RECEIVED

Dec 15 2021

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Pickens County
Letitia H. Verdin, Circuit Court Judge

Opinion No. 2020-UP-269 (S.C. Ct. App. filed Sept. 23, 2020)

THE STATE,

RESPONDENT,

V.

JOHN WILLIAM MCCARTY,

PETITIONER

APPELLATE CASE NO. 2021-000062

BRIEF OF PETITIONER

SUSAN B. HACKETT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

ISSUES PRESENTED

I. Did the Court of Appeals err by holding "the trial court did not err in failing to resolve evidentiary conflicts or in abdicating its role as fact finder" where the trial court found that whether the third party, on whose behalf Petitioner was interceding, was at fault in bringing on the difficulty presented a "quintessential jury question" under the Protection of Persons and Property Act?

II. Did the Court of Appeals err by ruling, in the alternative, that the trial judge did not err by failing to find Petitioner was immune from prosecution under the Act where Petitioner proved by a preponderance of the evidence that he acted in defense of others?

STATEMENT

On December 8, 2015, a Pickens County grand jury indicted Petitioner for murder (2015-GS-39-2275) and possession of a weapon during the commission of a violent crime (2015-GS-39-2276). R. 564-569. Petitioner moved for immunity from prosecution pursuant to the Protection of Persons and Property Act (hereinafter "the Act") found at Section 16-11-410, et seq. of the South Carolina Code. R. 2, ll. 10-14. On February 23, 2017, the Honorable Letitia H. Verdin heard evidence and argument on the motion. R. 1. Baker Cleveland and Britni McCall represented the state. R. 1. Robert Newton represented Petitioner. R. 1. By an order dated April 7, 2017, Judge Verdin denied Petitioner's request for immunity. R. 132-135.

Thereafter, the state called the case to trial on October 16-18, 2017. R. 1. The jury found Petitioner guilty as charged. R. 541, ll. 11-22. Judge Verdin sentenced Petitioner to thirty years imprisonment for murder and to five years imprisonment for the weapon. R. 543, ll. 13-17; R. 564-569. She ordered the sentences to be served concurrently. R. 543, l. 16; R. 564-569.

On October 26, 2017, Petitioner served his notice of appeal. Petitioner then filed his brief, challenging the trial judge's ruling on his motion for immunity. On September 23, 2020, the Court of Appeals affirmed the trial judge's ruling denying Petitioner immunity. State v. McCarty, 2020-UP-269 (S.C. Ct. App. filed Sept. 23, 2020). The Court of Appeals found "the trial court did not err in failing to resolve evidentiary conflicts or in abdicating its role by finding whether Randy Wilson, the person McCarty was protecting, acted in self-defense was a jury question." Id. The Court of Appeals concluded that Judge Verdin's finding that "whether Wilson was at fault in bringing on the difficulty presented a jury question" was not an abdication of the trial court's role as fact finder. Id. Further, the Court of Appeals held Judge Verdin did not err in denying Petitioner's request for immunity because Petitioner failed to prove by a preponderance of the

evidence that Wilson was not at fault in bringing on the difficulty and therefore entitled to self-defense. Id.

On October 8, 2020, Petitioner filed a petition for rehearing. The Court of Appeals denied the petition on December 21, 2020. Thereafter, Petitioner filed a petition for writ of certiorari, which this Court granted on November 10, 2021. This brief follows.

STANDARD OF REVIEW

The appellate courts review a claim of immunity under the Act using an abuse of discretion standard of review. State v. Curry, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013); see also State v. Douglas, 411 S.C. 307, 316, 768 S.E.2d 232, 237 (Ct. App. 2014). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." Douglas, 411 S.C. at 316, 768 S.E.2d at 237 (internal citation omitted).

ARGUMENT

I. The Court of Appeals erred by holding "the trial court did not err in failing to resolve evidentiary conflicts or in abdicating its role as fact finder" where the trial court found that whether the third party, on whose behalf Petitioner was interceding, was at fault in bringing on the difficulty presented a "quintessential jury question" under the Protection of Persons and Property Act.

