Glenn's interaction with Deputies Whitten and Lewis belies the finding that Glenn "fled the scene," for nothing is quite as antithetical to fleeing, as that term applies to the commission of a crime, than "pulling right up on a officer and t[elling] him a man was shot, [he] needed to go help." Immunity Hr'g Tr. p. 80:22-25. Moreover, despite Glenn's effort to quickly direct deputies to the scene, which certainly does not indicate an individual driven by malice or anger, the trial court took the interaction with Deputy Lewis in conjunction with the absence of further words by Glenn as its sole and dispositive evidence that Glenn "had [not] been in danger or fear for his life." Order Denying Immunity p. 2. In doing so the trial court erroneously turns on its head the principal that a defendant's "behavior and words immediately after the shooting were relevant to his state of mind immediately before and during the shooting." State v. Oates,, 421 S.C. 1, 28-29, 803 S.E.2d 911, 926 (Ct. App. 2017) (emphasis added). The justification for the underlying principle restated in Oates is that such affirmative acts and statements are as "instinctive, spontaneous utterances of the mind while under the active, immediate influences of the transaction…[such

[11] Moreover, in light of the unrefuted testimony of Glenn, Tivarius, and Jamarus that Elfonso appeared to be gripping a handgun in his waistband, Glenn, Tivarius, and Jamarus all believed that Kevin potentially had access to a gun that he could turn on them if they did not get themselves out of the danger zone.

that the] circumstances preclud[e] the idea that the utterances are the result of reflection or design to make false or self-serving declarations." State v. McDaniel, 68 S.C. 304, 310, 47 S.E. 384, 386 (1904) (emphasis added). "When the inquiry is as to a certain transaction, not only what was done but what was said by those present during the transaction is admissible for the purpose of explaining its character…[however] [i]f the declarations are a mere narration of a past occurrence, they are not admissible as res gestae." Id. 47 S.E. at 386. In addition to the fact that "someone got shot" constitutes an inadmissible "mere narration of past occurrence," in the face of silence as to any other points, the "special reliability accorded to a statement uttered in spontaneous excitement which suspends the declarant's powers of reflection and fabrication" is lacking such that Glenn's silence cannot be used to explain the character of the difficulty that preceded Glenn's interaction with Deputy Lewis.[12] State v. Dennis, 321 S.C. 413, 468 S.E.2d 674 , 677 (Ct. App. 1996).

Even if Glenn's silence did not lack the affirmative nature to make it admissible and the "someone got shot" statement was not a "mere narration of past occurrence," the silence and comment to Deputy Lewis fall outside the moments "immediately" following the self-defense shooting during which Glenn would be under the spontaneous excitement which suspends the

[12] Additionally, the trial court's use of Glenn's silence, particularly pre-Miranda, to a police officer to deny Glenn the fundamental right of self-defense as protected by the Second Amendment to the United States Constitution certainly implicates and runs afoul of Glenn's Fifth Amendment right to remain silent and against self-incrimination as extended to the States through the Fourteenth Amendment. "In essence, the [trial court] attempted to show had [Glenn] acted in self-defense he would have immediately explained this to authorities." State v. Hill, 360 S.C. 13, 17, 598 S.E.2d 732 (Ct. App. 2004).

declarant's powers of reflection and fabrication."[13] Illustrative of the narrowness of the time window in cases such as this, the Court of Appeals, in examining the defendant's behavior immediately after a shooting, stated in Oates:

> Nelson testified that immediately after shooting Victim, Appellant was "waving [his pistol] around and saying, [‘whoever comes] near me, I [will] kill you, don't move.[’]" Nelson also testified that when he asked Appellant why he killed Victim, Appellant "was just saying bad words" and "put his gun...on my forehead ...[a]nd he said, [‘]You make another step, I [will] kill you.[’]" Nelson's neighbor, Steve Varedi, recounted that immediately after Appellant shot Victim, Appellant "was waving the firearm around just erratically at everyone, myself included." Claudia Olivera gave a similar account: "[Appellant] pointed the gun at me and at everyone, and he pointed the gun to my husband's head."She testified that when she tried to get near Victim's body, Appellant told her "[‘]don't move or I'll shoot.[’]"

Oates, 421 S.C. at 28-29, 803 S.E.2d at 926. Based on the evidence examined by the Court in Oates, it is clear that "immediately after" is a brief and narrow window that does not extend beyond the heat of the moment. See also McDaniel, 68 S.C. at 310, 47 S.E.at 386 (holding that declarations in a self-defense case that "were made probably within two or three minutes after the shooting, and within two or three hundred feet of the place of the shooting" were not admissible where the "circumstances tended to indicate a mind which was not then being actively influenced by the transaction to make explanation thereof, but rather a mind adverting to means of future safety." Id.

