

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to McCormick County

Honorable David P. Caraker, Jr, Circuit Court Judge

JOE ROSS WORLEY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2025-000928

APPENDIX

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1 point out to the jury why you surmised, through
2 testimony or otherwise, that this is what occurred?

3 **MR. MYERS:** I couldn't hear the question. I
4 apologize, Your Honor.

5 **THE WITNESS:** And I want to emphasize --

6 **MR. MYERS:** I could not hear the question.

7 **JUROR:** You need to turn the gun the other way
8 now. It's pointing towards us.

9 **THE COURT:** Point it to the wall.

10 BY MR. GARRETT:

11 **Q** Tell you what, why don't we do this: Why don't
12 you stand up here, and we can show it to them. All
13 right. This is Number 7 --

14 **MR. MYERS:** Now, once again, Your Honor, I did
15 not hear the question.

16 **THE COURT:** I think he's going to it now.

17 BY MR. GARRETT:

18 **Q** Mr. Myers asked you on cross-examination about
19 why you believed, based on all of your review of all
20 the evidence, that Mr. Rushton pointed his gun
21 towards Mr. Worley.

22 **MR. MYERS:** Oh, no. Oh, no. He's not an
23 expert in this area. He's an expert in standards
24 and procedures in law enforcement. He's not a
25 firearms expert or anything of that nature. That's

1 just speculation on his part. He can't give an
2 opinion on that.

3 **THE COURT:** Mr. Garrett?

4 **MR. GARRETT:** Your Honor, he was in the room
5 while Mr. Rushton testified, and Mr. Rushton
6 testified about what he did out there that night.
7 And I think he, as an expert witness, can synthesize
8 all of the evidence as a criminologist, including
9 criminalist, in coming to his conclusions.

10 **MR. MYERS:** No, sir. He can't be an expert
11 for --

12 **THE COURT:** Hold on, hold on.

13 **MR. MYERS:** Thank you, sir.

14 **THE COURT:** Madame Forelady, would you take
15 your jury to your jury room?

16 (The jury retires to the jury room.)

17 **THE COURT:** Mr. Garrett, you're asking him to
18 give his opinion as to the direction of that gun the
19 night in question versus based on why he said that.
20 I mean, those are two different things.

21 I agree with Mr. Myers, based on his stated
22 expertise in standards and procedures for police,
23 differs from forensic analysis of what's going on
24 with the evidence. But if he's going to say the
25 basis of why he says that or why he thinks that, the

1 factual basis that's in evidence now, I don't have a
2 problem with it. But if he's going to go further
3 and give his opinion otherwise from a forensic
4 standpoint, I do.

5 **MR. GARRETT:** I understand.

6 **THE COURT:** Okay. Or I will sustain the
7 objection.

8 **MR. GARRETT:** I understand your ruling.

9 **THE COURT:** Anything further, Mr. Myers?

10 **MR. MYERS:** No, sir.

11 **THE COURT:** All right. Would you bring the
12 jury back in?

13 (The jury returns to the courtroom.)

14 **THE COURT:** All right, Mr. Garrett.

15 **MR. GARRETT:** Thank you.

16 BY MR. GARRETT:

17 **Q** Dr. Kirkham, based upon the testimony you heard
18 from Mr. Rushton and Officer Moore, Officer Collier,
19 the weapon itself had to be pointed or did it have
20 to be pointed at Mr. Worley in order for Mr. Worley
21 to shoot in the position of the gun that he shot?

22 **A** Yes. The weapon has -- and I want to
23 emphasize, the defense presented a very fine
24 ballistics expert. I'm not a ballistics expert, but
25 I do deal with firearms a lot. I own a Glock 23

1 identical to that, shoot it frequently.

2 It's obviously sustained a massive deformation
3 of the grip such as would be consistent with the
4 weapon being pointed. Something caused a
5 projectile, presumably of some sort, produced a
6 tremendous amount of deformation, damage to that
7 weapon.

8 **Q** Is this a deadly weapon?

9 **A** It certainly is. It's not in its present
10 condition, but it is in its former condition, yes.

11 **MR. GARRETT:** That's all we have.

12 **THE COURT:** Any recross?

13 **MR. MYERS:** I don't have anything else from
14 him.

15 **THE COURT:** Any reason why this witness can't
16 be excused?

17 **MR. GARRETT:** None, Your Honor.

18 **MR. MYERS:** No objection.

19 **THE COURT:** All right. Thank you, sir. You're
20 excused.

21 Would you call your next witness?

22 **MR. GARRETT:** I call Mr. Bo Willis.

23 **MR. MYERS:** He's not on their witness list.

24 **MR. GARRETT:** He's subpoenaed.

25 **MR. MYERS:** I know he's subpoenaed, but he's

1 not on their witness list.