Relevant facts

In 2015, Randy Wilson and Petitioner were partners for almost thirty years. R. 10, ll. 3-12; R. 74, ll. 13-22. The two lived in a trailer in Liberty. R. 4, ll. 17-24; R. 5, ll. 11-23. Around 2013, Jacob Kirk was down on his luck with nowhere to go when Wilson and Petitioner agreed to allow him to live with them. R. 4, ll. 15-19; R. 8, ll. 8-12; R. 85, ll. 8-13. The arrangement worked well for a time because Kirk, who did not pay rent, assisted Wilson with household chores that Wilson was no longer able to do as a result of an old injury to his neck. R. 8, l. 13 – R. 9, l. 8; R. 9, ll. 20-24; R. 85, ll. 17-21. When Wilson was sixteen-years old, he was riding a bicycle after an interview for his first job. R. 6, ll. 6-7. Suddenly, a car going sixty-five miles per hour hit him. R. 6, ll. 7-8. Wilson suffered a broken neck as a result. R. 6, ll. 8-10. Over the years, Wilson's neck pain intensified greatly limiting his functioning and abilities. R. 7, ll. 14-23.

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

4-6. Wilson then spoke to his niece on the phone, and Petitioner went to bed. R. 12, ll. 8-9; R. 50, l. 1 – R. 51, l. 20; R. 66, ll. 16-19.

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

Wilson told Kirk and Bradley that he wanted them to leave. R. 12, l. 22 – R. 13, l. 3; R. 87, ll. 11-12. Kirk readily agreed to leave and began packing his belongings. R. 13, ll. 1-3; R. 42, ll. 12-15; R. 88, ll. 21-22. Bradley, however, refused to leave. R. 13, ll. 19-20; R. 14, ll. 4-6. In response to Wilson's call, two police officers arrived. R. 13, ll. 13-14; R. 78, l. 18 – R. 79, l. 1. According to one of the officers, Wilson, Kirk, and Bradley were "grossly intoxicated." R. 79, ll. 6-24; see also R. 56, ll. 10-11; R. 88, ll. 2-11; R. 105, ll. 6-13. While the police were at the residence, Petitioner remained in his bedroom. R. 80, ll. 1-14; R. 50, l. 21 – R. 51, l. 4. According to Petitioner, when the officer looked into the bedroom, the officer told him there was no reason for him to get up because the situation was under control. R. 50, l. 21 – R. 51, l. 2; R. 51, ll. 16-17; R. 68, ll. 2-3. Petitioner went back to sleep. R. 51, ll. 2-4; R. 51, l. 18.

Wilson asked the officers to make Bradley leave. R. 15, ll. 3-9; R. 80, ll. 15-24. However, the officers refused to make Bradley leave. R. 15, ll. 15-21; R. 81, ll. 21-25; R. 90, ll. 10-14. According to the officers, Bradley was invited by Kirk, who was a resident; therefore, Wilson could not expel him. R. 15, ll. 15-17; R. 80, ll. 22-24; R. 81, ll. 15-20. Wilson pleaded with the officers "to do something" because he feared Kirk and Bradley would "get onto [him] again." R.

15, ll. 21-23. Nevertheless, the police left. R. 82, ll. 1-7. Kirk then walked to Wilson and said, "[S]ee, just because it's your property doesn't mean that you get to control everything that goes on here." R. 92, ll. 2-6.

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

After Wilson finished working on the truck, he started walking up the steps to reach the porch where Bradley was. R. 16, ll. 3-4. Bradley stood at the steps and hit Wilson's headlamp to turn it off and asked what he was going to do about it. R. 16, ll. 4-9. Bradley's position on the steps would not permit Wilson to get up to the porch so Wilson pushed him to the side. R. 16, ll. 10-12.[1] According to Kirk, Wilson was "shuffling through [Bradley]'s stuff" "like cigarette tubes where he rolls his own cigarettes," "just making a mess of things, throwing his stuff around." R. 92, ll. 8-13. Kirk explained that he knew "those all aren't things to get upset about. But to some people, it's an attack to their character." R. 106, ll. 15-17. He analogized messing with cigarettes to someone messing with "another person's mother." R. 106, ll. 17-19. He explained that even though it was not to that person directly, the person would retaliate. R. 106, ll. 17-20.

Bradley then shoved Wilson down the steps. R. 16, ll. 12-13; R. 92, ll. 15-19; R. 93, ll. 9-12. Wilson's fall broke his leg and two of the steps. R. 16, ll. 13-15; R. 25, ll. 2-19; R. 92, l. 19.

