

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM LEXINGTON COUNTY
Court of General Sessions

The Honorable R. Knox McMahon, Circuit Court Judge

Appellate Case No. 2012-213137

RECEIVED
JUN 14 2013

SC Court of Appeals

Sidney A. Hursey, Jr.,.....Appellant,

v.

The State of South Carolina,.....Respondent.

INITIAL BRIEF OF APPELLANT

S. Jahue Moore
M. Brooks Biediger
Moore, Taylor & Thomas, P.A.
1700 Sunset Boulevard
P.O. Box 5709
West Columbia, South Carolina 29171
Tel.: (803) 796-9160
Fax: (803) 791-8410

Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	ii
STATEMENT OF ISSUES ON APPEAL	1
STATEMENT OF THE CASE	2
STATEMENT OF FACTS	3
ARGUMENT	11
I. THE TRIAL COURT ERRED IN DENYING IMMUNITY PURSUANT TO S.C. CODE § 16-11-440(c); THE APPELLANT REASONABLY BELIEVED THE USE OF FORCE WAS NECESSARY TO PREVENT DEATH OR GREAT BODILY INJURY WHEN HE WAS ATTACKED OUTSIDE OF HIS HOME AND THEREFORE WAS IMMUNE FROM PROSECUTION.....	11
II. THE COURT ERRED IN FAILING TO ADDRESS THE IMMUNITY PROVISION OF THE ACT; IN PARTICULAR, THE COURT INCORRECTLY DISREGARDED THE LANGUAGE OF SECTION 16-11-450(A) IN FINDING THERE IS NO OTHER APPLICABLE PROVISION OF LAW WHICH WOULD ENTITLE A DEFENDANT TO IMMUNITY.....	21
III. THE TRIAL COURT ERRED IN ADMITTING EVIDENCE THAT WAS SEIZED PURSUANT TO AN INVALID SEARCH WARRANT; THE WARRANT WAS NOT SIGNED BY A JUDGE WHEN IT WAS EXECUTED ON THE PROPERTY AND ANY EVIDENCE SEIZED IS INADMISSIBLE.....	31
CONCLUSION	36

TABLE OF AUTHORITIES

CASES

<i>Beard v. U.S.</i> , 158 U.S. 550, 15 S.Ct. 962 (1895)	13
<i>Brown v. U.S.</i> , 256 U.S. 335, 41 S.Ct. 502 (1921).....	28
<i>Davenport v. City of Rock Hill</i> , 315 S.C. 114, 432 S.E.2d 451 (1993)	22
<i>Davis v. Saunders</i> , 40 S.C. 507, 19 S.E. 138 (1894).....	32
<i>Doty v. Boyd</i> , 46 S.C. 39, 24 S.E. 59 (1896))	32
<i>State v. Bryant</i> , 391 S.C. 225, 705 S.E.2d 465 (2010)	29
<i>State v. Burkhardt</i> , 350 S.C. 252, 565 S.E.2d 298 (2002)	26
<i>State v. Covert</i> , 382 S.C. 205, 675 S.E.2d 740 (2009)	31-32
<i>State v. Dickey</i> , 394 S.C. 491, 716 S.E.2d 97 (2011).....	12,14- 15
<i>State v. Duncan</i> , 392 S.C. 404, 709 S.E.2d 662 (2011)	12, 23
<i>State v. Fuller</i> , 297 S.C. 440, 377 S.E.2d 328 (1989).....	14
<i>State v. Gordon</i> ,128 S.C. 422, 122 S.E.2d 501 (1924).....	25
<i>State v. Hendrix</i> , 270 S.C. 653, 244 S.E.2d 503 (1978)	18-19, 25-27
<i>State v. Hercheck</i> , Opinion No. 27258, 2013 WL 2325589 (2013)	22
<i>State v. Hewitt</i> , 205 S.C. 207, 31 S.E.2d 257 (1944).....	25
<i>State v. Rye</i> , 375 S.C. 119, 651 S.E.2d 321 (2007)	29
<i>State v. Sparks</i> , 179 S.C. 135, 183 S.E.2d 719 (1936).....	29

STATUTES

S.C. Code Ann. § 16-11-440(a)	13
S.C. Code Ann. § 16-11-440(c)	11,12
S.C. Code Ann. § 16-11-450	21
S.C. Code Ann. § 17-13-140.....	31
S.C. Code Ann. § 17-13-150.....	31
Ga. Code Ann. § 16-3-24.2	23-24
K.R.S. § 503.085	24-25
N.H. Rev.Stat. § 627:1-a.....	24-25
42 Pa. C.S.A. § 8340.1	24-25

T.C.A. § 39-11-622..... 24-25
West's F.S.A. § 776.032 24

SECONDARY SOURCES

40 C.J.S. Homicide § 131(b) ... 19-20

STATEMENT OF ISSUES ON APPEAL

- I. Whether the trial court erred in denying immunity pursuant to the "stand your ground" law in finding the Appellant did not reasonably believe his use of force was necessary to prevent death or great bodily injury?
- II. Whether the trial court erred when it determined the language "another applicable provision of law" in the immunity statute does not encompass the common law doctrines of self-defense and defense of habitation?
- III. Whether the trial court abused its discretion in admitting evidence seized pursuant to a search warrant when there was testimony the warrant was not signed by a judge before it was executed?

STATEMENT OF THE CASE

On November 24, 2009, the Appellant Sidney A. "Butch" Hursey, Jr. was arrested and charged with the murder of the decedent Michael Reese (hereinafter "decedent"). On November 8, 2011, counsel for the Appellant filed and served its Motion to Dismiss pursuant to the Protection of Person's and Property Act, S.C. Code § 16-11-410, et seq.

The Appellant's motion was heard from December 5-12, 2011, before the Honorable R. Knox McMahon in the Lexington County Court of General Sessions. Appellant was represented by S. Jahue Moore, Esquire, and M. Brooks Biediger, Esquire. Respondent was represented by Deputy Solicitors Shawn Graham, Esquire, and Rick Hubbard, Esquire.

During the hearing, counsel for the Appellant moved to suppress any and all evidence seized as a result of an invalid and unsigned search warrant on the property

On March 7, 2012, Judge McMahon issued his order denying both the motion to dismiss and the motion to suppress. Shortly thereafter, the Appellant moved the Court to reconsider.

The Appellant's motion to reconsider was heard on August 12, 2012. On October 1, 2012, Judge McMahon issued his order denying the motion to reconsider. The present appeal followed shortly thereafter.

The Appellant now respectfully requests this Court reverse the trial court's Order Denying the Motion to Dismiss and Denying the Motion to Suppress. The Appellant hereby respectfully requests this Court dismiss the charges against him.

STATEMENT OF FACTS

The Appellant Butch Hursey is a 70 year old man from Gaston, South Carolina. (Tr. 305). He owns and operates Cowboy's Auction house located at 1505 Busbee Road, Gaston, South Carolina. (Tr. 313). His home is located on the property adjacent to the auction house. He has lived in Gaston and operated the auction house for the past 22 years. (Tr. 313).

The Appellant has a significant history of medical problems. He has been a patient of Dr. Melton Stuckey for some 40 years. (Tr. 44). According to Dr. Stuckey, the Appellant suffers from diabetes, hypertension, high cholesterol, arthritis, and a host of other ailments. (Tr. 46-50). Since 1991, the Appellant has had three heart attacks. (Tr. 309). In 2001, the Appellant underwent quadruple heart bypass surgery. (Tr. 47). Since the heart bypass surgery, the Appellant has had a number of stints and other heart procedures performed. He has had surgery on his knee and cannot kneel down. (Tr. 311). At the time of the incident, he suffered from an undiagnosed case of cataracts. (Tr. 308). Essentially, the Appellant is an older gentleman who has been significantly weakened by years of chronic medical conditions. He is certainly not a good candidate to get involved in a fight. (Tr. 50). The Appellant does not have a criminal record and does not use illegal drugs. (Tr. 312).