Furthermore, even if Mr. Glenn's interaction with police did not occur outside the moments immediately following the shooting, the fact that Mr. Glenn or his brother did not seek

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[13] Moreover, it is an important distinction that this proceeding is focused solely on the elements of immunity as provided for by the PPPA and not on the elements of the crimes for which the State indicted Glenn, which might provide a broader basis for consideration of the events transpiring after Glenn reached the safety of his car.

the assistance of the police is in no way probative of whether Mr. Glenn was not in imminent danger or did not reasonably believe he was in imminent danger. Far from being evidence negating the elements of self-defense, Mr. Glenn or his brother not seeking the assistance of the police is nothing more than confirmation of the societal and systemic concerns about policing and justice that have been experienced by the black community for years, and have recently become the focus of national discussion. As Chief Justice Beatty recently discussed in his dissenting opinion in State v. Spears, 429 S.C. 422, 839 S.E.2d 450 (2020) in connection with an African-American's Fourth Amendment protections regarding seizure:

> Scholars have examined ad nauseam the dynamics between marginalized groups—particularly African-Americans—and law enforcement.[14] African-Americans generally experience police misconduct and brutality at higher levels than other demographics.[15] Consequently, it is no surprise that scholars have also found African-Americans often perceive their interactions with law enforcement differently than other demographics. "For many members of minority communities, however, the sight of an officer in uniform evokes a sense of fear and trepidation, rather than security." Robert V. Ward, Consenting to a Search and Seizure in Poor and Minority Neighborhoods: No Place for a "Reasonable Person", 36 How. L.J. 239, 247 (1993). Moreover, "[g]iven the mistrust by certain racial, ethnic, and

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[14]See, e.g., Charles R. Epp et al., Beyond Profiling: The Institutional Sources of Racial Disparities in Policing, 77 Pub. Admin. Rev. 168 (2017); Emily Ekins, The Cato Inst., Policing in America: Understanding Public Attitudes Toward the Police. Results from a National Survey (2016).

[15]See, e.g., Epp, supra , at 174 ("Simply put, investigatory stops of vehicles especially target minority communities and people of color."); Ekins, supra , at 30 ("African Americans are about twice as likely as whites to report profanity or knowing someone physically mistreated by the police."); Scottie Andrew, Police Are Three Times More Likely to Kill Black Men, Study Finds: 'Not a Problem Confined to a Single Region', Newsweek (July 23, 2018, 1:41 PM), https://www.newsweek.com/black-men-three-times-likely-be-killed-police-1037922 ("Across the country, black men are over three times more likely to be killed by police than white men, according to a study ...."); Maggie Fox, Police Killings Hit People of Color Hardest, Study Finds, NBC News (May 8, 2018, 8:00 AM), https://www.nbcnews.com/health/health-news/police-killings-hit-people-color-hardest-study-finds-n872086 ("While just over half of people killed by police are white, Hispanics and African-Americans are on average younger, the researchers found. And people of black, Hispanic and Native American background are disproportionately killed by police, they reported.").

> socioeconomic groups, an individual who has observed or experienced police brutality and disrespect will react differently to inquiries from law enforcement officers ...."). Id. at 253.

Unfortunately, as is the case with Fourth Amendment protections, given the analytical framework applicable to questions of self-defense and circumstances that are frequently involved therewith, "fail[ure] to meaningfully consider the ways in which a person's race can influence their experience with law enforcement" can mean that "minority groups are not always afforded the full protections" of their fundamental constitutional right to self-defense under the Second Amendment. Id. 429 S.C. at 449, 839 S.E.2d at 464. As further noted by Chief Justice Beatty, and of particular significance to the trial court's denial of immunity to Glenn based on the fact that he "did not seek assistance from Deputy Stan Whitten," Courts have also noted the existence of racial disparities in policing.