---

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

According to Kirk, Wilson began yelling for Petitioner while he was on the ground with his injuries form the fall. R. 93, ll. 13-17

Wilson then used the handrailing to get up from the concrete pad to which he had fallen. R. 16, ll. 19-21; R. 94, ll. 5-10. As Wilson scrabbled up the steps, he knocked over another beer that was on the handrailing. R. 16, ll. 21-23; R. 37, ll. 9-10. Kirk claimed Wilson intentionally knocked the beer off the railing. R. 94, ll. 12-14. Wilson then reached for the door to enter his home, but he was shoved from behind by Bradley before he could enter. R. 16, l. 23 – R. 17, l. 1; R. 35, ll. 1-7; R. 37, ll. 9-12. It was undisputed that when Wilson was trying to get back into the house, he was retreating. R. 108, ll. 1-6; R. 109, ll. 12-16. Kirk agreed that Wilson "was trying to get away, trying to get back in the house and [Bradley] wasn't letting him do that." R. 109, ll. 12-16.

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

Bradley was holding and shoving Wilson. R. 17, ll. 6-8.[2] Bradley was pushing Wilson over the bannister. R. 37, ll. 17-25. Kirk claimed Bradley was "popping" Wilson in the face with an open hand. R. 95, ll. 4-9. Kirk believed Bradley was trying to "incite him to throw the first punch." R. 95, ll. 12-13. While Bradley popped Wilson in the face, Bradley repeatedly asked why he was "hollering for [Petitioner]." R. 95, ll. 16-18.

---

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

Wilson saw Bradley draw back to punch him, but Bradley did not because Petitioner appeared and fired a warning shot into the floor – hoping to diffuse the situation. R. 17, ll. 8-14; R. 39, ll. 13-14; R. 110, l. 25 – R. 111, l. 4; R. 52, ll. 17-21; R. 55, ll. 19-24; R. 56, ll. 7-10; R. 96, ll. 11-13. Kirk claimed that when Petitioner walked up, Wilson "threw a punch." R. 96, ll. 16-17. Petitioner had tried, desperately, to open the door to get to the porch, but he was unable to do so because Bradley and Wilson were blocking the door. R. 39, ll. 8-12; R. 53, ll. 13-24; R. 60, ll. 21-23; R. 62, ll. 17-23; R. 97, ll. 8-19. Despite the warning shot, Bradley's attack against Wilson continued. R. 20, ll. 10-18; R. 53, ll. 2-4. Then, Petitioner shot Bradley. R. 20, l. 19 – R. 21, l. 3; R. 39, ll. 15-22. Kirk claimed that after the warning shot, Wilson pushed Bradley off of him, which was when Petitioner shot Bradley. R. 96, ll. 23-25. Petitioner made clear that he shot Bradley because he feared Wilson would suffer serious bodily injury or death. R. 54, ll. 6-14; R. 15-18. Wilson performed CPR on Bradley while Kirk called 911. R. 21, ll. 4-12; R. 21, ll. 16-22; R. 82, ll. 16-23.

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

Next, defense counsel emphasized the undisputed evidence of Wilson's "weak condition, weak neck from an automobile accident in 1980." R. 113, ll. 17-19. Defense counsel explained

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

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

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

When the judge questioned whether the statute required consideration of what Petitioner reasonably believed, the prosecutor then changed tactics and argued that it was for the jury to say if Petitioner's belief was reasonable. R. 117, l. 19 – R. 118, ll. 2-8. When the judge honed in on the fact that such an argument would mean that immunity would never be available during a pre-trial setting, the state changed tactics again, arguing "immunity is available at this stage if they

proved that fact *beyond* a preponderance of the evidence." R. 118, ll. 11-13 (emphasis added). According to the state, "it could be completely reasonable to say that two people watching two drunks having a fight is not reasonable to pull a gun and shoot and kill the one they wanted to lose the fight." R. 118, ll. 19-23. Using hyperbole, the state argued "using that logic, [Petitioner] could follow Mr. Wilson around anywhere and let Mr. Wilson pick fights and egg on people. And as soon as they swung a punch at him, because of his weak neck, whether they knew about it or not, he could shoot and kill them." R. 118, l. 23 – R. 119, l. 3.

