IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

Appeal from Greenville County
Honorable Edward W. Miller, Circuit Court Judge

The State,

Appellant,

v.

Gregory Kirk Duncan,

Respondent.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE ISSUE ON APPEAL

AS AN ISSUE OF FIRST IMPRESSION, DID THE TRIAL COURT ERR IN DETERMINING PRIOR TO TRIAL THAT AS A FACTUAL MATTER THE IMMUNITY PROVISION IN THE PROTECTION OF PERSONS AND PROPERTY ACT REQUIRED DISMISSAL OF THE INDICTMENT, AND DID THE COURT ALSO ERR IN INTERPRETING THE STATUTE IN A MANNER THAT LED THE COURT TO FAIL TO ANALYZE EVIDENCE WHICH CREATED SIGNIFICANT FACTUAL DISPUTES ON THE ISSUES ENCOMPASSED BY THE ACT?

STATEMENT OF THE CASE

Defendant[1], Gregory Kirk Duncan, was indicted by the Greenville County Grand Jury for murder (07-GS-23–5016).

The Honorable Edward W. Miller conducted pre-trial hearing on March 24th, 2009, and subsequently issued an order dismissing the indictment based on the immunity provision in the Protection of Persons and Property Act.

The State filed a timely Notice of Appeal. This appeal follows.

[1] Because this is a pre-trial State's appeal, for clarity's sake the State will use "Defendant" to refer to Respondent Duncan.

STATEMENT OF FACTS

This is a state's appeal resulting from the order of the trial court dismissing the indictment for murder based on application of the the Protection of Person and Property Act ("the Act"), S.C. Code Ann. § 16-11-410, *et. seq.*

On the night of the incident, the victim Chris Spicer and his girlfriend Amanda Grubbs were visiting Defendant and his girlfriend, Jean Templeton. Jean claimed that Amanda showed Chris a picture of Defendant's teenage daughter, and Chris started making vulgar comments about her. Jean said Defendant told Chris and Amanda to leave, and they did. However, according to Jean, Chris returned and came onto the porch, and she got in between the two big men as they argued. Jean claimed she was able to get Chris to the top step but he was trying to force his way back inside, when Defendant went into the house, came back out with a gun, and fired a shot that parted Jean's hair and struck Chris. **{R. 103; R. 105-07; R. 62-72}**.

Amanda stated that Chris only told Defendant that his daughter was pretty and he should keep an eye on her, and that Defendant took it wrong. She said that Chris said he wanted to return to apologize. **{R. 104}**.

The tape of the 911 call that occurred shortly before the shooting recorded Defendant yelling at the victim to "come on in dickweed" and "come on in motherfucker", and also calling the victim a "pervert motherfucker". **{R. 95-101; State's Exhibit 9}**. The autopsy reflected a downward shot, and a blood spot was found at the bottom of the steps. **{State's Exhibit 1; R. 89-94; State's Exhibit 7; State's Exhibit 8}**.

The trial court found that the indictment had to be dismissed because Defendant

was entitled to immunity under the Protection of Persons and Property Act, based on the court's conclusion that the victim was unlawfully on Defendant's property and had forcibly entered the porch. **{R. 110-17}**.

ARGUMENT

AS AN ISSUE OF FIRST IMPRESSION, THE TRIAL COURT ERRED IN DETERMINING PRIOR TO TRIAL THAT AS A FACTUAL MATTER THE IMMUNITY PROVISION IN THE PROTECTION OF PERSONS AND PROPERTY ACT REQUIRED DISMISSAL OF THE INDICTMENT, AND THE COURT ALSO ERRED IN INTERPRETING THE STATUTE IN A MANNER THAT LED THE COURT TO FAIL TO ANALYZE EVIDENCE WHICH CREATED SIGNIFICANT FACTUAL DISPUTES ON THE ISSUES ENCOMPASSED BY THE ACT.

The trial court in the instant case erred in granting the Defendant's motion to dismiss his indictment for murder, finding after hearing evidence about the crime that Defendant was immune from prosecution based on the provisions of the Protection of Persons and Property Act ("the Act"), S.C. Code Ann. § 16-11-410, *et. seq.* How to handle the immunity provision is a question of first impression in South Carolina, and indeed one which has caused much consternation among courts who have addressed their versions of this same statute. The State would respectfully assert that to allow the trial court to factually determine applicability of immunity provisions of the Act prior to a trial would violate the State constitutional perogative of prosecutors, and be at odds with the intent of the General Assembly and language of the Act. Regardless of procedure, the trial court erred as a matter of law in concluding that applicability of subsection (A) of 16-11-440 necessarily meant immunity was warranted, and the court failed to analyze other evidence which created material dispute on the factual issues encompassed by the Act.

