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STATEMENT OF ISSUE ON APPEAL

The judge correctly determined that the Protection of Persons and Property Act, specifically S.C. Code §16-11-450, contemplates a pretrial hearing at which the State bears the burden of rebutting the factual presumptions provided by Section 16-11-440 and, at the end of such a hearing, finding that Duncan was entitled to immunity from prosecution as a matter of law.

STATEMENT OF THE CASE

Gregory Kirk Duncan shot his erstwhile friend, Chris Spicer, one time as Spicer, who was intoxicated, attempted to re-enter Duncan's dwelling after having been ejected from the premises for making crude sexual comments about Duncan's teenaged daughter. The State indicted Duncan for murder.

Defense counsel filed a motion to dismiss the prosecution pursuant to S.C. Code §16-11-450 of the Protection of Persons and Property Act, which provides in relevant part, "A person who uses deadly force as permitted by the provisions of this article … is justified in using deadly force and is immune from criminal prosecution." On March 24, 2009, Judge Edward W. Miller heard arguments on this motion and limited testimony and received a number of written statements concerning the incident. By subsequent order, the judge found Duncan immune from prosecution under the statute and dismissed the indictment.

ARGUMENT

The judge correctly determined that the Protection of Persons and Property Act, specifically S.C. Code §16-11-450, contemplates a pretrial hearing at which the State bears the burden of rebutting the factual presumptions provided by Section 16-11-440 and, at the end of such a hearing, finding that Duncan was entitled to immunity from prosecution as a matter of law.

The State's appeal essentially presents two issues, the first one of statutory interpretation and the second specific to this particular case: (1) whether S.C. Code §16-11-450 provides for a pretrial determination of immunity and (2) if so, whether the judge properly found that Duncan was immune from prosecution under the Act. The first of these two issues involves a determination of legislative intent. The recent case of *State v. Sweat,* 386 S.C. 339, 688 S.E.2d 569 (2010), succinctly summarizes the rules of statutory construction. In particular:

> The Court should give words their plain and ordinary meaning without resort to subtle of forced construction to limit or expand the statutes of operation. … Courts will reject a statutory interpretation which would … defeat the plain legislative intention.

688 S.E.2d at 575-6 (citations and quotation marks omitted).

Section 16-11-420(B) contains a legislative finding that "it is proper for law-abiding citizens to protect themselves, their families, and others from intruders and attackers without fear of prosecution … for acting in defense of themselves and others." S.C. Code §16-11-440(A)(1) and (2) provides:

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

> person: (1) against whom the deadly force is used is in the process of unlawfully and forcefully entering, or has unlawfully and forcibly entered a dwelling [or] residence … and (2) who uses deadly force knows or has reason to believe that an unlawful and forcible entry or unlawful and forcible act is occurring or has occurred.

Finally, S.C. Code §16-11-450(A) plainly states, "A person who uses deadly force as permitted by the provisions of this article … is justified in using deadly force and immune from criminal prosecution." Note that the General Assembly said "immune from criminal *prosecution*," not "immune from criminal *conviction*."

The State's analysis ignores the legislature's statement of intent and the presumption it specifically created and renders the Act a nullity:

> [A] prosecutor in his or her discretion would be entitled to reject that presumption if the facts and circumstances warrant. … 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 a 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.

Brief of Appellant p. 14-15.

The General Assembly plainly intended a pretrial determination of the immunity from criminal prosecution provided by Section 16-11-450(A). Compare *State v. Pittman,* 373 S.C. 527, 647 S.E.2d 144 (2007) (common law presumption of minors incapacity to commit crime properly raised by directed verdict motion). The State argues, "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." Brief of Appellant, p. 22. But unless the State is able to rebut the presumption established by S.C. Code §16-11-440, a homeowner *is* entitled to employ deadly force to resist an unlawful and forcible entry.

Compare *State v. Grooms,* 343 S.C. 248, 540 S.E.2d 99 (2000) (S.C. Code §16-25-90 requires defendant to prove by preponderance of evidence history of criminal domestic violence at hands of victim). There are two possibilities for the State's burden of defeating the presumption: either an

"any evidence" creating a material issue of fact or a "preponderance of the evidence" standard.

The State failed to meet either burden. The decedent, Spicer, was attempting to enter Duncan's dwelling forcibly and unlawfully while intoxicated. None of the so-called "facts in dispute" advanced by the State alter this fundamental scenario, under which Duncan was entitled to employ deadly force in repelling the invasion and to claim the immunity provided by S.C. Code §16-11-450(A). For this reason, the State appears to question the wisdom of the Act:

> 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 eminent death or bodily harm was not reasonable, or the actor simply was not really afraid of the victim or in actual danger.

Brief of Appellant, p. 23.

"And the circumstances of this case provide a good example of just this problem," the State contends. Brief of Appellant, p. 22. It is not the Court's province, however, to question the wisdom of a legislative enactment. *State v. Hamilton,* 327 S.C. 440, 486 S.E.2d 512 (1997).

For these reasons, the Court should affirm the order dismissing the indictment against Gregory Kirk Duncan pursuant to S.C. Code §16-11-450.

Respectfully submitted,

____

Joseph L. Savitz, III
Senior Appellate Defender

ATTORNEY FOR RESPONDENT

This 8th day of October, 2010

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

____

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Edward W. Miller, Circuit Court Judge

STATE OF SOUTH CAROLINA,

APPELLANT,

V.

GREGORY KIRK DUNCAN,

RESPONDENT

FINAL BRIEF OF RESPONDENT

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Edward W. Miller, Judge

STATE OF SOUTH CAROLINA,

APPELLANT,

V.

GREGORY KIRK DUNCAN,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Respondent in the above referenced case has been served upon S. Creighton Waters, Esquire, at Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, SC 29201, this 8th day of October, 2010.

____

Joseph L. Savitz, III
Senior Appellate Defender

ATTORNEY FOR RESPONDENT

SUBSCRIBED AND SWORN TO before me
this 8th day of October, 2010.

______________________________(L.S.)
Notary Public for South Carolina

My Commission Expires: December 4, 2017.

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February 8, 2011

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Re: The State v. Gregory Kirk Duncan

Dear Mr. Waters

Enclosed please find two copies of the Final Brief of Respondent in the above entitled case, which I have filed today with the South Carolina Court of Appeals.

Should you have any questions concerning this matter, please do not hesitate to contact me.

Sincerely,

Joseph L. Savitz, III
Senior Appellate Defender

JLS,III/pds

Enclosure