2 **THE COURT:** Y'all come around here.

3 (Whereupon, a bench conference was held off
4 the record, in the presence of the jury, but out of
5 the hearing of the jury.)

6 **THE COURT:** Is Mr. Willis in the courtroom?

7 **OFFICER WILLIS:** Yes, sir.

8 **THE COURT:** Have you been in the courtroom
9 during testimony?

10 **OFFICER WILLIS:** Just that -- what just
11 transpired right here.

12 **THE COURT:** For the last few minutes with the
13 defense expert?

14 **OFFICER WILLIS:** Right. That last whatever.

15 **MR. MYERS:** We have no objection.

16 **THE COURT:** All right. Call your witness.

17 **MR. GARRETT:** Thank you. We call Mr. Bo Willis
18 to the stand.

19 BO WILLIS,
20 having been duly sworn, testified as follows:

21 (Defendant's Exhibit Number 11, diagram,
22 marked for identification.)

23 DIRECT EXAMINATION

24 BY MR. GARRETT:

25 **Q** Officer Willis, is this your magazine?

1 **A** Yes, it is. That's mine.

2 **Q** That's one that was sent to you?

3 **A** Yeah. I get several of them.

4 **Q** All right. I notice -- would you stand up,
5 please, in front of the jury here? I'd like for
6 them to see your uniform.

7 **A** Yes, sir.

8 **Q** All right. And does the City and McCormick
9 have a different budget from the County of
10 McCormick?

11 **A** Yes, sir, we're budgeted differently.

12 **Q** Budgeted differently.

13 Do you know how much y'all have -- how many
14 people are on your City police team?

15 **A** Seven of us.

16 **Q** Seven?

17 **A** And one reserve.

18 **Q** Do you have any idea what your budget is for
19 uniforms?

20 **A** Yes, sir. We get -- I'm trying to think what
21 it was last year -- seven or \$8,000 a year for
22 uniforms.

23 **Q** All right. Just have a seat there.

24 **A** (Witness complies.)

25 **Q** Can I ask you to identify this, Defendant's

1 Exhibit 11? Tell us what that is.

2 **A** Yes, sir. This is a drawing that I did right
3 after the incident happened out at the residence
4 that this is going on about.

5 **Q** Yes, sir.

6 **A** I did this and the preliminary report right
7 behind it.

8 **Q** All right. And there's an area -- if we're
9 using this -- this is State's Exhibit 4 --

10 **THE COURT:** Would you turn that so the jurors
11 over here in the corner can see it?

12 BY MR. GARRETT:

13 **Q** Can you see that?

14 **A** Yes.

15 **Q** Could you point out the area where the debris
16 field was?

17 **A** Yes, sir. There was a debris field in this
18 area that the deputies and, I think, the sheriff
19 actually collected a -- debris from what was Deputy
20 Rushton's weapon.

21 **Q** All right. And the weapon was in the patrol
22 car or do you know?

23 **A** I don't know where the weapon was at. I cannot
24 testify to that.

25 **Q** All right. And his flashlight, do you know

1 where his flashlight was?

2 **A** No, sir. That was already picked up before I
3 got there.

4 **Q** All right. And in your -- can you sit down a
5 moment now?

6 **A** Sure.

7 **Q** Because I want you to read your document there.

8 **A** Okay.

9 **Q** And where did you conclude, based upon your
10 examination, as to where Officer Rushton had been
11 shot?

12 **A** It was in this area here by this -- can I just
13 show them on this?

14 **Q** Yeah.

15 **A** Right in here would have been the area
16 {indicating}. This is the first place I located any
17 kind of blood, and that was where I -- and was the
18 first place I located any blood.

19 **Q** All right. And the debris field that was all
20 the way -- that you testified to right here --

21 **A** Yes, sir.

22 **Q** -- how did that -- how did that get -- if he
23 shot in this direction, how does it get over here?

24 **A** There in the magazine of a Glock is a
25 spring-loaded magazine, which means it's under

1 pressure. And if you look at the weapon, the bottom
2 of the weapon, the magazine butt plate is gone. So
3 that spring-load would actually push everything out.

4 **Q** Okay. Pushed everything out?

5 **A** Yes, sir.

6 **Q** In which direction?

7 **A** Towards whichever way the butt plate was
8 facing.

9 **Q** And what about the pieces of the weapon, the
10 balance of the pieces of the weapon, did you find
11 any pieces to the weapon?

12 **A** I did not, no, sir.

13 **Q** All right. So the debris field was what then?

14 **A** Was spent casing -- well, not spent casing, but
15 weapon -- the rounds that come out of the magazine,
16 rounds that was broken that come from the magazine.

17 **Q** All right. From Officer Rushton's magazine?

18 **A** Right.