A. The Act

Aside from some intent and definitional provisions, the substance of the Act is in S.C. Code Ann. § 16-11-440 and -450 (Supp. 2007). Subsection 16-11-440(A) provides that a "person is presumed to have a reasonable fear of imminent peril of death or great bodily injury" when using deadly force against "another person", if: (1) the other person is unlawfully and forcefully entering "a dwelling, residence, or occupied vehicle", or is attempting to remove someone against his will from "a dwelling, residence, or occupied vehicle"; or (2) if the person using deadly force knows or has reason to believe an unlawful and forcible entry or act is occurring or has occurred. This provision apparently modifies the third element of the self-defense test which is, of course, that:

> (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, defendant must show that a reasonably prudent person of ordinary firmness and courage would have entertained the belief that he was actually in imminent danger and that the circumstances were such as would warrant a person of ordinary prudence, firmness, and courage to strike the fatal blow in order to save himself from serious bodily harm or the loss of his life; and*
>
> (4) the defendant had no other probable means of avoiding the danger.

State v. Slater, 373 S.C. 66, 69, 644 S.E.2d 50, 52 (2007) (emphasis added). Subsection (A) modifies this rule in favor of a defendant by presuming reasonable fear in cases of unlawful and forcible entry.

Subsection -440(B) has exclusions for the presumption in subsection (A), including where the person who uses deadly force is engaged in an unlawful activity or is using the dwelling, residence, or occupied vehicle for an unlawful activity, and where the other person has a legal right to enter.

Subsection -440(C) seems to have a significant effect on the duty to retreat in South Carolina, which is of course encompassed within the fourth element of the self-defense test. It provides that one not engaged in unlawful activity "who is attacked in a place where he has a right to be, including, but not limited to, his place of business", has no duty to retreat. Such a person may use deadly force if he reasonably believes it to be necessary to prevent death or great bodily injury to himself "or another person", or to prevent the commission of a violent crime.

Subsection -440(D) provides that a person who unlawfully and forcefully attempts to enter another's dwelling, residence, or occupied vehicle is presumed to be doing so with the intent to commit an unlawful act involving force or a violent crime. This provision seems to affect an element of burglary, that being entry with intent to commit a crime, as it focuses on the state of mind of the person unlawfully entering a residence, whereas self-defense focuses on the state of mind of the defending homeowner who uses deadly force. Of course, in a self-defense situation, the intent by the person unlawfully entering might be relevant in assessing the actuality and reasonableness of the defending homeowner's belief under the second and third elements of the self-defense test.

Subsection -440(E) provides that a person who forcefully enters or attempts to

enter a dwelling, residence, or occupied vehicle in violation of an order of protection, restraining order, or bond condition is presumed to be doing so with the intent to commit an unlawful act. Again, this provision, which focuses on the state of mind of the person entering rather than the defending homeowner, seems more addressed to easing state's proof in a burglary case rather than having anything to do with self defense.

Subsection (A) of S.C. Code Ann. § 16-11-450 provides that "a person who uses deadly force as permitted by the provisions of this article or another applicable provision of law is justified in using deadly force and is immune from prosecution and civil action". There is an exclusion relating to law enforcement officers. The proper application of the provision is of central concern in the instant case.

Subsection (B) of -450 precludes a law enforcement agency from arresting a person who used deadly force unless probable cause exists that the deadly force used was unlawful.

Finally, subsection (C) of -450 provides for the awarding of fees, costs, expenses, and losses if the court finds a civil defendant was immune from prosecution under subsection (A).

B. Caselaw from other jurisdictions addressing immunity provisions

A survey of caselaw throughout the nation finds a number of decisions where courts have dealt with similar immunity provisions, and a review here is necessary to frame for the Court some of the options available in handling this provision.

Colorado addressed such a provision in People v. Guenther, 740 P.2d 971 (Colo. 1987). The statute there authorizes the use of deadly force in self-defense or defense

of others, and provides that an "occupant of a dwelling" who uses deadly force as authorized by the statute "shall be immune from criminal prosecution" and "any civil liability" from the use of such force. 740 P.2d at 974 n.2. Guenther first found the grant of immunity was more than just an affirmative defense, and noted legislative history suggesting the intent of the statute was to prevent a homeowner from bearing the financial burden of a trial. 740 P.2d at 975-76. The court next determined that the statute conferred authority on the trial court to determine where the factual elements were established such that charges should be dismissed pursuant to the grant of immunity – which the court analogized to pre-trial determinations on speedy trial and double jeopardy claims. 740 P.2d at 977-78. Colorado has a 12(b) rule of criminal procedure, allowing for motions to assess any defense or objection that can be raised before trial, and the court thus concluded that immunity claims should be raised by such a 12(b) motion. 740 P.2d at 978-79. The court pointed out that while a reasonable argument could be made that the issue should be asserted at the probable cause determination of a preliminary hearing, it was proper for a defendant to raise the issue by motion to dismiss after being bound over for trial. 740 P.2d at 979. Finally, the court concluded that there was no due process issue in allocating the burden to establish immunity at the pre-trial hearing by a preponderance of the evidence on the defendant, as the grant of immunity was a benefit greater than an affirmative defense, and akin to motions to dismiss based on a speedy trial, for which a defendant also bears the burden. The court held that a defendant could still raise the issue at trial as well, where the State would have to disprove self-defense by a reasonable doubt if

there was some evidence in the record on the issue. 740 P.2d at 979-80.