> [O]ur court addressed at length "the burden of aggressive and intrusive police action that falls disproportionately on African-American, and sometimes Latino, males" and observed that "as a practical matter neither society nor our enforcement of the laws is yet colorblind." There is little doubt that uneven policing may reasonably affect the reaction of certain individuals—including those who are innocent—to law enforcement.

Id. 429 S.C. at 449, 839 S.E.2d at 464 (quoting United States v. Brown, 925 F.3d 1150, 1156 (9th Cir. 2019). Given the illumination that has been brought to the racial disparities in both law enforcement and the judicial system, the trial court's denial of immunity should be considered an abuse of discretion given that the central finding supporting denial of immunity fails to meaningfully consider the ways in which a Glenn's race influenced his experience with and, consequently, reaction to law enforcement.[16]

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[16] Henning, Kristin N. (2018) "The Reasonable Black Child: Race, Adolescence, and the Fourth Amendment," American University Law Review: Vol. 67 : Iss. 5, Article 2, 1554 ("A black youth's flight from the police is just as likely to reflect a personal desire to avoid contact with a corrupt system as it is to be consciousness of guilt.").

In conclusion, from the PPPA's "clearly enunciated" intent and the "broadly worded" language of S.C. Code Ann. § 16-11-440(C) it is apparent that the PPPA was enacted to provide broad protection for innocent persons who find themselves the victim of criminal activity to have the right to defend themselves without fear of prosecution by shifting self-defense laws away from protecting criminals to the side of victims through the extension of the common law principle that intruders enter the home at their own peril to attackers invade people's right to remain unmolested at their peril. Jones 416 S.C. at 296, 786 S.E.2d at 139.

In opposition to the legislative intent of empowering citizens to "protect themselves… from…attackers without fear of prosecution," the trial court's decision offers protection not to Glenn, who by all accounts was the victim of an unprovoked violent attack by multiple assailants, but rather to Glenn's attackers on the nonsensical grounds that Glenn had not received a sufficiently severe beating yet to justify defending himself, and that as a young black man his first reaction to being involved in a self-defense shooting was not to run into the open and waiting handcuffs of law enforcement. Accordingly, in light of the consistent and uncontested facts establishing Glenn's entitlement to immunity, the trial court's conclusory and legally unfounded Order Denying Immunity should be reversed as an abuse of discretion.

5. Having satisfied the first three elements of common law self-defense, the facts establish that Glenn is entitled to immunity pursuant to S.C. Code Ann. § 16-11-440(C). However, assuming arguendo that Glenn did not meet the statutory requirements of S.C. Code Ann. § 16-11-440(C), Glenn neither had the ability nor duty to retreat under the circumstances and, accordingly, Glenn is entitled to immunity pursuant to S.C. Code Ann. § 16-11-450

Section 16-11-440(C) 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.

Glenn, Op. No. 27935 (Shearouse Adv. Sh. No. 49 at 31-32) (quoting S.C. Code Ann. § 16-11-440(C) (2015)) (emphasis in original). Where the section is applicable, it replaces the duty to retreat element required to establish self-defense. Id.

As discussed hereinabove, the uncontroverted evidence in the record establishes that in light of the proximate cause analysis adopted by the Supreme Court in Glenn, Mr. Glenn was not engaged in any unlawful activity and was in a place where he had a right to be when he was the victim of an unprovoked attack by Kevin and Elfonso. Accordingly, Mr. Glenn had no duty to retreat when attacked by Kevin and Elfonso and had the right to stand his ground and meet force with force, including deadly force given his reasonable belief that it was necessary to prevent death or great bodily injury to himself.

However, assuming arguendo that Mr. Glenn did not satisfy the elements of Section 440(C), he nonetheless is entitled to immunity because he neither had the ability nor the duty to retreat under the circumstances. "A defendant is not required to retreat if he has 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." Dickey, 394 S.C. at 501, 716 S.E.2d at 102 (citation and internal quotations omitted). Just as in Dickey, and as discussed previously, Mr. Glenn was not at fault in bringing about the harm by exiting his friend's apartment to walk to his car to depart the Complex. Once outside, Mr. Glenn was faced with a situation where two men of superior physical stature advanced toward him and intentionally blocked his path to his