19 **Q** Now, did you find any .30-06 fired cartridges?

20 **A** I didn't find them, but they were found.

21 **Q** All right. During -- were you in charge of the
22 investigation or who was in charge of the
23 investigation?

24 **A** I was called out to assist. I was called out
25 to pretty much take pictures and help out with

1 diagramming the crime scene.

2 **Q** I understand. And that was your work for that
3 evening?

4 **A** Pretty much, yes, sir.

5 **Q** Is it pretty much or is --

6 **A** Yes, sir. That was what I was called to do,
7 assist, take pictures and help out with the crime
8 scene.

9 **Q** And, Officer Willis, how much time was it that
10 you wrote your report after that evening?

11 **A** About a week or so.

12 **Q** A week or so?

13 **A** At the most, yes, sir.

14 **Q** All right. Now, I want to talk to you about
15 those .30-06 empties. Okay?

16 **A** Okay.

17 **Q** Can you read your report there? Refresh your
18 recollection and see if you can point out for us
19 where these empties were found, .30-06 empties.

20 **A** The .30-06 empties, oh, yes, sir. There was
21 some .30-06 empties was found -- there was chairs on
22 the balcony --

23 **Q** Yes, sir.

24 **A** -- that was found there and then off to the
25 side of the balcony.

1 **Q** Okay. And how many were found on the balcony?

2 **A** On the balcony, two.

3 **Q** And how many were found on the ground in that
4 area?

5 **A** At the time of the report, it was reported to
6 me was once, but I was informed that there was two
7 after I did the report.

8 **Q** All right. Informed two after you did the
9 report.

10 **A** Right.

11 **Q** Did you go back and do an amended report?

12 **A** No, sir.

13 **Q** All right. And do you know where the second
14 one was found?

15 **A** My understanding, what I was reported to me, it
16 was found off to the balcony in this place.

17 **Q** Who found it?

18 **A** I cannot say. It's not in my report, I don't
19 think.

20 No, sir, it's not in my report who found it, I
21 do not believe.

22 **Q** I'm going to let you look at this one. It
23 appears to be two empties, and that is State's
24 Number 26. Can you tell me where those two were
25 found?

1 **A** According to the paperwork, it was found on the
2 top deck, outside the living room and dining room.

3 **Q** Okay. Those two were found there?

4 **A** Yes, sir.

5 **Q** All right. And then we've got two separate --

6 **MR. MYERS:** Your Honor, can I ask the relevance
7 of this? Is this to impeach the State's witness or
8 is it just cumulative? If it's cumulative, I'm
9 asking the relevance.

10 **THE COURT:** What is the relevance?

11 **MR. GARRETT:** Your Honor, I want to make sure
12 that we find out where these -- where these were
13 found or located.

14 **MR. MYERS:** But he didn't find them.

15 **THE COURT:** I understand. I'll give him some
16 leeway. Go ahead.

17 **MR. MYERS:** Thank you, sir.

18 BY MR. GARRETT:

19 **Q** Can you look at State's Exhibit Number 11. You
20 said these two were found on the balcony up here?

21 **A** Yes, sir. That's what's indicated on the
22 paperwork, on the top deck, outside the living room
23 and dining room.

24 **Q** All right. And then where were the other two
25 found -- you found one. Which one did you find?

1 **A** I did not find them. This is what they
2 informed me was found.

3 **Q** Okay.

4 **A** Found on the ground --

5 **MR. MYERS:** We're going to have to object to
6 hearsay then. He's asking him what other people
7 did; it's hearsay.

8 **THE COURT:** I'm going to sustain that.

9 BY MR. GARRETT:

10 **Q** All right. Tell me what -- well, is this your
11 bag that you prepared that night and bagged that
12 evidence?

13 **A** No, sir.

14 **Q** Was this reported in your report?

15 **A** I was told what was found and where it was
16 found.

17 **MR. MYERS:** See, that's hearsay.

18 **THE COURT:** Is it in his report?

19 **MR. GARRETT:** Yes, sir.

20 **THE COURT:** If it's in the report, it's in
21 evidence. He can ask him about it.

22 **MR. MYERS:** No, sir. It's not in his report
23 who found it.

24 **MR. GARRETT:** It's not in the report who found
25 it. It's where it was found was in the report.

1 **MR. MYERS:** He came in and was told things and
2 made a diagram. He didn't collect them.

3 **THE COURT:** It's in evidence. As long as it's
4 in the report, you can ask him what's in the report.
5 Otherwise, I'll sustain him on the hearsay grounds.

6 **MR. MYERS:** Thank you.

7 **MR. GARRETT:** Thank you, Your Honor.

8 BY MR. GARRETT:

9 **Q** Now, can you determine, based on the evidence
10 that's in the record, where each of those two were
11 found?