Georgia has followed Guenther in addressing its similar statute, which provides that a person is immune from prosecution if he acts under their self-defense, aid to law enforcement, and defense of habitation statutes. In Boggs v. State, 581 S.E.2d 722 (Ga. Ct. App. 2003), the court noted that because a grant of immunity barred criminal prosecution, the issue had to be determined by the trial court before the trial commenced. In Fair v. State, 664 S.E.2d 227 (Ga. 2008), the court held that the trial court erred in deferring a ruling on a claim of immunity until the close of the evidence, and in not ruling on the claim prior to trial. Finally, in Bunn v. State, 667 S.E.2d 605 (Ga. 2008), the court cited Guenther and concluded that the defendant would bear the burden of showing entitlement to immunity by a preponderance of the evidence in a pre-trial proceeding.

However, other courts have rejected the Guenther approach. For example, there is some conflict among the lower Florida appellate courts on how to handle the issue, and the South Carolina Act here is in many respects identical to the Florida "Stand Your Ground" law. In Peterson v. State, 983 So.2d 27 (Fla. Dist. Ct. App. 2008), the First District concluded that the grant of immunity was true immunity and more than a mere affirmative defense. The court relied on Guenther, and accordingly found that when the issue was raised by a defendant, the trial court had to hear evidence, and then weigh and decide factual disputes to resolve the motion with the burden on the defendant to show entitlement by a preponderance of the evidence. Under the Peterson view, a trial court could not simply deny the motion simply because

there were factual disputes as to applicability of the provision. Id.

The Fourth District disagreed and took a different approach in Velasquez v. State, 9 So.3d 22 (Fla. Dist. Ct. App. 2009). There, the court noted that Florida rules of criminal procedure only allow dismissal if "there are no material disputed facts and the undisputed facts do not establish a prima facie case of guilt against the defendant", and provide that a motion to dismiss should be denied if the State files a traverse denying a material fact. While noting that the statute authorized the immunity determination to be made "by law enforcement officers, prosecutors, judges, and juries" throughout a "time continuum stretching across the entire criminal process", the court pointed out that where the facts surrounding the motion were in dispute, the trial court properly denied the motion. A number of lower Florida appellate courts have noted the conflict on whether the trial court should resolve factual disputes, and they have certified the issue for resolution by the Florida supreme court. See Horn v. State, 17 So.3d 836 (Fla. Dist. Ct. App. 2009); Govoni v. State, 17 So.3d 809 (Fla. Dist. Ct. App. 2009) denying because facts in dispute); Gray v. State, 13 So.3d 114 (Fla. Dist. Ct. App. 2009) (conducting full hearing). At least one case on this conflict is pending before the Florida Supreme Court at the time of the writing this brief. See Clarence Dennis v. State, Case No. SC09-941 (reviewing State v. Dennis,17 So.3d 305, 2009 WL 605356 (Fla. Dist. Ct. App. 2009) (trial court properly denied motion to dismiss due to factual disputes)).

Kentucky completely rejected the Guenther procedure in Rodgers v. Commonweath, 285 S.W.3d 740, 753 (Ky. 2009), which addressed Kentucky's "Stand

Your Ground" law, also nearly identical to South Carolina's Act. The court agreed that the legislature had intended to establish a true immunity and not just a criminal defense. Pointing out the statute offered little in the way of guidance, it concluded that upon motion by the defendant, the State had to show probable cause that the force used was unlawful. However, the State only needed to rely on statements and documentary evidence. The court concluded this showing could either be done at the preliminary hearing, or after indictment in circuit court. In determining probable cause to be the appropriate standard for a court to assess a pretrial immunity claim, Rodgers relied on the fact that the Kentucky statute precluded an investigating agency from arresting an individual unless there was probable cause that the force used was unlawful, and the immunity provision itself expressly defined the "criminal prosecution" from which there is immunity as including "arresting", "detaining", and "charging".