vehicle, one making aggressive demands and the other highly intoxicated, visibly enraged, and threatening and ultimately acting on an obvious intent to assault Mr. Glenn. Moreover, the State did not disprove Mr. Glenn's testimony or that of other witnesses that stated Elfonso reached for or appeared to reach for something under his shirt throughout his and Kevin's engagement and attack of Mr. Glenn—thus leading Mr. Glenn to believe Elfonso was armed with a deadly weapon. What's more, the testimony is consistent that Kevin, Elfonso, and Mr. Glenn were close enough together that Mr. Glenn had no other means to avoid serious bodily injury or death other than to act as he did, as is evidenced by the fact that Kevin was able to punch Mr. Glenn in the throat and knock him to the ground before Mr. Glenn knew what was happening. Accordingly, even if Mr. Glenn had not been knocked to the ground and blinded by the initial assault and been able to turn his back to try to run for the closed and potentially locked apartment doors behind him, his assailants' attack would have likely continued from behind before Mr. Glenn could even reach the potentially locked apartment doors. Dickey, 394 S.C. at 501, 716 S.E.2d at 102. Thus, Kevin and Elfonso, by their own actions of aggressively and intentionally blocking Mr. Glenn from reaching the safety of his car and by knocking Mr. Glenn to the ground and blinding him through the initial physical attack, eliminated Mr. Glenn's ability to retreat and left him with 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. Accordingly, Mr. Glenn had no duty to retreat. Therefore, each of the elements required for a valid case of self-defense has been established by a preponderance of the evidence, thereby entitling Mr. Glenn to immunity from prosecution for his exercise of his fundamental right of self-defense.

II. It was error for the trial court to find Glenn, while reasonably exercising his license as a social guest of Spring Grove tenants, was not "in [a] place where he ha[d] a right to be" when he defended himself from an unprovoked attack. S.C. Code Ann. § 16-11-440(C)

In addition to the trial court's opinion being directly contrary to the expressly stated intent of the PPPA, it also is contrary to proper interpretation of S.C. Code Ann. § 16-11-620, which states in pertinent part that:

> Any person who, without legal cause or good excuse, enters into the dwelling house, place of business, or on the premises of another person after having been warned not to do so or any person who, having entered into the dwelling house, place of business, or on the premises of another person without having been warned fails and refuses, without good cause or good excuse, to leave immediately upon being ordered or requested to do so by the person in possession or his agent or representative shall, on conviction, be fined not more than two hundred dollars or be imprisoned for not more than thirty days.

(emphasis added). That the interpretation and application of S.C. Code Ann. § 16-11-620 resulting in the denial of immunity to Glenn under the PPPA constitutes clear error of law is supported by a recent and well-reasoned opinion of the South Carolina Attorney General, well-settled and fundamental principles of South Carolina property law, and a wealth of persuasive jurisprudence and scholarly material.

The Attorney General opinion in question, which is on all fours with the central issue presented by this appeal, was promulgated by the current South Carolina Attorney General in 2013 to respond to a request for opinion from the Honorable Danny Singleton of Seneca on the subject of whether "a person placed on trespass notice with regards to an apartment complex or housing project may enter upon such property at the invitation of a tenant." See Op. S.C. Att'y Gen., p. 5 (June 5, 2013).

Specifically the Attorney General opinion reconciles a property manager's ability to place individuals on trespass notice pursuant to S.C. Code Ann. § 16-11-620 with tenants' rights to possession, use, and quiet enjoyment of their property to conclude that while a property manager or owner possesses the right to place individuals on trespass notice, that right is limited, bound, and superseded by the right of the tenant to invite an individual onto the leased property for lawful purposes. See Op. S.C. Att'y Gen., p. 4 (June 5, 2013) ("[W]e believe a court would hold that § 16-11-620 may not be applied so as to infringe upon a tenant's right of access to his or her residence, including the right to admit an invited guest.") (emphasis added).

The cases from other jurisdictions espousing the same reasoning and underlying principals as the Massachusetts decisions relied upon by the Attorney General Opinion are legion. See Or. v. Schneider, 265 P.3d 36 (Or. Ct. App. 2011) (holding that a tenant had the right to invite guests to the common areas of an apartment complex and accordingly reversing a criminal conviction for trespass because the defendant was privileged to be in the parking lot at the time of his arrest); L.D.L. v. Fla., 569 So.2d 1310, 1312 (Fla. Dist. Ct. App. 1990) (holding that "[a] landlord generally does not have the right to deny entry to persons a tenant has invited to come onto his property[,] [that] [t]his law also applies to the common areas of the premises…. [and that] [o]ne who thus comes upon the premises upon the invitation of the tenant, although expressly forbidden to do so by the landlord, is not guilty of criminal trespass.") (emphasis added); Albee v. Collins, 463 S.E.2d 922, 925 (Ga. App. 1995) ("The tenant's invitation to a third party…also carries with it the same rights enjoyed by the tenant to common areas in a multi-dwelling apartment complex to the extent the use of such common areas is connected to the purpose of the invitation.") (emphasis added; citations omitted); Folgueras v. Hassle, 331 F.Supp.