The Appellant has lived at the Busbee Road property for approximately 25 years. (Tr. 313). From time to time, the Appellant allows homeless people or people who are down on their luck to stay in a metal building on his property. (Tr. 314). This building is located between the auction house and his home.

Approximately one month before the incident, the decedent's aunt and the Appellant's friend Faye Williams approached the Appellant about the decedent. Mrs.

Williams ran the canteen at the Appellant's auction house. (Tr. 157). Mrs. Williams asked the Appellant to hire the decedent as a short order cook. (Tr. 158). The Appellant allowed the decedent to work at the canteen. (Tr. 158).

When the decedent began working at the canteen, he began sleeping in a furnished area in the rear part of a garage adjacent to the auction house. The Appellant did not invite the decedent to sleep in the garage, the decedent simply began sleeping there. (Tr. 319). The Appellant did not lease the area to the decedent and the decedent did not pay any rent. (Tr. 319). At the time the decedent began staying in the furnished area, the Appellant was leasing the garage to an unrelated landscaping company. (Tr. 318).

The decedent only worked as a short order cook for two weeks. (Tr. 316). According to his Aunt Faye, he would show up to work extremely intoxicated and would act belligerent and loud. (Tr. 159). On a daily bases, the decedent would get drunk in the morning and take pills. (Tr. 322). After two weeks of this erratic behavior, the Appellant fired the decedent. (Tr. 159). The decedent then left the auction and moved to Orangeburg, South Carolina, with his girlfriend Tammy Phillips. (Tr. 159). Approximately two or three days after he left, the decedent returned to the Appellant's property without invitation. (Tr. 317).

In the weeks leading up to his death, the decedent's behavior became more and more erratic. Approximately a week before the incident, a .22 Derringer pistol (hereinafter the "Derringer") owned by the Appellant went missing. (Tr. 334). The Appellant usually kept the Derringer in a cubby hole above the radio in his van. (Tr. 334). The Appellant went out to the van to retrieve the Derringer, but it was gone. (Tr.

335). In the cubby hole was the a cell phone belonging to the decedent. (Tr. 335). The decedent admitted putting his cell phone in the Appellant's van to charge. (Tr. 336). The Appellant decided not to address the missing pistol because the pistol was insignificant to getting the decedent moved. (Tr. 336).

At approximately 10:00 a.m. on November 19, 2009, six days before the incident, a customer of the auction overheard the decedent threaten the Appellant's life. (Tr. 135). The customer John O'Neale spoke with the decedent outside the auction house while waiting on the Appellant. (Tr. 129). Mr. O'Neale asked the decedent how he and the Appellant were getting along, to which the decedent responded, "the first chance I get I'm going to kill that motherfucker." (Tr. 129). Mr. O'Neale took the threat seriously because he knew the decedent and his behavior. (Tr. 131). Mr. O'Neale immediately ended the conversation at that point. (Tr. 129). When the Appellant arrived a few minutes later, Mr. O'Neale relayed the decedent's threat to the Appellant and left the property. (Tr. 130).

On November 21, 2009, the decedent threatened the Appellant's life a second time. (Tr. 136). On that evening, the Appellant was calling an auction at the auction house. (Tr. 324). At approximately 10:00 p.m., the Appellant received a report the decedent was selling drugs in the auction house. (Tr. 324). The Appellant confronted the decedent and told him to leave the auction house. (Tr. 324). The decedent began to yell and scream at the Appellant. (Tr. 142). The decedent was heavily intoxicated throughout the incident. (Tr. 324). Mr. O'Neale approached the Appellant and warned him the decedent had threatened to kill the Appellant again. (Tr. 324). Mr. and Mrs. O'Neale waited outside the auction house to make sure the decedent did not attack the

Appellant. (Tr. 142). Mr. and Mrs. O'Neale testified they were genuinely scared the decedent was going to hurt the Appellant that night. (Tr. 142). The Appellant eventually calmed the decedent down. (Tr. 142). The Appellant told the decedent to sleep it off and hugged the decedent. (Tr. 136). The Appellant was able to defuse the situation from further escalating further that night. (Tr. 136).

At approximately 10:30 p.m. on November 24, 2009, the Appellant was just getting in bed to go to sleep. (Tr. 329). The Appellant's ex-wife Cissy Cooper was already asleep in another room in the house. (Tr. 63). The Appellant's son Robert Hursey and his friend Aaron Bishop were playing video games in another room in the house. (Tr. 331).

At approximately 10:36 p.m., the Appellant received a phone call from the decedent on the house landline. (Ex. 3). The decedent was angry at the Appellant because the Appellant would not allow him to stay on the property. (Tr. 327). During the phone call, the decedent went off on a tirade and began arguing with his girlfriend. (Tr. 328). During the twelve minute phone call, the decedent was drunk, belligerent, cursing, and hell bent on doing the Appellant physical damage. (Tr. 327). It became apparent to the Appellant the decedent might be coming over to his house at any minute. (Tr. 329). The Appellant eventually told the decedent to meet him outside to talk about the decedent's problems. (Tr. 329). The phone call ended at 10:48 p.m. (Tr. 60).

The Appellant did not call the police to come arrest the decedent. (Tr. 437). He has had to call the police before and it often takes multiple calls to get a response. (Tr. 437). According to the lieutenant in command of the Lexington County Sheriff

Department's south region, the likely response time for a trespasser complaint would be 30-45 minutes. (Tr. 500). The Appellant knew it would take at least 30 minutes for the police to show up and this simply would not be fast enough to protect him from the decedent. (Tr. 380) Instead, he decided to walk outside and calm the decedent down himself. (Tr. 380)

After hanging up the phone, the Appellant got out of bed and put on a shirt, pants, and his loafers. (Tr. 330). He also picked up his Smith & Wesson .38 Special revolver and tucked it behind his back into his belt. (Tr. 330). He always carried a pistol outside on his property on the advice of Lexington County Sheriff James Metts ever since his wife was murdered in 2003. (Tr. 330).

Once he was dressed, the Appellant walked into the living room and asked Robert and Aaron to accompany him outside. (Tr. 383). The Appellant asked the young men to come with him because he was afraid the decedent was going to physically attack him. (Tr. 383). The Appellant believed having three people meet the decedent outside would calm him down and prevent an attack. (Tr. 383). According to Robert, the Appellant appeared very uncomfortable when he asked them to walk outside with him. (Tr. 212).

The Appellant and the two young men left the house and walked out into the yard to meet the decedent. (Tr. 332). Throughout the entire incident, the Appellant never left his property. (Tr. 332). The yard was poorly lit with trees overhanging. (Tr. 198).

As they walked across the yard, the three men heard someone screaming in the garage adjacent to the auction house. (Tr. 244). The decedent was in the garage, drunk and cussing loudly. (Tr. 191). As the men approached the fence line that

separates the Appellant's residential lot from his business lot, the decedent exited the garage through a door on the far side of the building. (Tr. 192).

According to SLED toxicologist Dustin Smith, the decedent was grossly intoxicated on the night of the incident. (Tr. 30). A toxicology analysis later determined the decedent's blood alcohol level was .214%. (Tr. 25, Ex. 1). The decedent also tested positive for marijuana and various benzodiazepines. (Ex 1). The cocktail of drugs and alcohol in the decedent's system likely had a synergistic effect of magnifying the decedent's level of intoxication. (Tr. 29). The cocktail of drugs would likely make a novice user pass out, but an experienced user like the decedent would have decreased inhibitions, difficulty thinking, slurred speech, and unsteadiness in his feet. (Tr. 30).