Finally, the Rodgers court cited "compelling reasons" for rejecting a claim that there should be a Guenther-style "mini-trial" on the issue prior to the real trial, first noting the lack of support for such an unusual procedure in the statute. The court continued by noting that typical evidentiary hearings for pre-trial motions, such as suppression hearings or competency hearings, do not involve "proof that is the essence of the crime charged", but that would be the case under the immunity provision were such a mini-trial to occur. The court believed that having a mini-trial on the ultimate issue for trial would be a "process fraught with potential for abuse", would result in a bench determination on one of the elements of the crime, and would violate the strong preference for jury trials on all elements of a criminal charge. Rodgers, 285 S.W.3d at

753-56.

A final provision of law to be considered, though, in assessing the impact of the immunity provision, is the fact that the state constitution protects the discretion of prosecutors in deciding who to charge, what to charge, and whether any resolution should be accepted prior to trial. The South Carolina Constitution grants the Attorney General of the "power to decide when and how to prosecute a case". State v. Thrift, 312 S.C. 282, 440 S.E.2d 341 (1994) (discussing S.C. Const. Art. V § 24, and noting the "unfettered discretion to prosecute solely in the prosecutor's hands"). This constitutional perogative gives to prosecutors only the right to pursue a case to trial, to plea bargain the case to a lesser offense or a certain sentence, or to simply decide not to prosecute the offense at all. State v. Needs, 333 S.C. 134, 508 S.E.2d 857 (1998).

Thus, it seems there are five main options available to this Court in deciding how to handle the immunity provision in the Act:

> (1) while prosecutors must consider the immunity provision, as they consider all valid law, in the exercise of their constitutionally protected discretion in charging decisions, any disputed factual issues are to be resolved, as they always have been, before a jury at trial if directed verdict is denied;
>
> (2) the immunity provision is to be considered by the magistrate at a preliminary hearing or by the grand jury in determining whether there is probable cause to prosecute;
>
> (3) the immunity provision is to be addressed pre-trial by the court only in the context of whether there is probable cause to believe the use of force was not legally justified by the Act;
>
> (4) the immunity provision can be addressed by pre-trial motion before the trial judge, but if there are material facts in dispute, then the judge must deny the motion to dismiss, as is done in the civil arena;

(5) the immunity provision is to be addressed by pre-trial motion before the trial judge who is to hear all the evidence and assess its weight and credibility in deciding the issue.

As will be seen, the State asserts that option one is the correct procedure.

C. To allow the trial court to factually determine applicability of the Act prior to a trial would violate the State constitutional perogative of prosecutors, and be at odds with the intent of the General Assembly and the language of the Act.

First, of course, the State would assert that while the immunity provision is instructive to prosecutors and police with regard to their charging decisions, factual issues surrounding application of the act are only to be assessed by a jury, unless the court upon the close of evidence finds the issue should be resolved by directed verdict.

Admittedly, the Act's use of the word "immunity" has led a number of courts as described above to conclude that the provisions of the Act are somewhat more than a mere defense for trial. And, of course, in its intent and findings section, our General Assembly stated that law-abiding citizens should be able to protect themselves "without fear of prosecution or civil action", which has led some courts, as described above, to view the immunity provision as requiring some sort of legal proceeding to address the claim before the defendant is subjected to a jury trial.

There are a few problems with this approach in South Carolina, however.

1. To interpret the Act as allowing the court to factually determine immunity prior to trial would violate the State Constitution.

First, an interpretation of subsection (A) of S.C. Code Ann. § 16-11-450 as

allowing the judge to dismiss the indictment as a pre-trial matter would violate the South Carolina Constitution, and thus the judge's ruling to that effect here was error. A contention that the judge should make an independent determination under the Act whether it precludes prosecution – complete, obviously, with necessary factual findings and credibility determinations – violates the South Carolina Constitution's grant to the Executive Branch of the "power to decide when and how to prosecute a case". State v. Thrift, 312 S.C. 282, 440 S.E.2d 341 (1994) (discussing S.C. Const. Art. V § 24, and noting the "unfettered discretion to prosecute solely in the prosecutor's hands"). Indeed, this Court has noted that the constitutional power of the Attorney General to supervise the prosecution of all criminal cases "arises from our State constitution and *cannot be impaired by legislation*". Thrift, 312 S.C. at 308, 440 S.E.2d at 355 (refusing to interpret Ethics Act as requiring a referral from the Ethics Committee before a prosecution could occur as this interpretation would violate the constitutional perogative of the Attorney General) (emphasis added). See also State v. Peake, 353 S.C. 499, 579 S.E.2d 297 (2003) (to interpret statute as allowing or requiring DHEC to prosecute environmental crime would violate Attorney General's sole discretion to control the prosecution of cases under the state constitution).