615, 625 (W.D. Mich., 1971) (holding that "[o]ne of the rights of tenancy with which the landlord may not interfere is the right to invite and associate with guests of the tenant's own choosing"); Right of third person to enter premises against objection of the landlord, 6 A.L.R. 465 (stating that a landlord generally does not have the right to deny entry to social guests a tenant has invited to come onto the tenant's property); see also In re Jason Allen D., 733 A.2d 351 (Md. Ct. Spec. App. 1999) (holding the housing authority's no-trespass order did not supersede the defendant's invitation given by a resident of the housing complex) (emphasis added); see e.g. Vt. v. Dixon, 725 A.2d 920, 922 (Vt. 1999); Anthony v. Chicopee Mfg. Corp., 147 S.E. 887, 888-89 (Ga. 1929); Bremerton v. Widell, 51 P.3d 733, 738-39 (Wash. 2002); D.L. v. Fla., 87 So. 3d 824. 825 (Fla. Dist. Ct. App. 2012); Conn. v. Schaffel, 229 A.2d 552, 562 (Conn. Cir. Ct. 1966); Pa. v. Burford, 73 A. 1064, 1067 (Pa., 1909); Todisco v. Tishman Realty & Const. Co., 62 N.Y.S.2d 458, 459 (Sup. Ct. 1946).

That a social guest of a tenant is not a trespasser is also supported by the Department of Housing and Urban Development (hereinafter "HUD") implementing regulations for the United States Housing Act, 42 U.S.C. § 1437 (hereinafter the "Housing Act"), which substantively prohibits subsidized apartment complexes like Spring Grove from "unreasonably interfering with tenants' ability to entertain guests in the tenants' public housing apartments." Diggs. v. Hous. Auth., 67 F. Supp. 2d 522, 532 (D. Md. 1999); 24 C.F.R. § 966.4(d) (stating that a "lease shall provide that the tenant shall have the right to exclusive use and occupancy of the leased premises which shall include reasonable accommodation of the tenant's guests or visitors…."). Consistent with both the available caselaw and the Housing Act and HUD implementing regulations,

modern law review articles have also engaged in in-depth analysis of the trespass issue and concluded that:

> [I]t is important to stress that tenants, not landlords, have the right to choose who may enter the property in order to visit a tenant in her place of residence. Since a tenant may determine who shall be allowed to enter her home, persons who enter a building with the permission of a tenant cannot be deemed a trespasser, even if they have been forbidden from entering by the landlord. The same analysis applies to persons using roads or walkways to reach a tenant's apartment pursuant to an invitation.

Elena Goldstein, Responding to Public Housing No-Trespass Policies, 38 HARV. C.R.-C.L. L. REV. 215, 221 (2003) (emphasis added); see also Gregory A. Beck, Ban Lists: Can Public Housing Authorities Have Unwanted Visitors Arrested?, 2004 U. Ill. L. Rev. 1223, 1224-38, 1259 (2004) (discussing the common law and statutory background for tenants' right to invite guests to their residence over the objection of landlords and recommending that "ban list policies should recognize an exception for invitees [for] [w]hile an invitation may not give the visitor the right to unrestricted access to the premises, it should at least allow visitation to the tenant's apartment and access to all the common areas necessary for ingress and egress").