At the time of the incident, the decedent was 37 years old (29 years younger than the Appellant). (Tr. 97). The decedent was a good physical condition at the time of the incident. (Tr. 753-755).

The decedent exited the building and began moving towards the Appellant and the two young men at a stumbling but aggressive pace. (Tr. 192). The decedent was reaching around in his pockets as he walked. (Tr. 192). The lighting was poor, but the Appellant saw the decedent brandish what appeared to be his missing .22 derringer pistol. (Tr. 341). Seeing what appeared to be a pistol, the Appellant shouted for the decedent to stop. (Tr. 341). The Appellant believed the decedent was going to start shooting at him at any moment. (tr. 342). Robert also believed the decedent was going to attack the Appellant. (Tr. 201).

When the decedent refused to stop and continued cussing and shouting as he approached the Appellant. (Tr. 193). The Appellant pulled the pistol from his back and

shouted for the decedent to stop for a second time. (Tr. 343). The Appellant pointed the pistol at the decedent, but the decedent did not stop. (Tr. 343). At this point, the Appellant was approximately 25 feet away from the decedent. (Tr. 342). The decedent still appeared to have the Appellant's .22 derringer pistol in the darkness. (Tr. 343). The Appellant did not have time to retreat or call the police before he was forced to act. (Tr. 395).

When the decedent refused to stop after the second command, the Appellant motioned at Robert with his unarmed hand to get back. (Tr. 196). The Appellant then fired his pistol at the decedent, striking him four times until the decedent fell on the ground behind a nearby SUV. (Tr. 345). The Appellant approached the decedent who was now on the opposite side of the SUV. As the Appellant looked over, it appeared the decedent was alive on the ground, on his elbow, pointing the gun at him. (Tr. 347). The Appellant then fired again in a dipping motion, striking the decedent. (Tr. 348). This was the fifth and final shot. (Tr. 348). Although the Appellant had six bullets in his gun, he only fired five shots. (Tr. 347).

Immediately after the incident, the decedent's girlfriend ran out of the garage. (Tr. 350). The Appellant told his son to go wake up his mother, Mrs. Cooper, and have her call the police. (Tr. 199). The call to 911 went out at 10:52 p.m., approximately four minutes after the phone call between the Appellant and the decedent ended. (Tr. 60).

The Appellant did not attempt flee the scene and complied with the 911 operator's instructions to put the gun in a vehicle on the property. (Tr. 350).

At approximately 11:00 p.m., Sgt. Kevin Howard with the Lexington County Sheriff's Dept. was the first officer on the scene. (Tr. 619). When he arrived, he saw the

decedent's girlfriend standing over the decedent's body screaming and making a commotion. (Tr. 620). Due to the poor lighting, Sgt. Howard drew his gun. (Tr. 621). Another deputy then arrived on the scene. Sgt. Howard ordered the Appellant to put his hands up and get on the ground. (Tr. 622). The Appellant put his hand up but was unable to get on the ground because of his bad knee. (Tr. 352). The second deputy on the scene tackled the Appellant. (Tr. 352). After he was tackled on the ground, the Appellant began having heart pains. (Tr. 352). The deputies on the scene thought the Appellant was having a heart attack. (Tr. 633). The Appellant was then taken to the hospital. (Tr. 353, Ex. 6-8). Shortly thereafter, the Lexington County Sheriff's Department arrested the Appellant and charged him with murder.

A document purporting to be a search warrant was then executed against the property. (Ex. 49). During the *Duncan* hearing, law enforcement testified this search warrant was the original warrant and the authority to search the property relied upon this warrant. (Tr. 704) The warrant, later referred to as Exhibit 49, does not include a date or signature of a judge. (Tr. 706).

The Respondent then admitted into evidence another purported search warrant, referred to as Exhibit 61 S. (Tr. 772). This document is identical to Exhibit 49 in nearly all facets, except this document is signed by Lexington County Magistrate and dated November 25, 2009. (Order Denying Immunity, March 7, 2012).

The Appellant maintains Exhibit 49 was the true original search warrant and that the evidence seized was inadmissible. The Appellant moved to suppress any and all evidence seized as a result of the invalid and unsigned search warrant. (Appellant's Memorandum in Support, December 22, 2011).

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING IMMUNITY PURSUANT TO S.C. CODE § 16-11-440(c); THE APPELLANT REASONABLY BELIEVED THE USE OF FORCE WAS NECESSARY TO PREVENT DEATH OR GREAT BODILY INJURY WHEN HE WAS ATTACKED OUTSIDE OF HIS HOME AND THEREFORE WAS IMMUNE FROM PROSECUTION

The trial court erred in its application of the S.C. Code § 16-11-440(c), also known as the “stand your ground” provision in the Protection of Persons and Property Act. In the *Duncan* hearing, the primary focus of the Appellant’s evidence was directed towards the “stand your ground” provision. In the Appellant’s post-hearing memorandum of law, the primary argument for immunity was based upon the “stand your ground” provision. Despite the evidence and arguments in support of immunity under the “stand your ground” provision, the trial court’s original order did not address this provision of law in its decision to deny immunity.¹

The Appellant then moved for reconsideration, again with the primary focus towards immunity under the “stand your ground” provision. In the order denying reconsideration, the trial court essentially found that “[a]lthough there was testimony of the victim’s boisterousness, there is no evidence to support a finding that the victim was engaging in forceful behavior such that would necessitate a response of deadly force to protect the [Appellant] or any other bystanders.” The Appellant respectfully submits that this is not supported by the facts of this case. There is ample evidence to support a finding of reasonableness for the Appellant’s actions. Based on the evidence presented during the *Duncan* hearing, as well as the statutory and case law in support of the

¹ The Trial Court quoted the language of S.C. Code § 16-11-440(c) in its original order denying immunity, but the “stand your ground” provision was not applied or ruled upon until the order denying reconsideration.

“stand your ground” provision, the trial court’s decision in this regard amounts to an error of law and should be reversed.

a. The standard of review

“In criminal cases, the appellate court only reviews errors of law and is clearly bound by the trial court’s factual findings unless the findings are clearly erroneous.” *State v. Dickey*, 394 S.C. 491, 498-499, 716 S.E.2d 97, 100 (2011). Pursuant to *State v. Duncan*, “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.” *State v. Duncan*, 392 S.C. 404, 411, 709 S.E.2d 662, 665 (2011).

The “stand your ground” provision reads as follows:

(C) 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 16-11-420(C).

Although the stated intent of the Protection of Persons and Property Act is to codify the common law castle doctrine, the statute itself also codifies the common law doctrine of “stand your ground” in Section 440(c). The Act itself is a relatively new piece of legislation. As a result, the common law interpreting the Act is limited. The concept of “stand your ground,” however, dates back over 100 years in American law.

a. The history of the “stand your ground” law.

“Stand your ground” cases tend to present a similar pattern of facts. These cases typically involve a homeowner or resident being attacked on his or her own property by a third party. This was also the case with the Appellant and the decedent.

The term “stand your ground” came into widespread use as a result of the 1895 United States Supreme Court decision in *Beard v. U.S.*, 158 U.S. 550, 15 S.Ct. 962 (1895). In *Beard*, the Defendant was convicted of manslaughter following his use of deadly force on his own property. The decedent came onto the Defendant’s property during a dispute over livestock. *Id.* at 553, 963. The decedent essentially charged at the Defendant in an “angry manner” and the Defendant struck the decedent over the head with a shotgun, killing him. *Id.* at 552, 962. During the decedent’s charge, it appeared the decedent was attempting to pull a pistol from his pocket. *Id.* at 552-553, 963. The United States Supreme Court held the Defendant “was entitled to stand his ground, and meet any attack made upon him with a deadly weapon.” *Id.* at 563, 967.