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

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

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

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

Explaining that "what the law allows is that an accused that provokes or initiates an assault cannot claim self-defense unless he both withdraws from the conflict and communicates his withdrawal by word or act to the adversary," R. 123, l. 21 – R. 124, l. 1, the state opined Wilson did not withdraw. R. 125, ll. 1-5. After noting that one who claims defense of others has the right to kill the assailant only if the one being defended had the right to do so, the state argued there was "testimony that [Wilson] provoked the situation and because he is at fault with bringing about the difficulty, then that element of self-defense is not satisfied, and therefore, is not available to him." R. 124, ll. 7-12. Thus, according to the prosecutor, self-defense was not available to Petitioner. R. 124, ll. 12-13. The law, in the prosecutor's estimation, "requires a little more diligence on someone who is willing to act on appearances and use deadly force to kill somebody." R. 124, ll. 13-16.

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

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

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

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

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

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

R. 133.

Thereafter, without any findings of fact to support her conclusion, Judge Verdin determined Petitioner "failed to meet his burden because he did not prove that Wilson was without

fault in bringing about the difficulty." R. 134. Judge Verdin determined the case presented "a factual question that must be answered by a jury" because "the evidence presented conflicting views as to Randy Wilson's involvement in the argument that led to the fatal encounter." R. 135.

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

Discussion

In 2006, the South Carolina General Assembly adopted the Protection of Persons and Property Act ("the Act"). S.C. Code Ann. § 16-11-410, et seq. The General Assembly explained its intent was to "codify the common law Castle Doctrine which recognizes that a person's home is his castle and to extend the doctrine to include an occupied vehicle and the person's place of business." S.C. Code Ann. § 16-11-420(A). The General Assembly found it "proper for law-abiding citizens to protect themselves, their families, *and others* from intruders and attackers without fear of prosecution or civil action for acting in defense of themselves *and others*." S.C. Code Ann. § 16-11-420(B) (emphasis added). The General Assembly recognized "that persons residing in or visiting this State have a right to expect to remain unmolested and safe within their

homes, businesses, and vehicles." S.C. Code Ann. § 16-11-420(D). Finally, the General Assembly explained "that no person or victim of crime should be required to surrender his personal safety to a criminal, nor should a person or victim be required to needlessly retreat in the face of intrusion or attack." S.C. Code Ann. § 16-11-420(E).

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

> A person who is not engaged in an unlawful activity and who is attacked in another place where he has a right to be, including, but not limited to, his place of business, has no duty to retreat and has the right to stand his ground and meet force with force, including deadly force, if he reasonably believes it is necessary to prevent death or great bodily injury to himself or another person or to prevent the commission of a violent crime as defined in Section 16-1-60.

S.C. Code Ann. § 16-11-440(C). "A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard." State v. Curry, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013). During the pretrial hearing, a defendant must show "a valid case of self-defense must exist," excluding the duty to retreat prong, "and the trial court must necessarily consider the elements of self-defense in determining a defendant's entitlement to the Act's immunity." Id. at 371, 752 S.E.2d at 266.

In State v. Duncan, 392 S.C. 404, 410, 709 S.E.2d 662, 665 (2011), this Court held that because immunity under the Act was a bar to prosecution, it "must be decided prior to trial." This Court also held "that when a party raises the question of statutory immunity prior to trial, the proper standard for the circuit court to use in determining immunity under the Act is a preponderance of the evidence." Id. at 411, 709 S.E.2d at 665. In doing so, this Court established that the circuit

court must resolve the conflict in the evidence to arrive at findings of fact in order to determine if the defendant proved entitlement to immunity by a preponderance of the evidence. Id. at 410, 709 S.E.2d at 665. To rule that conflicting evidence "created a question for the jury," ignores the standard of proof the circuit court was obligated to apply. When faced with conflicting evidence, the circuit court must make credibility findings, not simply conclude at conflict creates "a jury question," and therefore rule the defendant had not carried his burden of proof.

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

Despite what appeared clear in the law, this Court directly addressed the matter recently. This Court held that circuit court judges confronted with the question of immunity must resolve conflicts in the evidence. State v. Cervantes-Pavon, 426 S.C. 442, 451, 827 S.E.2d 564, 569 (2019). This Court explained that "just because conflicting evidence as to an immunity issue exists does not automatically require the court to deny immunity; the court must sit as the fact-finder at this hearing, weigh the evidence presented, and reach a conclusion under the Act." Id. "Thus, the relevant inquiry is not merely whether there is a conflict in the evidence but, rather, whether the accused has proved an entitlement to immunity under the Act by a preponderance of the evidence." State v. Andrews, 427 S.C. 178, 181, 830 S.E.2d 12, 13 (2019).