Moreover, though the volume of caselaw supporting the position espoused by the Attorney General's June 5, 2013 Opinion is impressive, the more persuasive fact is that each of the above-cited cases are based on well-settled and generally applicable legal touchstones that are consistent with those found in South Carolina jurisprudence. Specifically, in reaching the conclusion that tenants may invite guests to a leased property over the objection of a landlord, the courts have frequently focused on the principle that a tenant's easement is equivalent to a license by which tenants and their social invitees may pass through the complex's common areas in order to access the tenant's apartment. See Minn. v. Hoyt, 304 N.W.2d 884, 890 (Minn. 1981)

(holding that "[o]ne in possession of premises by permission of a tenant who is entitled to possession is not a trespasser but a licensee," and that license bestowed by the tenant "is actually a justification for acts done under the license, a sort of immunity from trespass") (emphasis in original, citation omitted). Consequently, as a "license for tenants to grant or withhold, one embraced within the easement conferred upon them by the letting…and one which the tenants could exercise notwithstanding the objections of the landlord," the landlord or owner "could not revoke the license any more than he could an invitation extended by the tenant to one calling upon any legitimate business." Mass. v. Richardson, 48 N.E.2d 678, 683 (Mass. 1943).

Although the courts of South Carolina have yet to have the opportunity to join the chorus of courts that have properly concluded that an invitee of a tenant cannot be guilty of trespass so long as the invitee stays within the scope of the invitation, this Court has nevertheless hinted around the edges of such a principle when discussing related principles of South Carolina property jurisprudence.

For example, the South Carolina Supreme Court recently held that "[a] trespass is an invasion of the interest in the exclusive possession of land, as by entry upon it." Babb v. Lee County Landfill SC, LLC, 405 S.C. 129, 747 S.E.2d 468 (2013) (quoting Restatement (Second) of Torts § 821D (1979)). Implicit in the Babb holding is the corollary that where possession is not exclusive, an appropriate defense to a claim of trespass is the assertion of license, privilege, invitation, or legality. See also Neil v. Byrum, 288 S.C. 472, 473, 343 S.E.2d 615, 616 (1986) (holding that "[a] social guest is a licensee. A licensee is a person who is privileged to enter or remain upon land by virtue of the possessor's consent.") (emphasis added).

Accordingly, it logically follows that when a landlord has ceded a portion of his right to "exclusive possession" of a leased property by bestowing upon a tenant a portion of the landlord's bundle of property rights, and specifically the right to use and quiet enjoyment of property which necessarily includes the right to determine who may enter the property to visit the tenant, a guest of a tenant cannot be deemed a trespasser if the tenant is reasonably exercising his license within the scope of the invitation of the tenant. See Babb, 405 S.C. at 129, 747 S.E.2d at 468 ("A well-known principle of property law is that property consists of a bundle of rights...included in the value of property are the rights of exclusive possession and use and enjoyment...."); Shramek v. Walker, 152 S.C. 88, 149 S.E. 331, 336 (1929) (citing the proposition that "[i]t is a well-settled principle that the occupant of any house, store, or other building, has the legal right to control it, and to admit whom he pleases")(citation omitted; emphasis added). Stated simply, the invitee's right to be on leased property over the objection of a landlord flows directly from the rights given up by the landlord to tenants in leasing a property. This premise is further proven by the fact that a landlord's right to his property is necessarily circumscribed if another person peaceably possesses the property, such that even a landlord who owns a property can be convicted of trespass after notice.[17]

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[17] In addressing this issue directly, the Court of Appeals in State v. Tyndall, 336 S.C. 8, 17, 518 S.E.2d 278, 283 (Ct. App. 1999) held that "regardless of who owned the property on the date in question, the home was Tyndall's father's 'dwelling house.' The language of section 16-11-620 does not exclude an owner from the class of persons who may be convicted of trespass after notice. The section provides that '[a]ny person' who violates the statute may be convicted. A record owner's right to be on the property may be circumscribed if another person peaceably possesses the property. For example, the South Carolina Residential Landlord and Tenant Act restricts the access of a landlord, even one who is the owner, to property in the possession of a tenant. See S.C. Code Ann. § 27-40-530 (1991) (restricting a landlord's access to property in possession of a tenant).") (emphasis in original).