It is true, of course, that pre-trial motions are often heard when someone claims immunity based on some sort of contract with or action of the prosecutor; however, this is consistent with the constitutional power to prosecute as it is based in actions taken by the prosecutor to aid investigation and prosecution. Alternatively, such pre-trial motions are made to enforce constitutional limits on prosecution such as the right

against self-incrimination or the double jeopardy clause. See State v. Morris, 376 S.C. 189, 656 S.E.2d 359 (2008); State v. Brewer, 351 S.C. 226, 569 S.E.2d 340 (2002) (noting that the purpose of immunity provisions is to aid the prosecution in investigating crimes and bringing charges); Thrift, *supra*. Nothing about those sorts of actions precludes a finding of a constitutional impediment here.

One might argue that there is no prosecutorial discretion to be violated where no crime was committed, and that if the Act applies there is no crime. However, the only provision that really matters in the instant case is section 16-11-440(A), which merely provides for a "presumption" that the defendant has a reasonable fear of imminent peril in circumstances of unlawful and forcible entry. However, a prosecutor in his or her discretion would be entitled to reject that presumption if the facts and circumstances warrant; thus, the statute (or at least the judge's application of it here) infringes on the prosecutor's constitutional perogative to assess that presumption in decisions to prosecute. See Black's Law Dictionary 1185-86 (6th ed. 1990) (noting that "a presumption is a rule of law, statutory or judicial, by which finding of basic fact gives rise to existence of presumed fact, until presumption is rebutted"; and that "in general, all presumptions other than conclusive presumptions are rebuttable presumptions"). Once the prosecutor determines the facts rebut the presumption and decides to prosecute the case, then the ultimate factual issues are to be resolved by a jury, with the important check that the judge can grant directed verdict under the normal standard if based on the Act there is not a viable factual issue in the light most favorable to the State.

Since a statute should not be interpreted in an unconstitutional manner if

possible, then the Act should not be interpreted as allowing a trial court to take evidence and assess the viability of a prosecutor's charging decision in a pre-trial manner. State v. Thrift, 312 S.C. 282, 440 S.E.2d 341 (1994) (adopting narrow construction to avoid infringement on constitutional prosecutorial discretion). The judge in this case accordingly erred.

2. The General Assembly did not intend for the immunity provision to result in a bench trial on the ultimate issues before the jury trial on the same issues, any time the provisions of the Act are in play.

Regardless of the viability of the constitutional impediment, other arguments support the view that while prosecutors of course have to take the provision into account in charging decisions, the General Assembly did not intend for the immunity provision to result in a bench trial of the case before the jury trial of the case. Florida and Kentucky's versions of this statute are almost verbatim to South Carolina's, but their subsections containing the provision that a person is "immune from criminal prosecution" also add: "As used in this subsection, the term 'criminal prosecution' includes arresting, detaining in custody, and charging or prosecuting the defendant". See Rodgers v. Commonweath, 285 S.W.3d 740, 753 (Ky. 2009) (discussing KRS 503.085); Velasquez v. State, 9 So.3d 22 (Fla. Dist. Ct. App. 2009) (discussing Fla. Stat. Ch. 776.032(1) (2007)). The Kentucky Supreme Court in Rodgers cited this broad definition of "criminal prosecution" as evidence that the state legislature intended true immunity and not merely a criminal defense. 285 S.W.3d at 753. Similarly, the Florida appellate court in Velasquez noted that by defining "criminal prosecution" so

broadly, the legislature "did not restrict the time frame for determining immunity, but rather provided a time continuum stretching across the entire criminal process". 9 So.2d at 24.

In contrast is the very telling fact that the broad definition of "criminal prosecution" was left out of South Carolina's version of the immunity provision. This omission obviously reflects an intent that, instead of a "time continuum" in which the issue could be raised at any time, the General Assembly intended for South Carolina trials be conducted they way they always are – with ultimate factual issues and credibility issues to be resolved by a jury at trial, unless the State cannot produce sufficient evidence of the defendant's guilt.

Indeed, as the Kentucky Supreme Court pointed out in Rodgers, there simply no support or authorization in the statute for the unprecedented step of creating a Geunther-style "trial before the trial". Rodgers v. Commonweath, 285 S.W.3d 740, 755 (Ky. 2009). Additionally, many of the concerns expressed by the Kentucky Supreme Court about such a procedure are applicable in South Carolina as well. As Rodgers pointed out, pre-trial evidentiary hearings on things like suppression and competency do not require proof of all the facts surrounding the actual crime, including calling all the witnesses and entering all the proof for trial. They also do not result in a bench decision on an actual element of the crime. As for abuse, defendants with minimal claims under the Act could still get a "dry run" at the State's witnesses in such a proceeding by simply raising the motion, and the necessity for such a procedure could be used for purposes of delay. Moreover, having a trial before the trial would not result

in any lesser burden of prosecution on the defending homeowner, as he or she would still have to litigate pretty much a full trial before the judge on the actual use of deadly force.