Contrary to the Court of Appeals' conclusion, the circuit court judge abused her discretion by failing to make the findings of fact and conclusions of law necessary to determine whether Petitioner proved by a preponderance of the evidence that his conduct satisfied the Act. The language used by the judge showed she abused her discretion by failing to resolve any conflicts in the evidence presented regarding Petitioner's entitlement to immunity under the Act. The language used by Judge Verdin contrasted greatly with the language used by the pre-trial hearing judge in a case recently decided by the Court of Appeals. See State v. Pickrell, Op. No. 5878 (S.C. Ct. App. filed Dec. 8, 2021) (Howard Adv. Sh. No. 43 at 112). According to the Court of Appeals, the judge recited the language of Curry, but she immediately followed the statement by recognizing "she was tasked with evaluating whether [Pickrell] proved by the preponderance of the evidence that she acted in self-defense." Id. The Court of Appeals determined the judge weighed the evidence and determined Pickrell failed to prove she was entitled to immunity. Id. Here, the judge's language made clear she refused to weigh the evidence and resolve any conflicts in order to arrive at her conclusion.

After recognizing that the key issue in the case was whether Wilson was without fault in bringing on the difficulty, the judge stated that "[w]hether or not a defendant is without fault in bringing on the difficulty present[ed] 'a quintessential jury question' which [was] 'not a situation warranting immunity from prosecution.'" R. 134 (quoting Curry, 406 S.C. at 372 752 S.E.2d at 267). According to the judge "[t]he evidence presented conflicting views as to Randy Wilson's involvement in the argument that led to the fatal encounter, and that presents a factual question that must be answered by a jury." R. 135. Contrary to the state's position, this language is not out of context. See Ret. at 3. The judge simply recited the uncontested facts, and then relayed the testimony of the witnesses concerning the contested facts. R. 132-133. Thereafter, the judge did

not resolve the conflicting testimony about the contested facts. In fact, the judge relied upon the mere existence of conflicting testimony to find Petitioner did not satisfy his burden.

Reading the order as a whole demonstrates the point. The judge found Petitioner failed to meet his burden of proof "because he did not prove that Wilson was without fault in bringing about the difficulty." R. 134. She then explained how she arrived at this finding. According to the judge the case presented "a factual question that must be answered by a jury" because "[t]he evidence presented conflicting views as to Randy Wilson's involvement in the argument that led to the fatal encounter." R. 135. Judge Verdin correctly explained that because Petitioner was "only entitled to immunity if Wilson was entitled to act in self-defense," it was "a material question as to whether Wilson was at fault in bringing about the difficulty." R. 134-135. However, Judge Verdin improperly found that "[w]hether or not a defendant is without fault in bringing on the difficulty presents 'a quintessential jury question' which is 'not a situation warranting immunity from prosecution.'" R. 134 (quoting State v. Curry, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013)). Judge Verdin's abdication of her duty is made clear in the last sentence of the order prior to the conclusion: "The evidence presented conflicting views as to Randy Wilson's involvement in the argument that led to the fatal encounter, and that presents a factual question that must be answered by a jury." R. 135.

Judge Verdin, as the trier of fact at the immunity hearing, had the duty to make credibility findings where she found the evidence was not consistent. Instead, the judge found that inconsistent testimony made this a "quintessential jury question." Her ruling was an abdication of her duty to exercise discretion and make credibility findings. That failure to exercise discretion was in itself an abuse of discretion that constituted reversible error because it was a refusal to exercise discretionary authority. See State v. Hawes, 411 S.C. 188, 191, 767 S.E.2d 707, 708

(2015); Samples v. Mitchell, 329 S.C. 105, 112, 495 S.E.2d 213, 216 (Ct. App. 1997). In light of this error, Petitioner respectfully requests this Court vacate the order and remand for a new order.

II. The Court of Appeals erred by ruling, in the alternative, that the trial judge did not err by failing to find Petitioner was immune from prosecution under the Act where Petitioner proved by a preponderance of the evidence that he acted in defense of others.