The typical “stand your ground” situation is more akin to a traditional self-defense case than a statutory castle doctrine case because it involves an analysis into the reasonableness of a defendant’s actions. In other words, the statutory castle doctrine in Section 440(a) of the Act creates a presumption of reasonableness if the attacker is in the process of entering the defendant’s home. Similarly, the “stand your ground” provision requires someone to be in “a place where he has the right to be” at the time of the attack. However, there is no presumption of reasonableness created in the “stand your ground” provision. Therefore, the reasonableness of the defendant’s actions must be proven by a preponderance of the evidence. Based on the evidence submitted

during the *Duncan* hearing, the Appellant is entitled to immunity because he reasonably used force to defend himself on his own property.

b. The greater weight of the evidence proves the Appellant qualifies for immunity under the “stand your ground” law.

Pursuant to the “stand your ground” provision of the Act, there are essentially three elements that must be proved to invoke the immunity: (1) The Defendant must not be engaged in unlawful activity at the time of the incident; (2) the Defendant must be attacked in a place where he had the right to be, and; (3) the Defendant has the right to use force only if he reasonably believes it is necessary to prevent death, great bodily injury, and the commission of a violent crime.

As a threshold matter, there is no question the Appellant was not engaged in unlawful behavior and was lawfully where he had the right to be at the time of the incident. The incident took place entirely on the Appellant’s property. (Tr. 329). The Appellant was preparing to go to sleep in his own bed moments before the incident occurred. (Tr. 329) The trial court correctly concluded “[the Appellant] armed himself and it was not unlawful for him to do so.” (16, original order). Therefore, the Appellant was not engaged in unlawful activity and was lawfully where he had the right to be when the incident occurred. The only remaining issue is the reasonableness of the Appellant’s actions.

In *State v. Dickey*, the South Carolina Supreme Court addressed the elements of actual and reasonable belief of imminent danger. The Supreme Court held “[a] person has the right to act on appearances, even if the person’s belief is ultimately mistaken.” *State v. Dickey*, 394 S.C. 491, 716 S.E.2d, 97, 102 (2011) (citing *State v. Fuller*, 297 S.C. 440, 443-44, 377 S.E.2d 328, 331 (1989)). Essentially, the Court in *Dickey* held

that a person may act on events as they subjectively appear to the defendant, rather than what a reasonable person may have believed. The Supreme Court held the following factors to be determinative in evaluating whether the defendant reasonably believed he was in imminent danger:

It is uncontroverted that [the decedent] was highly intoxicated, acted aggressively over the course of the conflict, that he began advancing toward Petitioner quickly with the purpose of assaulting him, that he continued advancing toward Petitioner after Petitioner pulled the gun, that there was great disparity in the physical stature and capabilities of [the decedent] and Petitioner, Furthermore, the State did not rebut Petitioner's testimony that he saw [the decedent] reach under his shirt as he advanced . . . Petitioner testified he did not see what [the decedent] was reaching for when he fired the shots, but because [the decedent] continued advancing after seeing the gun, Petitioner believed he was reaching for a deadly weapon.

Id. at 102.

The uncontradicted evidence admitted throughout the *Duncan* hearing proves the Appellant reasonably used force pursuant to the Act. The present case is nearly identical to the salient facts of *State v. Dickey*, especially in the analysis used to determine reasonable belief of imminent danger.

In the Appellant's case, the attacker was grossly intoxicated at the time of the incident. (Tr. 30). The eye-witnesses testified to the decedent's appearance of intoxication. (Tr. 250). This eye-witness testimony was corroborated by the forensic evidence. The head of the SLED Toxicology Department offered his expert opinion that the decedent was grossly intoxicated as well. (Tr. 30) This expert opinion was based on the combination of alcohol (.214 BAC) and prescription drugs in the decedent's system at the time of death. (Tr. 30; Ex. 1).

The Appellant's case is also similar to *Dickey* based on the disparity in physical stature between the Appellant and the decedent. At the time of the incident, the Appellant was 66 years old and the decedent was 37 years old. (Tr. 97). At the time of the incident, the Appellant was weakened by a host of medical conditions, including: three heart attacks, quadruple bypass surgery, hypertension, diabetes, arthritis, cataracts, and knee surgery. (Tr. 309). According to the Appellant's life long doctor, the Appellant would not have the physical stamina to get into a fight. (Tr. 50). The decedent, on the other hand, has no evidence of chronic ailment aside from a fatty liver as the potential result of chronic alcohol and drug abuse. (Tr. 753-755). Based on the physical disparity between the Appellant and the decedent, the Appellant was reasonably fearful the decedent would inflict serious harm on him the night of the incident.

The eye-witnesses also testified the decedent was acting aggressively towards the Appellant on the night of the incident. (Tr. 192). The decedent advanced towards the Appellant with the appearance he was going to assault him. (Tr. 192). While advancing towards the Appellant, the decedent reached into his jacket and pulled out an object that appeared to be a .22 derringer which was previously stolen from the Appellant. (Tr. 341). The decedent continued advancing after the Appellant pulled his gun and commanded him to stop multiple times. (Tr. 343). This aggressive behavior led the Appellant to reasonably believe his life and the lives of others were under imminent threat of danger.

While the present facts are similar to the facts of *State v. Dickey*, there is even more evidence the Appellant acted reasonably to defend himself and others. During the *Duncan* hearing, there was testimony the decedent threatened the Appellant's life in the

days leading up to the incident. (Tr. 130). The Appellant had personal knowledge of the decedent's belligerent and violent tendencies before the incident. (Tr. 130, 324). The Appellant also had reason to believe that one of his guns was missing and that the decedent had stolen it. (Tr. 336). When the decedent erratically reached into his pocket after the Appellant drew his gun, the Appellant believed the decedent was going for his pistol. The Appellant had very poor vision, which was unknown to him at the time. (Tr. 307-308). In the dim light on the evening in question, it appeared to the Appellant that the decedent was going to shoot him with his own pistol. (Tr. 341). The Appellant was forced to shoot the decedent as the only means of stopping the apparent threat of deadly force.

In light of the factors outlined in *State v. Dickey*, as well as the particulars in this case, the Appellant's use of force was reasonable given the circumstances. Therefore, he was justified in acting upon a reasonable belief of imminent danger of losing his life or sustaining serious bodily injury.

c. The trial court's finding that the Appellant did not reasonably believe he had to use force to stop the decedent's attack is clearly erroneous and should be reversed.

Despite the testimony and forensic evidence to the contrary, the trial court found there was simply "no evidence" the Appellant acted in a reasonable manner. The Court then listed the evidence "that could potentially indicate some basis for the reasonable belief that [the Appellant's] actions were necessary to prevent death or great bodily injury," including the Appellant's physical weakness and the decedent's previous threats to his life. (Order of Oct. 1, 2012, p. 3). However, the trial court concluded the Appellant did not act reasonably because he "requested the meeting, that [the

Appellant] had never worried about his safety at the hands of the [decedent], and that [the Appellant's] own in-court demonstration of the manner in which he fired his gun all suggest" the Appellant did not act reasonably, as well as the decedent was "an-armed" and "unaware." (Order of Oct. 1, 2012, p. 3).

The Appellant respectfully submits the trial court improperly disregarded relevant evidence and relied upon irrelevant evidence in deciding the Appellant was not acting reasonably. Whether the Appellant invited the decedent out or had previously feared for his safety have essentially no bearing on whether the Appellant acted reasonably during the incident. In the *Dickey* case above, the Defendant also initiated the contact with the decedent and also was never previously worried about the decedent's behavior (the Defendant met the decedent for the first time on the night of the incident). In any event, the trial court's findings were clearly erroneous based on the following reasons.