Finally, though, and most importantly, is the fact that like Kentucky, our state law expresses a strong preference for a jury trial on all elements of a criminal offense, as even the State can veto a defendant's decision to waive a jury. See Rule 14(b), SCRCrimP ("A defendant may waive his right to a jury trial only with the approval of the solicitor and the trial judge."). See also S.C. Const art. V, § 5 (Supreme Court corrects errors of law, and while Supreme Court can review facts in equity cases, it cannot do so where the facts were found by a jury); S.C. Const art. V, § 21 ("Judges shall not charge juries in respect to matters of fact, but shall declare the law."); Curtis v. State, 345 S.C. 557, 570, 549 S.E.2d 591, 597-598 (2001) (mandatory presumption invades the fact finding responsibility of the jury); State v. Arthur, 296 S.C. 495, 374 S.E.2d 291 (1988) (quoting US Supreme Court case for proposition that "the maintenance of the jury as a fact-finding body in criminal cases is of such importance and has such a place in our traditions, that, before any waiver can become effective, the consent of government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant"); State v. Norris, 270 S.C. 552, 243 S.E.2d 440 (1978) ("the constitutional provision was designed to preserve inviolate the jury's fact finding function", and "all questions of fact are to be decided exclusively by the jury").

Given the intent as expressed by the General Assembly in removing the

expanded definition of “criminal prosecution” and in providing nothing in the statute to authorize the unprecedented step of a “trial before the trial”, which would be subject to abuse and delay and inconsistent with long-standing traditions in our criminal justice system, a pre-trial evidentiary proceeding is not authorized and the trial court erred in holding one and dismissing the indictment.

3. In the event this Court decides a judicial pre-trial assessment of an immunity provision claim is necessary before a jury trial, the court should deny any motion to dismiss and proceed to trial if there are material facts in dispute.

In the event that this Court decides that there must be some pre-trial judicial review of applicability of the Act where raised by the defendant, the State would assert that the appropriate procedure would require the judge to deny the motion to dismiss where the material facts are in dispute, as the Florida appellate court held in Velasquez v. State, 9 So.3d 22 (Fla. Dist. Ct. App. 2009). The reasons why this rule is preferable are the same ones as set forth in the preceding discussion: the statute does not provide for the unprecedented step of a full bench trial on the ultimate issues prior to the jury trial; having a full bench trial could lead to abuse and necessarily would lead to delay; and longstanding South Carolina rules and law reflect a strong preference for resolution of factual issues by a jury in a criminal case.

Of course, this manner of addressing the immunity claim would be roughly equivalent to how summary judgment motions are handled in the civil arena, including claims of immunity under, for example, theTort Claims Act. There, summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. See Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002); Quail Hill, LLC v. County of Richland, 379 S.C. 314, 665 S.E.2d 194 (Ct. App. 2008); Rule 56(c), SCRCP.

It is true that the Kentucky Supreme Court went a different way in Rodgers v. Commonweath, 285 S.W.3d 740, 755 (Ky. 2009), instead looking at the issue as one of probable cause. However, Rodgers relied on the expanded definition of "criminal prosecution" in the immunity provision which includes "arrest", and "inferred" that probable cause must be the test because the next subsection precludes a "law enforcement agency" from arresting a person unless there was probable cause the use of deadly force was unlawful. Id. at 754.

Of course, as noted before, the South Carolina General Assembly removed the expanded definition of "criminal prosecution", leaving only the prohibition of a law enforcement agency's arrest of a person unless probable cause exists that the use of force was unlawful. See S.C. Code Ann. § 16-11-450(B) (Supp. 2008). Arrest, which simply involves the taking into custody, is different from indictment or charging, and thus the South Carolina provision seems merely addressed at preventing a person who killed another from being taken into custody as a matter of course, unless there was a basis for concluding the Act did not apply. This is consistent with the beginning of the

subsection, which allows the law enforcement agency to use "standard procedures" in investigating the case.

Ultimately, it may be that it is a rare case in which the State and the defendant agree on the material facts, including the existence of an actual fear, but still disagree on whether the Act precludes liability. Regardless, such a procedure would still give effect to immunity by making the State at least identify a good faith basis justifying prosecution.

Whatever procedure this Court adopts, including a Geunther-style procedure, the burden would be on the defendant in the pre-trial stage, as it is with issues of competency, see Hall v. Catoe, 360 S.C. 353, 601 S.E.2d 335 (2004), standing, see State v. McKnight, 291 S.C. 110, 352 S.E.2d 471 (1987), and speedy trial issues, see State v. Robinson, 335 S.C. 620, 518 S.E.2d 269 (Ct. App.1999). Otherwise a defendant could obtain a "dry run" by merely filing the motion. Once the case gets to the jury, regardless of procedure, then it would be the State's burden to disprove beyond a reasonable doubt that the defendant acted with justification under the Act, as is the case with "regular" self-defense.