In the event this Court determines the trial judge ruled on the merits of the request for immunity, Petitioner respectfully requests this Court reverse the trial judge's refusal to grant immunity to Petitioner. Petitioner incorporates by reference the legal analysis presented in Issue I, supra. Additionally, this Court held "a trial court should first consider whether the defendant has proved the elements of self-defense by a preponderance of the evidence." State v. Glenn, 429 S.C. 108, 118, 838 S.E.2d 491, 496 (2019). "If the defendant has failed to meet the elements of reasonable fear or the duty to retreat, the court should then determine whether section 16-11-440(A) or (C) is applicable." Id.

Self-defense

To establish self-defense, four elements must be present: (1) the defendant must be without fault in bringing on the difficulty; (2) the defendant must have been in actual imminent danger of losing his life or sustaining serious bodily injury, or he must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) if his defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief, or if the defendant was actually in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life; and (4) the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in the particular instance. State v. Hendrix, 270 S.C. 653,

657-658, 244 S.E.2d 503, 505-506 (1978); see also State v. Davis, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984).

An individual who provokes or initiates an assault may not assert self-defense. State v. Bryant, 336 S.C. 340, 345, 520 S.E.2d 319, 322 (1999). "Any act of the accused in violation of law and reasonably calculated to produce the occasion amounts to bringing on the difficulty and bars his right to assert self-defense as a justification or excuse for a homicide." Id. Along these lines, "[i]f, after commencing the assault, the aggressor withdraws in good faith from the conflict and announces in some way to his adversary his intention to retire, he is restored to his right of self-defense." Id. (internal quotation omitted). "One's right to self-defense is restored after a withdrawal from the initial difficulty with the victim if that withdrawal is communicated to the victim by word or act." Id. (citing State v. Graham, 260 S.C. 449, 196 S.E.2d 495 (1973)); see also State v. Hendrix, 270 S.C. 653, 659 n.3, 244 S.E.2d 503, 506 n.3 (1978) (explaining that Hendrix's "act of ordering deceased away would have constituted a withdrawal after aggression which was communicated to the deceased and which would have restored [Hendrix]'s right of self-defense").

An individual has the right to act on appearances. State v. Starnes, 340 S.C. 312, 531 S.E.2d 907 (2000); see also State v. Jackson, 277 S.C. 271, 87 S.E.2d 681 (1955). This Court held the trial judge erred in failing to instruct the jury that the defendant had the right to act on appearances concerning one of the shootings. Starnes, 340 S.C. at 320, 531 S.E.2d at 912. In Starnes, one of the potential drug buyers, Wellborn, pointed a gun at the defendant, cursed him, and questioned where he was going. Id. The Court held the defendant was not entitled to a charge on the right to act on appearances concerning Wellborn because his claim to self-defense arose from an *actual* threat. Id. However, concerning the shooting of the other potential buyer, Champlin, the Court held the defendant was entitled to an appearances charge. Id. at 321, 531 S.E.2d at 912. The pertinent fact

noted by the Court was that "[i]mmediately prior to the shooting, [the defendant] observed Champlin hold a gun to [another]'s head and threaten to shoot him, apparently because the intended drug deal, which [the defendant] had arranged, had gone awry." Id. The Court held the defendant was entitled to an appearances charge even though the defendant did not testify that he thought he saw a weapon in Champlin's hand at the time of the shooting. Id.

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

Defense of others

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

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

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

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

The defense of others imposes the "alter ego" rule, meaning "an intervenor who used deadly force to defend a person not entitled to use deadly force himself would be held criminally liable." Marco F. Bendinelli, James T. Edsall, Defense of Others: Origins, Requirements, Limitations and Ramifications, 5 Regent U. L. Rev. 153, 153 (Spring 1995).[3] "'[A] person is

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

justified or excused in killing in defense of another person when, *and only when*, the circumstances are such that the latter would be justified or excused if *he* had committed the homicide in his own defense.'" Id. at 158 (quoting Lovejoy v. State, 15 So.2d 300, 301 (Ala. Ct. App. 1943)) (emphasis in the original).