The trial court found the Appellant invited the decedent to meet him to support the contention he did not act reasonably. This is essentially a finding of provocation. In *State v. Hendrix*, the South Carolina Supreme Court addressed the issue of provocation on facts that closely resemble the evidence presented in the present case. *State v. Hendrix*, 270 S.C. 653, 660-61, 244 S.E.2d 503, 507 (1978). In *Hendrix*, the defendant was on his own property when he shot an attacker. The attacker had a blood alcohol level of .208 percent at the time he died. In *Hendrix*, the "Appellant was sixty-five years of age, some fifteen to twenty years older than his adversary and hardly a physical match for the younger man." *Id.* at 660, 506. In determining whether the Defendant provoked the encounter, the Supreme Court placed significance on the statements of the defendant immediately prior to the shooting:

When the deceased arrived and got out of his truck and approached appellant, the appellant at that point pulled out the shotgun, pointed it at the deceased, and told him to “back off” three times. The only reasonable explanation for this action is that appellant, who had reason to expect trouble, because of [decedent’s] earlier threat that they would fight, was trying to avoid a fight. This would not constitute evidence of provocation.

Id. at 659, 506.

Likewise, the evidence before the Court in the *Duncan* hearing indicates the Appellant shouted “stop!” at the decedent at least twice before the shooting. (Tr. 343). Testimony from the only other eye-witnesses – Robert Hursey and Aaron Bishop – corroborates this point. (Tr. 196). Therefore, the Appellant did not provoke the altercation as a matter of law because he told the decedent to stop twice in an attempt to avoid confrontation.

The Court next found that “[the Appellant] had never worried about his safety at the hands of the victim.” In *Dickey*, the Defendant had never previously worried about his safety at the hands of the decedent because he had never met the decedent. What the Defendant previously knew or felt towards the decedent was simply not a factor in the Court’s decision to find the Defendant acted in self-defense. Further, the trial court’s finding is contrary to the greater weight of the evidence presented during the *Duncan* hearing. Multiple witnesses testified the decedent had threatened the Appellant’s life on at least two occasions prior to the incident. (Tr. 135, 324).

Finally, the trial court stated the Appellant did not act in a reasonable manner because of the manner in which he shot the decedent. This is essentially an argument on excessive force. In *Hendrix*, the defendant shot the decedent four times with a shotgun. The Supreme Court held that the force was not excessive, stating that “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.” *Id.* at 661, 507 (citing 40 C.J.S. Homicide § 131(b) at 1020 (1944)) (emphasis added). Once an individual's right to fire in self-defense arises, the law does not require him to wait until his adversary is on equal terms before he fires. *Id.* at 660-61, 507.

In the *Duncan* hearing, the Appellant testified he shot five shots of a six shot gun at the decedent when he thought his life was threatened. (Tr. 345-348). The Appellant testified he continued shooting until he was certain the decedent was not longer a threat. (Tr. 348). Pursuant to *Hendrix*, the Appellant was justified in his continued use of force because there was still an apparent threat of danger. Therefore, as a matter of law, the trial court erred because the manner in which the Appellant shot the decedent was justified and reasonable given the circumstances.

Based on the foregoing, the Appellant reasonably used force to defend himself pursuant to S.C. Code § 16-11-440(c), the “stand your ground” provision of the South Carolina Protection of Persons and Property Act. The trial court’s denial of immunity amounts to an error of law. The Appellant respectfully requests this Court reverse the trial court’s order in this regard.

II. THE COURT ERRED IN FAILING TO ADDRESS THE IMMUNITY PROVISION OF THE ACT; IN PARTICULAR, THE COURT INCORRECTLY DISREGARDED THE LANGUAGE OF SECTION 16-11-450(A) IN FINDING THERE IS NO OTHER APPLICABLE PROVISION OF LAW WHICH WOULD ENTITLE A DEFENDANT TO IMMUNITY

The Protection of Persons and Property Act has two key substantive sections. The first substantive section is Section 16-11-440. This is essentially the qualification statute. This section deals with the general requirements a Defendant must meet to qualify under the Act.

The second substantive section is Section 16-11-450: the immunity statute. This section grants immunity from prosecution to individuals who satisfy the requirements of the Act. Section 16-11-450 also has a qualification element in its language as well. Subsection (A) reads as follows:

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 criminal prosecution and civil action for the use of deadly force . . .

S.C. Code § 16-11-450(A) (emphasis added). In other words, if a defendant proves that the use of deadly force was permissible under one of the enumerated instances of Section 16-11-440 *or* under “another applicable provision of law,” the defendant is immune from criminal prosecution. Therefore, a Defendant qualifies for immunity even if he fails to satisfy the requirements of Section 16-11-440, so long as his use of deadly force was justifiable under “another applicable provision of law.”

- a. **The trial court erred as a matter of law because it incorrectly found the language “another applicable provision of law” did not include the doctrines of self-defense, defense of others, and defense of habitation.**

The words “or another applicable provision of law” are a part of the immunity statute. This provision grants immunity to a Defendant who uses justifiable force in a manner which is not enumerated under the qualification statute in Section 16-11-440. Without the words “or another applicable provision of law,” the immunity statute would be limited to those individuals who qualify under Section 16-11-440. If the presence of these words conveys any meaning, the meaning must be that the immunity statute is not limited to individuals who qualify under Section 16-11-440, but also individuals who use justifiable force under another applicable provision of law.

“It is never to be supposed that a single word was inserted into the law of this state without the intention of thereby conveying some meaning.” *State v. Hercheck*, Opinion No. 27258 (May 29, 2013) (quoting *Davenport v. City of Rock Hill*, 315 S.C. 114, 432 S.E.2d 451 (1993)).

In its original order denying immunity, the trial court held the words “another applicable provision of law” do not require an analysis into the doctrines of self-defense and defense of habitation:

The inclusion of the words “another applicable provision of law” is troubling because it can be read as requiring judges to have separate pretrial hearings in every case where it is asserted that there was a justifiable use of deadly force. The legislature could not have intended such a broad reading of the statute. Further there is no other applicable provision of law that grants a pretrial hearing and immunity from prosecution in the case of homicide.

(Order Denying Immunity, March 6, 2012).

The trial court's analysis is necessarily flawed because it conflicts with the statutory rule of construction that every word in the statute must be intentional and have meaning. If the General Assembly accounts for "another applicable provision of law," there must necessarily be other provisions of law to which the immunity applies. The trial court's finding that there are no other applicable provisions of law is in direct conflict with the statute itself. Therefore, the trial court erred as a matter of law in finding that no other applicable provision of law exists.

The appropriate analysis should include a determination of what the words "another applicable provision of law" mean. The immunity statute itself does not give any guidance or limitation in interpreting these words. Further, the jurisprudence regarding the Protection of Persons and Property Act is limited. See *State v. Duncan*, 392 S.C. 404, 709 S.E.2d 662 (2011) (addressing the substantive provisions of Act on first impression in May of 2011). Therefore, the Court should look to other states which have adopted similar but more specific statutes to the South Carolina Protection of Persons and Property Act, as well as the South Carolina common law for guidance in applying the Act.

- i. **The Court should seek guidance from other states which have specified the other applicable provisions of law to include the doctrine of self-defense; defense of others; defense of home or property; and the use of force by a law enforcement officer.**

Other states have adopted immunity statutes similar to Section 16-11-450. These states offer greater detail as to what provisions of law give a Defendant protection under the Act. For instance, the Georgia immunity statute is codified as Ga. Code Ann., § 16-3-24.2. Pursuant to this statute:

A person who uses threats of force in accordance with Code Section 16-3-21, 16-3-23, 16-3-23.1, or 16-3-24 shall be immune from criminal prosecution therefor unless in the use of deadly force, such person utilizes a weapon the carrying or possession of which is unlawful by such person...