South Carolina property jurisprudence further indicates that to permit a landlord or property manager's placement of a resident's social guest on a trespass notice and thereby prohibit visitation by a tenant's invitees would breach tenant's fundamental rights to use and quiet enjoyment of their leased premises. Sea Cabins On The Ocean IV Homeowners Assn. Inc. v. North Myrtle Beach, 345 S.C. 418, 431, 548 S.E.2d 595, 602 (2001) (quoting Nolan v. California Coastal Comm'n, 483 U.S. 825 (1987) for the proposition that "the right to exclude others is one of the most essential sticks in the bundle of rights that are commonly characterized as property") (internal quotations omitted). The right to exclude, and as a corollary the right to invite, have been described as a right "valued so highly that their abolishment will result in [an] offending law being declared unconstitutional." Op. S.C. Att'y Gen., p. 4 (Aug. 5, 2014) (quoting Jan G. Laitos, Law of Property Rights Protection: Limitations on Governmental Powers, ch. 5, § 5.03[A], p. 5-16 (1999)). These principles are also supported by other courts, including the Diggs court which held that "it would be patently unreasonable to prohibit public housing tenants from entertaining guests." 67 F. Supp. 2d at 531.

It is clear that the Spring Grove trespass policy, in attempting to deny tenants the right to invite social guests to the Complex for lawful purposes, "unreasonably interfere[s] with tenants' ability to entertain guests in the tenants' public housing apartments." Diggs, 67 F. Supp. 2d at 532. As such the Spring Grove trespass policy should not have been enforceable against Glenn, as an invitee of Shelricka and Kiana, to prohibit him from visiting tenants at Spring Grove for lawful and peaceable purposes. Accordingly, given the invitations of Shelricka and Kiana for Mr. Glenn to come to their apartments, it was an error of law for the trial court to hold that Glenn was a trespasser and as such did not have a right to be where he was standing when he fired his

gun. To the extent the trial court's Order denied Glenn immunity based in any part of Spring Grove's trespass policy or the alleged Trespass Notice, such is an abuse of discretion.

III. The trial court erred as a matter of law in finding that Glenn was a trespasser due to an alleged violation of a three year old Trespass Notice for loitering where possession of the property in question had changed at least once since the issuance of the alleged Trespass Notice

Violation of S.C. Code Ann. § 16-11-620 can only occur if a person "without legal cause or good excuse, enters into…the premises of another person after having been warned not to do so by the person in possession or his agent or representative." In this case, the company in possession of Spring Grove at the time of the alleged verbal trespass notice to Mr. Glenn was not the same company that possessed Spring Grove on the date the incident in question occurred. See Immunity Hr'g Tr., pp. 210:19–211:11. Significantly, the record contains no proof of a nexus between the original verbal notice and a re-publication or ratification by the new party in possession of Spring Grove. Given that the right to place someone on trespass notice arises from a right to exclusive possession of property indicates that trespass notices are gross in nature because they benefit the interest of a particular person or entity and not the land itself. See Babb, 405 S.C. at 129, 747 S.E.2d at 468 ("[a] trespass is an invasion of the interest in the exclusive possession of land, as by entry upon it.") (emphasis added; citation omitted); Williams v. Tamsberg, 425 S.C. 249, 821 S.E.2d 494 (Ct. App. 2018) ("The character of an express easement is determined by the nature of the right and the intention of the parties creating it. An easement in gross is a mere personal privilege to use the land of another; the privilege is incapable of transfer. In contrast, an appurtenant easement inheres in the land, concerns the premises…is essentially necessary to the enjoyment thereof. It also passes with the dominant estate upon conveyance. Unless an easement has all the elements necessary to be an appurtenant easement, it

will be characterized as a mere easement in gross."). Accordingly, given the gross nature of trespass notices, the trespass notice should no longer have had any force or effect after Spring Grove "changed hands a couple of times." See Immunity Hr'g Tr. pp. 210:19–211:11.

CONCLUSION

Appellant Marquez D. Glenn respectfully requests that this Court REVERSE the trail court's Order Denying Immunity pursuant to S.C. Code Ann. §§ 16-11-440(C), and 450(A), GRANT Appellant immunity from prosecution in connection with the events of April 12, 2013, and VACATE Appellant's convictions for Assault and Battery of a High and Aggravated Nature and Possession of a Weapon During a Violent Crime.

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Date:December 14, 2020
Greenville, South Carolina

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions
Letitia Verdin, Circuit Court Judge

Appellate Case No. 2020—001122

The State……Respondent,

v.

Marquez D. Glenn……Appellant.

PROOF OF SERVICE

I certify that I have served Appellant's Initial Brief and Designation of Matter to be Included in the Record on Appeal on Respondent State of South Carolina by emailing a copy of it on Monday, December 14, 2020 to attorney of record William M. Blitch, Jr. at wblitch@scag.gov.

Respectfully submitted,

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