In State v. Sales, 285 S.C. 113, 328 S.E.2d 619 (1985), this Court examined the defense of others instruction as it applied to the defendant in the criminal case. Sales' sister and her boyfriend were fighting in their shared home over the boyfriend's use of grocery money to buy liquor. The boyfriend hit the sister in the face with an iron poker. Sales' nieces ran to his home and begged him to help sister. Sales found sister at her home holding her face. When sister and boyfriend began to struggle over a heavy object, Sales separated the two. The boyfriend then swung the heavy object at Sales. A fight between Sales and the boyfriend ensued. The boyfriend died. This Court held the trial judge properly instructed the jury that, "under the law of self-defense, a person may not only take the life in his own defense but also in defense of a relative," and "that the right to intervene to protect the relative is subject to the same limitations as the right of self-defense." However, the judge instructed the jury on the duty to retreat, which this Court found to be in error. Instead, Sales had no duty to retreat because sister had no duty to retreat from her home and Sales assumed the rights and limitations of the person he acted to protect. Id. at 114-15, 328 S.E.2d at 619-620.

Petitioner established each of the elements of defense of others by a preponderance of the evidence as required by the Act and case law. In light of Petitioner acting to defend Wilson, it is Wilson's conduct and the conduct of Bradley toward Wilson that requires close scrutiny.

Despite the state's argument that Wilson was at fault in bringing on the difficulty, the evidence showed otherwise. This Court affirmed a grant of immunity in State v. Jones, 416 S.C.

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

This Court found there was "nothing in the record to suggest that Jones was at fault in bringing on the difficulty" because she attempted to leave the apartment before the first altercation, returned to the apartment to gather her belongings, and called her friends to pick her up. Id. at 301-302, 786 S.E.2d at 142. Jones told police that she believed Lee "was going to hit her again and that had she not acted as she did, then she would have been killed." Id. at 302, 786 S.E.2d at 142. Next, this Court held Jones' belief that she was in imminent danger of losing her life or sustaining great bodily injury was reasonable in light of Lee having punched her earlier in the night and Lee grabbing Jones and shaking her immediately prior to the stabbing. Id.

At most, Wilson messed with Bradley's cigarettes and beers. Without question, Wilson messing with – even destroying – cigarettes and beers could not be acts "in violation of the law and reasonably calculated to produce the occasion" of Bradley shoving him down the stairs and slamming him against the door. See State v. Bryant, 336 S.C. 340, 345, 520 S.E.2d 319, 322 (1999); see also State v. Douglas, 411 S.C. 307, 768 S.E.2d 232 (Ct. App. 2014) (explaining that Douglas was not at fault for bringing on the difficulty where "Smith's violent behavior was an unreasonable reaction to a reasonable demand for Smith to return [Douglas]'s medicine"). Furthermore, Wilson's

messing with Bradley's items was not the proximate cause the shooting death of Bradley. See State v. Glenn, 429 S.C. 108, 120-121, 838 S.E.2d 491, 497 (2019) (holding that a proximate cause analysis must be applied to the unlawful activity element of subsection (C) of the Act). Wilson had not acted aggressively or engaged with Bradley physically. Instead, Wilson had asked Bradley to leave his home, and had called the police to assist him in having Bradley removed. Even Bradley's brother, Kirk, admitted that "messing" with someone's cigarettes and beers was not something that would result in a physical confrontation for most people.

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

Having established that Wilson was not at fault for bringing on the difficulty, the next requirement was to show that Wilson was in actual imminent danger or believed he was in danger of losing his life or sustaining serious bodily injury. Wilson's testimony was unequivocal and undisputed – he believed he was in danger of losing his life or sustaining serious bodily injury. The

testimony also indicated that Wilson suffered a broken neck years earlier and was at a high risk of sustaining another serious injury to his neck. Wilson's belief was reasonable in light of the physical attack he had suffered already at Bradley's hands, which included a broken leg. Finally, Wilson had no duty to retreat because he was within the curtilage of his home or in a place where he had a right to be pursuant to the Act. See State v. Jones, 416 S.C. 283, 302, 786 S.E.2d 132,142 (2016); State v. Wiggins, 330 S.C. 538, 548 n.15, 500 S.E.2d 489 n. 494 n. 15 (1998); State v. Jackson, 227 S.C. 271, 279, 87 S.E.2d 681, 685 (1955).

For these reasons, the judge erred in failing to find that Petitioner established he was entitled to immunity under the Act by a preponderance of the evidence. Petitioner respectfully requests this Court find he is immune from prosecution.

CONCLUSION

As to Issue I, Petitioner respectfully requests this Court vacate the order in this case and remand it to the circuit court for a new order. As to Issue II, Petitioner requests this Court reverse the trial judge and hold that Petitioner is immune from prosecution for murder pursuant to S.C. Code Ann. § 16-11-450.

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 15th day of December, 2021.