Ga. Code Ann., § 16-3-24.2. Instead of using the broad language of "another applicable provision of law," the Georgia statute references the self-defense statute (§16-3-21), the defense of habitation statutes (§§16-2-23 and 23.1), and the use of force in the defense of property statute (§16-3-24).

The Florida immunity statute may also shed light on what is meant by "another applicable provision of law." Pursuant to the Florida immunity statute:

A person who uses force as permitted in s. 776.012, s. 776.013, or s. 776.031 is justified in using such force and is immune from criminal prosecution and civil action for such use of force . . .

West's F.S.A. § 776.032. The specific code sections referenced in the Florida immunity statute include the self-defense statute (§ 776.012), the defense of home statute (§ 776.013), and the defense of others statute (§ 776.031).

A number of other states, including Kentucky, Tennessee, Pennsylvania, and New Hampshire all have similar immunity statutes which provide greater detail for which provisions of law entitle a Defendant to immunity. See K.R.S. § 503.085; T.C.A. § 39-11-622; 42 Pa.C.S.A. § 8340.2; and N.H. Rev.Stat. § 627:1-a.

The general consensus among these states is statutory immunity is applicable to a Defendant who uses justifiable force according to the following provisions of law:

1. The use of force in self-defense. See K.R.S. § 503.050; T.C.A. § 39-11-611; 18 Pa. C.S.A. § 505; N.H. Rev.Stat. § 627:4.
2. The use of force in the defense of habitation. See K.R.S. § 503.055; T.C.A. § 39-11-614; N.H. Rev.Stat. § 627:7.

3. The use of force in defending another person. See K.R.S. § 503.070; 18 Pa.C.S.A. § 506; N.H. Rev.Stat. § 627:4.
4. The use of force in the protection of property. See K.R.S. § 503.080; T.C.A. § 39-11-614; 18 Pa.C.S.A. § 507; N.H. Rev.Stat. § 627:8.
5. The use of force by a law enforcement officer. See 18 Pa.C.S.A. § 508; N.H. Rev.Stat. § 627:5.

Taken as a whole, these statutes from other states offer a reasonable interpretation of the other applicable provisions of law the South Carolina immunity statute is referring to. The term “another applicable provision of law” is essentially a catch-all meant to encompass those doctrines of law which are most analogous to the justifiable use of force. In particular, the doctrines of self-defense, defense of others, defense of habitation, and defense of property are incorporated into the South Carolina immunity statute through the words “another applicable provision of law.”

- b. The South Carolina common law castle doctrine, as well as the common law of self-defense, defense of others, and defense of habitation are the appropriate provisions of law to which immunity under the Act should apply.**

The common law castle doctrine and the analogous common law doctrines of self-defense, duty to retreat, and defense of habitation are appropriate in this matter.

The common law castle doctrine is essentially an exception to the fourth element of self-defense: the duty of retreat. Under the common law, a defendant who is “attacked, without fault on his part, on his own premises, has the right, in establishing a plea of self-defense, to claim immunity from the law of retreat, which ordinarily is an essential element of that defense.” *State v. Gordon*, 128 S.C. 422, 122 S.E.2d 501, 502 (1924); *State v. Hewitt*, 205 S.C. 207, 31 S.E.2d 257, 258 (1944); *State v. Hendrix*, 270 S.C.653, 659, 244 S.E.2d 503, 506 (1978). In the present case, there is no question but

that The Appellant was on his own property at the time of the incident. (Tr. 332). The Appellant did not provoke any part of the incident, but instead was called from his bed at night by a violent and grossly intoxicated individual. (Tr. 329, Ex. 3). The undisputed evidence has shown that this grossly intoxicated individual had no right to be on The Appellant's property and had remained there despite The Appellant's pleas for him to leave. Therefore, under the common law castle doctrine, the Appellant was under no duty to retreat and was justified in standing his ground at the time the incident occurred.

Under the traditional law of self-defense, the State has the burden of disproving self-defense beyond a reasonable doubt. *State v. Burkhart*, 350 S.C. 252, 261, 565 S.E.2d 298, 303 (2002). The State must disprove each of the following elements beyond a reasonable doubt:

First, the defendant must be without fault in bringing on the difficulty. Second, the defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger. Third, if his defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief. If the defendant actually was in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life. Fourth, the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in the particular instance. If, however, the defendant was on his own premises he had no duty to retreat before acting in self-defense.

State v. Hendrix, 270 S.C. 653, 657-58, 244 S.E.2d 503, 505-06 (1978).

In the context of a *Duncan* hearing, the burden rests upon the Defendant to prove he is entitled to the statutory immunity by a preponderance of the evidence. *State*

v. Duncan. Therefore, the Appellant must prove he acted in self-defense by a preponderance of the evidence to be entitled to the statutory immunity.

The trial court in this matter found the Appellant was not entitled to immunity based on "the totality of circumstances." The trial court also found the elements of self-defense were not proven. Based on the common law of self-defense stated in *Dickey* and *Hendrix*, the Court's finding in this regard is clearly erroneous and should be reversed.

On the night of the incident, the decedent called the Appellant. (Ex. 3). For twelve minutes, the Appellant listened to the decedent's alcohol and drug fueled tirade and attempted to calm him down. (327, 136). When it became apparent the decedent would not calm down and may come to the Appellant's house at any moment, the Appellant attempted to diffuse the situation by talking to the decedent face to face. (329). Once outside, the decedent could be heard cussing and raging from across the lot. (Tr. 191, 244). The decedent then exited the middle building and advanced towards the Appellant in an aggressive and threatening manner. (Tr. 192). While he advanced, the decedent began erratically pulling something out of his pocket. (Tr. 192). In the darkness, it appeared the decedent was going for a weapon. (Tr. 341). The Appellant shouted multiple times for the decedent to stop, but he refused. (Tr. 343). The decedent still advanced in the face of the Appellant pulling his pistol and threatening deadly force. At this point, the Appellant testified he was in fear of imminent danger at the hands of the decedent. It was only then that the Appellant used deadly force to stop his attacker.

Pursuant to *Dickey* and *Hendrix*, the Appellant's use of force was appropriate given the decedent's apparent threat of imminent danger. It has long been the law that

"[d]etached reflection cannot be demanded in the presence of an uplifted knife." *Brown v. U.S.*, 256 U.S. 335, 343, 41 S.Ct. 501, 502 (1921, Holmes, J.). When facing an attacker, the Court does *not* demand as a condition of immunity that the Defendant "in that situation should pause to consider whether a reasonable man might not think it possible to fly with safety or to disable his assailant rather than to kill him." *Id.* Once an individual's right to fire in self-defense arises, the law does not require him to wait until his adversary is on equal terms before he fires. *State v. Hendrix*, 270 S.C. 653, 660-61, 244 S.E.2d 503, 507 (1978).

The Appellant was forced to use deadly force against an apparent attack by the decedent in the dark. (Tr. 198). The circumstances of the incident prove beyond a preponderance of the evidence the use of force was reasonable. These circumstances include the physical disparity between the two men, the decedent's previous threats against the Appellant, the decedent's gross intoxication, the darkness, the Appellant's ill health and age, as well as the decedent's aggressive and threatening behavior leading up to the incident and refusal to stop in the face of a deadly weapon.

Based on these circumstances, the Appellant acted with reasonable force to prevent the decedent's attack. Pursuant to the Protection of Persons and Property Act, the Appellant is immune from prosecution based on his act of self-defense. The Appellant respectfully requests the Court reverse the trial court's decision in this regard and dismiss the charges against him.