Here, the trial court noted both the Guenther and the Velasquez procedures but stated it made no difference, because the "relevant facts were not in dispute" and under any standard Defendant was entitled to immunity under the Act. As will be seen, regardless of what standard or procedure is used, the judge erred in his application of the Act and his failure to analyze all the evidence, which provided areas of dispute among the material facts.

B. The trial court erred as a matter of law in concluding that

applicability of subsection (A) of 16-11-440 necessarily meant immunity was warranted, and failed to analyze the other evidence who provides ample areas of factual dispute on the issues encompassed by the Act.

Even if the Act or the procedure employed by the court in this case was not a violation of the solicitor's constitutional power to decide how to prosecute, or the General Assembly's intent in passing the statute, or longstanding rules and practice in South Carolina, the court made an error of law in dismissing the indictment simply by finding that the victim "was unlawfully on the Defendant's property and [had] forcibly entered the premises by advancing onto the front porch, which is part of the dwelling". **{R. p. 117}**.

1. The trial court erred in reasoning that if subsection (A) of S.C. Code Ann. § 16-11-440 applied, then dismissal was *necessarily* warranted.

This language the court used to justify dismissal was clearly a conclusion that because subsection (A) of S.C. Code Ann. § 16-11-440 applied, then dismissal was *necessarily* warranted. Indeed, the order's substantive discussion centered on whether it was appropriate for the court to make a pre-trial ruling on whether immunity applied. **{R. 112-15}**. As far as the Act's substantive *application* to this case, all that was mentioned was a recitation of subsection (A)'s language as to a reasonable fear from unlawful entry at the beginning of the order, and the conclusory statement set forth above essentially finding that since subsection (A) was applicable, dismissal was warranted. **{R. 110-11}**.

However, the court overlooked that nothing at all in the language in subsection

(A) by itself authorizes the use of deadly force – it just speaks as to what constitutes a presumption that a person had a "reasonable fear". No where in that section does it state that deadly force is authorized if a person merely has a reasonable fear. Therefore, as argued before, the use of "reasonable fear" clearly means subsection (A) is meant to modify the third element of self defense.

Regardless of any presumption that a fear was reasonable, under the second element of self-defense, a Defendant still must have either *actually* been in imminent danger, or had an *actual* fear of imminent danger. See State v. Slater, 373 S.C. 66, 69, 644 S.E.2d 50, 52 (2007). Moreover, as noted before, presumptions are rebuttable – thus, the evidence could refute that a homeowner's fear was reasonable even if someone was unlawfully and forcibly entering. See Black's Law Dictionary 1185-86 (6th ed. 1990) (noting that "a presumption is a rule of law, statutory or judicial, by which finding of basic fact gives rise to existence of presumed fact, until presumption is rebutted"; and that "in general, all presumptions other than conclusive presumptions are rebuttable presumptions"). Simply because the victim may have been unlawfully and forcibly attempting to enter does not mean that the homeowner necessarily is entitled to open fire.

And the circumstances of this case provide a good example of just this problem, in a situation where the parties were friends and the victim a social guest immediately prior to the shooting – as opposed to a stranger randomly breaking into the house. There could be many situations in which a person might be entitled to the presumption of a reasonable fear because of unlawful entry, but for whatever reason not be in actual

fear – for example, if he knew the person was unarmed, if he knew the person was weak or infirm, or just if he knew the person in general (as one, for example, who might get stupidly drunk but was never violent). Many domestic situations among family and friends who know each other well could potentially give rise to the presumption, but be situations where given all the facts known to the actor, a fear of imminent death or bodily harm was not reasonable, or the actor simply was not really afraid of the victim or in actual danger.

Moreover, the facts of this case throw in an additional wrinkle – the possibility of mutual combat. "Mutual combat" exists when there is mutual intent and willingness to fight, and it bars a claim of self-defense because it negates the element of not being at fault. See Jackson v. State, 355 S.C. 568, 586 S.E.2d 562 (2003). To simply hold that if subsection (A) is applicable immunity is warranted would allow someone to taunt the victim to the point where the victim comes on the porch – thus allowing the shooter and then open fire with impunity. Such a "trap" cannot be countenanced by the law. Indeed, even short of mutual combat situations there may be such taunting or other conduct on the part of the homeowner or car occupant that would preclude him from establishing the "without fault" element of self-defense. See State v. Rowell, 75 S.C. 494, 510, 56 S.E.2d 23, 29 (1906) (question of fact for the jury as to whether one was at fault in bringin on the difficulty by using language so provoking that a reasonable man would expect would bring on a physical encounter).