- i. **The Appellant is immune from prosecution under the Protection of Persons and Property Act because he was justified in using deadly force under “another applicable provision of law,” the common law doctrine of defense of habitation.**

The trial court erroneously determined S.C. Code § 16-11-450(a) does not encompass the doctrine of defense of habitation. The trial court did not address the doctrine of habitation and essentially did not issue an order in this regard. The Appellant argued the doctrine of defense of habitation in its post-trial memorandum of law. In its order denying immunity, the trial court failed to apply the law or rule on a matter that was properly before the court for consideration. Therefore, the Appellant respectfully requests this Court reverse the trial court in this regard. In the alternative, the Appellant respectfully requests this Court remand this matter to the trial Court for appropriate consideration.

In *State v. Bryant*, the Court of Appeals of South Carolina addressed the common law doctrine of defense of habitation. *State v. Bryant*, 391 S.C. 225, 705 S.E.2d 465 (2010). “The defense of habitation provides that defending one’s home or premises means ending an unwarranted intrusion through the use of reasonably necessary means of ejection.” *Id.* at 233 (*citing State v. Rye*, 375 S.C. 119, 123, 651 S.E.2d 321, 323 (2007)). “When one becomes a trespasser, the law permits the owner of the home to employ such force, even to the taking of the life of the trespasser, as may be reasonably necessary to accomplish the expulsion.” *Id.* at 234 (*citing State v. Sparks*, 179 S.C. 135, 137, 183 S.E. 719, 720 (1936)).

Several witnesses have testified the decedent was an unlawful trespasser on the Appellant’s property. (Tr. 317) The testimony has established that the Appellant allowed

the decedent to sleep in a back room at the auction while the decedent worked as a short-order cook. (Tr. 319). When the decedent was fired from the auction for absenteeism and drunkenness, the Appellant told him to leave. (Tr. 159). The decedent eventually vacated the property and went to Orangeburg, but he returned to the auction a few days later and refused to leave. (Tr. 317). The decedent continued trespassing on the Appellant's property. The Appellant was justified in taking action to eject the trespasser. When the decedent attacked the Appellant on the night of the incident, the Appellant was justified in using deadly force to expel the decedent.

Under the common law of defense of habitation, the Appellant was justified in using deadly force at the time of the incident. Because he was justified in using deadly force under another applicable provision of law, the Appellant is immune from prosecution under the Protection of Persons and Property Act and the trial court's order in this regard should be reversed.

III. THE TRIAL COURT ERRED IN ADMITTING EVIDENCE THAT WAS SEIZED PURSUANT TO AN INVALID SEARCH WARRANT: THE WARRANT WAS NOT SIGNED BY A JUDGE WHEN IT WAS EXECUTED ON THE PROPERTY AND ANY EVIDENCE SEIZED IS INADMISSIBLE

During the Appellant's *Duncan* hearing, it became apparent the original search warrant used to gather a vast majority of the evidence in this case was not signed by a magistrate. One of the law enforcement officers that investigated the case testified that his only authority to search the property was as a result of the unsigned search warrant. (Tr. 704). The Respondent submitted evidence that the document referred to as "the original warrant" was simply an unsigned copy. (Tr. 772). The Appellant then moved to suppress any and all evidence seized pursuant to the invalid and unsigned search warrant.

The warrant used to search the location of the incident was facially defective and any evidence gathered from this warrant must be suppressed.

A search warrant in South Carolina is only valid if it satisfies the issuance requirements of Section 17-13-140 of the South Carolina Code of Laws. In addition to these requirements, a *copy* of the search warrant and supporting affidavit *must* be served when the warrant is executed. S.C. Code § 17-13-150.

In *State v. Covert*, the South Carolina Supreme Court held an unsigned search warrant is invalid and void. *State v. Covert*, 382 S.C. 205, 208, 675 S.E.2d 740, 742 (2009). In *Covert*, a search warrant was served and executed on the defendant two days before it was signed by a magistrate. The circuit court denied the defendant's motion to suppress the evidence gathered pursuant to the unsigned warrant. On review, the Supreme Court held the trial court's refusal to suppress evidence seized

pursuant to an unsigned search warrant constituted a reversible error. *Id.* at 210, 743. Further, there can be no “good faith” exception to an unsigned warrant because no warrant is ever issued in the first place. *Id.* at 208, 742.

The Supreme Court held a warrant that lacks magistrate signature “is not excusable as merely procedural or ministerial, but rather negates the existence of the warrant, creating instead an ‘unfinished paper.’” *Id.* at 208-09, 742. The Supreme Court relied on the 1894 decision in *Davis v. Sanders* for context:

[W]hen it is remembered that a sheriff or other officer, who undertakes to arrest a citizen under a warrant, is bound to show the warrant, if demanded, to the person proposed to be arrested, and if he refuses to do so the arrest may be lawfully resisted [internal citation omitted], we think it would be very dangerous to the peace of society for the court to hold that a paper, which shows on its face that it is an unfinished paper . . . would be a sufficient justification for an arrest.

Id. at 208, 742 (quoting *Davis v. Sanders*, 40 S.C. 507, 19 S.E. 138 (1894)). Therefore, any evidence gathered pursuant to an unsigned search warrant must be suppressed as a matter of law.

The search warrant used in the present case, Exhibit 49, fails as a search warrant because it is unsigned and unauthorized, similar to the warrant in *State v. Covert*. In addition, the affidavit supporting this search warrant contains the purported signature of the affiant, but it is not notarized as required by law. See *Doty v. Boyd*, 46 S.C. 39, 24 S.E. 59 (1896). This un-notarized affidavit is not an affidavit at all, but a mere unsworn paper. See *Id.* It follows that if an unsigned warrant is not a warrant, then an unsigned copy is not a copy. Therefore, in addition to failing as a search warrant for lack of a judicial signature, warrant in this case fails as a search warrant because the support affidavit is unsworn and fatally defective.

Law enforcement has testified to different stories about the search conducted on November 24, 2009. What we know is an unsigned document purporting to be a search warrant was left at the scene by law enforcement. We also know the testimony from law enforcement indicates this document was the original warrant they claim gave them the right to search the property. We also know the unsigned warrant was mistakenly left on the scene and the Sheriff's Department requested it be returned.

The police did not have an authorized search warrant when they investigated the incident. It appears they mistakenly left the unsigned warrant on the premises, which eventually found its way to the *Duncan* hearing. In any event, the most likely scenario is the authorities and the State have relied on evidence gathered from an unsigned, unauthorized search warrant. This is a clear violation of Due Process.

The ramifications of using this unsigned, unauthorized document to conduct a search and seized evidence in this matter cannot be understated. According to the testimony of law enforcement, essentially every item of tangible evidence collected in this matter was seized pursuant to the unsigned warrant. It appears the subsequent search warrants relied on information obtained under the unsigned warrant in their supporting affidavits. In fact, all of the subsequent search warrants in this matter appear to have been properly signed and authorized, unlike their predecessor in Exhibit 49. But because these subsequent search warrants are based on improperly gathered information from an improper search, they carry the same taint as the original unsigned warrant. As a matter of law, this evidence must be suppressed.

The trial court found that the unsigned search warrant was a mere copy or duplicate of the original search warrant. The Appellant respectfully submits this is not

the case. There is no copy of the signed search warrant as required. This assertion has been proven meritless by the testimony of the State's witnesses as well as the documents introduced by the State. The testimony from the State's law enforcement witnesses indicate the "only right" they had to search the property and gather evidence came from a search warrant that was never authorized by a magistrate.

It also appears this original warrant was left at the scene by accident. By this pure happenstance, the original warrant found its way to defense counsel. The State confirmed that the unsigned warrant left at the scene was the original warrant in a letter from the Sheriff Department's general counsel. (Ex. 50). Unbeknownst to defense counsel, the warrant left at the crime scene was the true original. (Ex. 51). The evidence begs the question: If the unsigned warrant was not the original warrant and was intentionally left at the scene, why did the Sheriff's Department refer to it as such in an attempt to retrieve it?