Accordingly, the judge erred as a matter of law in reasoning that if subsection (A) applied, then immunity was necessarily warranted. At a minimum, regardless of the

standard or procedure used, further analysis into the facts is necessary.

2. The facts of this case provide a number of areas of dispute as to applicability of the Act and self-defense in general, which the trial court failed to analyze based on its erroneous conclusion that applicability of subsection (A) necessarily entitled one to immunity.

Here, the facts before the judge certainly were enough to send the case to the jury, and provide a basis for rejection of the presumption in subsection (A), as well as raise issues of actual fear, mutual combat, and without fault in bringing on the difficulty.

As an initial matter, the trial court was flatly incorrect in saying the facts were not in dispute. The State repeatedly asserted that the facts were in dispute, and asked the judge to look at all the evidence. **{R. 18; 85-87}**. As the solicitor noted at the hearing **{R. 85-87}**, the photographs and video of the scene show blood at the base of the steps, and the autopsy reflected that the gunshot wound took a downward trajectory. **{State's Exhibit 1; State's Exhibit 2; State's Exhibit 7; State's Exhibit 8}**. The victim's brother found him at the bottom of the stairs after he was shot. **{R. 102}**. Although Jean Templeton gave a statement and testified at the hearing that the victim was forcing his way into the porch, she was Defendant's girlfriend and owned the murder weapon, and the solicitor cross-examined her on a number of such issues affecting her credibility, including things she left out of her statement to police, her claim that police changed her statement, and the fact that Defendant said "I think I really fucked up". **{R. 72-81}**. Indeed, the trial court erred in stating that Templeton's

testimony was “uncontradicted” **{R. p. 112}**, as uncontradicted evidence does not necessarily entitle one to judgment as a matter of law, where there may be issues of credibility for the jury. See State v. Richburg, 250 S.C. 451, 158 S.E.2d 769 (1968). Thus, as an initial matter, there is no support in the record for the trial court’s conclusion that the essential facts were not in dispute, and indeed, there was factual dispute as to whether the victim was even forcibly entering the porch.

But regardless of that is the fact that the judge makes no real substantive mention of the content of the 911 tape, which clearly reflects Defendant stating he was not scared of the victim, and exhorting the victim to “come on in, dickweed”, and “come on in, motherfucker”. Defendant also called the victim a “pervert motherfucker”, and certainly sounds far more mad and not at all scared. **{R. 95-101; State’s Exhibit 9}**. Defendant’s statement that he is not afraid of the victim alone would seem to be enough to rebut any presumption of fear, aside from his invitations and the aggressive tone of his voice. Defendant’s profane statements to the victim to “come on in” is certainly evidence that could raise issues of mutual combat, lack of an actual fear of imminent harm, and generally being at fault at bringing on the difficulty by taunting. The latter is buttressed by statements that the victim went over to the house to apologize, and indeed the victim is heard on the 911 tape simply asking “how am I a pervert?” – not screaming threats to kill Defendant. **{R. 95-101; 102; 104; State’s Exhibit 9}**. Moreover, another witness who called 911 told police she heard someone calling for help and saying “please don’t shoot, please don’t shoot” – which is hardly consistent with self-defense. **{R. 95-101}**.

Moreover, the judge's statement that "there is no dispute as to the essential facts of the case" **{R. p. 112}**, despite the portions of the record to the contrary, and failure to mention the clear fact at a minimum that it is apparent from the 911 tape that Defendant was enticing Victim onto the porch, is further evidence that the judge erroneously was focusing simply on whether Victim was on or attempting to enter the porch, with the belief that such a fact would alone trigger application of the immunity provision in the statute. The essential facts of the case are more than whether Victim was on or attempting to enter the porch, and the judge simply never analyzed this other evidence as to whether it might rebut the presumption, refute any notion of actual fear, and raise concern of mutual combat. There is certainly sufficient area of dispute among the facts on the issues to send the case to a jury.

Accordingly, the order must be reversed, regardless of what standard is applied or procedure followed for assessing claims under the Act's immunity provision.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the order granting the Defendant's motion to dismiss should be reversed.

Respectfully submitted,

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September 17, 2010.

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Greenville County
Honorable Edward W. Miller, Circuit Court Judge

The State,

Appellant,

v.

Gregory Kirk Duncan,

Respondent.

PROOF OF SERVICE

I, S. Creighton Waters, Counsel for Appellant, certify that I have this date served the ***Final Brief of Appellant***, dated September 17, 2010, on Respondent by depositing two copies of the same in the United States mail, first class postage prepaid, addressed to his attorney of record:

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I further certify that I have served all parties required by Rule to be served.

This 17th day of September, 2010.

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