It appears throughout this entire investigation and trial, the State has been relying on an unsigned, unauthorized search warrant. If there is no warrant, how can any of the evidence gathered from the crime scene be admissible? The return attached to the warrant indicates that a majority of the evidence the State has built its case around was gathered pursuant to a defective search warrant. The warrants issued subsequent to this warrant appear to be based information gathered pursuant to the invalid warrant.

Therefore, pursuant to South Carolina law and the information brought to light by the testimony of law enforcement, the Appellant respectfully requests this Court reverse the trial court and suppress any and all evidence gathered as a result of the unsigned search warrant. The Appellant also respectfully requests this Court reverse the trial

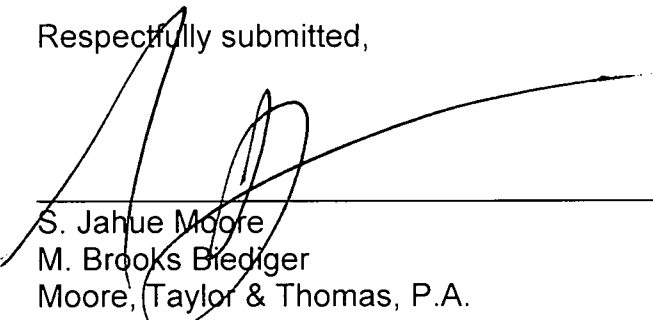
court suppress any and all evidence gathered pursuant to subsequent search warrants that are supported by affidavits containing illegally seized evidence.

CONCLUSION

For the foregoing reasons, the Appellant respectfully requests this Court reverse the trial court's order denying immunity and dismiss the charges against the Appellant pursuant to the Persons and Property Act.

In the alternative, the Appellant respectfully requests this Court remand this matter for pre-trial determination of the Appellant's immunity under the doctrine of defense of habitation. Additionally, the Appellant respectfully requests this Court reverse the trial court's order denying suppression of evidence seized pursuant to the invalid warrant.

Respectfully submitted,



S. Jahue Moore
M. Brooks Brediger
Moore, Taylor & Thomas, P.A.
1700 Sunset Boulevard
P.O. Box 5709
West Columbia, SC 29171
Tel.: 803-796-9160
Fax: 803-791-8410

Attorneys for Appellant Sidney A. Hursey, Jr.

West Columbia, South Carolina

June 14, 2013.

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
JUN 14 2013

APPEAL FROM LEXINGTON COUNTY
Court of General Sessions

SC Court of Appeals

The Honorable R. Knox McMahon, Circuit Court Judge

Appellate Case No. 2012-213137

Sidney A. Hursey, Jr,

Appellant,

v.

The State of South
Carolina,

Respondent.

DESIGNATION OF MATTER TO BE
INCLUDED IN THE RECORD ON APPEAL

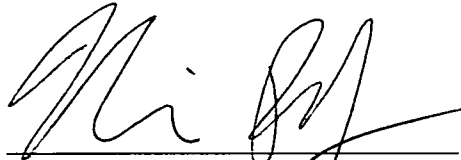
Appellant proposes the following be included in the Record on Appeal:

1. Order of the Honorable R. Knox McMahon denying immunity, dated March 7, 2012;
2. Order of the Honorable R. Knox McMahon denying reconsideration, dated October 1, 2012;
3. Appellant's Motion to Dismiss, dated November 8, 2011;
4. Appellant's Memorandum in Support of Motion to Dismiss, dated December 22, 2011;
5. Appellant's Reply Memorandum, dated December 27, 2011;
6. Transcript of *Duncan* hearing, dated December 5-12, 2011, pp. 22-180, 189-201, 212, 243-245, 305-440, 498-500, 618-622, 633, 703-710, 753-759, 772;
7. *Duncan* hearing exhibit numbers 1, 3, 6-8, 33-34, 49, 61 S;
8. Georgia immunity statutes: Ga. Code Ann. §§ 16-3-24.2, 16-3-21, 16-3-23, 16-3-23.1, and 16-3-24;
9. Florida immunity statutes: West's F.S.A. §§ 776.032, 776.012, 776.013, and 776.031;
10. Kentucky immunity statutes: K.R.S. §§ 503.085, 503.050, 503.055, 503.070, 503.080;

11. Tennessee immunity statutes: T.C.A §§ 39-11-622, 39-11-611, and 39-11-614;
12. Pennsylvania immunity statutes: 42 Pa. C.S.A. § 8340.2, 18 Pa. C.S.A. §§ 505-508;
13. New Hampshire immunity statutes: N.H. Rev. Stat. §§ 627:1-a, 627:4, 627:5, 627:7, and 627:8.

I certify that this designation contains no matter which is irrelevant to this appeal.

June 14, 2013



S. Jahue Moore
M. Brooks Biediger
Moore, Taylor & Thomas, P.A.
1700 Sunset Boulevard
Post Office Box 5709
West Columbia, South Carolina 29171
(803) 796-9160

Attorneys for Appellant Sidney A. Hursey, Jr.

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM LEXINGTON COUNTY
Court of General Sessions

The Honorable R. Knox McMahon, Circuit Court Judge

Case No. 2012-213137

Sidney A. Hursey, Jr.,.....Appellant,

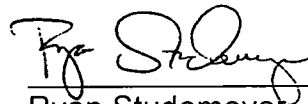
v.

The State of South Carolina,.....Respondent.

PROOF OF SERVICE

I certify that I served the Appellant's Initial Brief and Designation of Matter on
Appeal, by hand delivery to the following address on June 14, 2013:

Donald J. Zelenka, Esquire
Senior Assistant Deputy Attorney General
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, S.C. 29211
Telephone: 803-734-3601



Ryan Studemeyer
Law Clerk for Attorney S. Jahue Moore
Moore, Taylor & Thomas, P.A.
P.O. Box 5709
West Columbia, South Carolina 29171
Telephone: 803-796-9160
Attorneys for Appellant

RECEIVED
JUN 14 2013
SC COURT OF APPEALS

S. JAHUE MOORE
J. MARK TAYLOR*
DAVID L. THOMAS†
C. VANCE STRICKLIN, JR.
JAMES EDWARD BRADLEY
SHEILA McNAIR ROBINSON
ROBERT D. HAZEL
CHRISTIAN G. SPRADLEY††
C. DAVID SAWYER, JR.††
WILLIAM H. EDWARDS
STANLEY L. MYERS
JANE H. DOWNEY**
S. JAHUE MOORE, JR.
JOHN C. BRADLEY, JR.



1700 SUNSET BOULEVARD (HWY. 378)
POST OFFICE BOX 5709
WEST COLUMBIA, SOUTH CAROLINA 29171
TELEPHONE (803) 796-9160
FAX (803) 791-8410

MELISSA K. MOORE
WILLIAM B. FORTINO
R. NICHOLS "NICK" RILEY, JR.
M. BROOKS BIEDIGER
AMBER L. FULMER
SARAH TAYLOR CASSIDY
MARGARET "MEG" HAZEL

RETIRED:
BILLY C. COLEMAN††

††SALUDA OFFICE:
(864) 445-4544 OR (866) 604-4544
†GREENVILLE OFFICE:
(864) 271-6371

June 14, 2013

VIA HAND DELIVERY

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RECEIVED
JUN 14 2013
SC Court of Appeals

RE: State vs. Sidney Allen Hursey, Jr.
Appeal from Lexington County
Appellate Case No. 2012-213137

Dear Ms. Kitchings:

Enclosed for filing with your office is the Appellant's Initial Brief and Designation of Matter on Appeal. By copy of this correspondence, we are serving the Attorney General's Office with the same.

Yours very truly,

M. Brooks Biediger

MBB

Enclosures

cc: Donald J. Zelenka, Esq. (w/ encls.)