12 **MR. MYERS:** No, sir, that's not in his report.
13 If he shows him where it is in the report of where
14 it was found, I have no objection.

15 **THE COURT:** Show them in the report where it
16 is.

17 (Pause.)

18 **THE WITNESS:** The only reference that I have is
19 the -- location of the spent casings. It doesn't
20 say exactly where it was located except if you go to
21 the diagram, it says --

22 BY MR. GARRETT:

23 **Q** The report refers to the diagram, and the
24 diagram refers to the report, is that --

25 **THE COURT:** With both of those, I'm talking

1 about, report or diagram, if --

2 **MR. MYERS:** Yes, sir, but it doesn't say on
3 either one who found it.

4 **THE COURT:** He's asking where, not who.

5 **MR. MYERS:** Well, does he know where it was
6 found or is that hearsay?

7 **THE COURT:** You can ask him what's in the
8 report.

9 **MR. MYERS:** Thank you.

10 **THE COURT:** And otherwise, you're going to have
11 to base it on personal knowledge.

12 BY MR. GARRETT:

13 **Q** I'm asking you what's in your report.

14 **A** According to my report, there was two spent
15 casings found on the porch behind the chairs and
16 tables. And there was one spent casing off to, it's
17 according to how you want to look at it, the right
18 or left side of the building. All right --

19 **Q** Well, you tell me which is right and left?

20 **A** I have it marked. There was one on this side
21 of the building, but I later found out that there
22 was two found on this side of the building
23 {indicating}. Where the second one was found on
24 that side of the building, I do not know.

25 **Q** And you were the investigator out there?

1 **A** No, sir. I was just assisting. I'm not the
2 investigator. I think Nick Moore is the actual
3 investigator of this.

4 **Q** All right.

5 **A** I was asked by the County to take pictures and
6 help out with the crime scene.

7 **Q** All right. This is your report and as well as
8 your diagram?

9 **A** Yes, sir.

10 **MR. GARRETT:** Your Honor, I'd move at this time
11 to introduce Number 11.

12 **MR. MYERS:** We have an objection, because a lot
13 of stuff on there is hearsay and not of his own
14 personal knowledge.

15 **THE COURT:** All right. Pass that report up.

16 (Pause.)

17 **THE COURT:** I'm going to overrule the
18 objection. Everything contained in that report is
19 already in evidence.

20 **MR. MYERS:** Thank you, sir.

21 **MR. GARRETT:** Thank you, Your Honor.

22 (Defendant's Exhibit Number 11, diagram,
23 admitted into evidence.)

24 BY MR. GARRETT:

25 **Q** Now, your findings, could you tell us a little

1 bit about your findings? What -- based on your
2 investigation or what you did out there, you made
3 findings; is that correct?

4 **A** Right.

5 **Q** Tell us about these two spent cartridges that
6 were up near those chairs. What did you conclude,
7 based on your investigation, about those two
8 cartridges that were found up there as to when they
9 were shot in and about this scene -- this crime
10 scene?

11 **A** Alls I can tell you is the spent casings --
12 because this weapon is a right-fed weapon. This
13 weapon was actually fired -- or the spent casings
14 ended up in a position that would place that weapon
15 in this direction. All right. The spent casings
16 that was out to here, indicated a weapon being fired
17 in that direction.

18 **Q** Okay. Very good.

19 So if you found two here, they would have been
20 fired in that direction, and the other two would
21 have been fired in that direction?

22 **A** Yes, sir.

23 **Q** Or at least the one that you had at the time --

24 **A** Right.

25 **Q** -- when you wrote your report?

1 **MR. GARRETT:** That's all.

2 **THE COURT:** Cross-examination?

3 **MR. MAYE:** Yes, sir.

4 **MR. GARRETT:** Excuse me, I apologize.

5 BY MR. GARRETT:

6 **Q** Do you have any idea, based on any work that
7 you did that evening, as to which order these
8 bullets were fired?

9 **A** No, sir.

10 **Q** And, in fact, you -- I also saw in your report
11 you find that, as the police officers were leaving,
12 Mr. Worley fired at them twice, is that correct, as
13 they were leaving?

14 **A** It was a -- from being fired, yes, sir.

15 **Q** Is the reason for that -- there was three shots
16 fired we know: One hit Rushton, and there were two
17 other spent cartridges. So y'all assumed then that
18 he had fired those at the officer?

19 **A** Yes, sir.

20 **Q** Okay. And that may not be correct?

21 **A** Correct.

22 **MR. GARRETT:** Thank you.

23 CROSS-EXAMINATION

24 BY MR. MAYE:

25 **Q** Investigator Willis, tell me your rank. I

1 don't mean to --

2 **A** Major Willis.

3 **Q** Major Willis.

4 How long have you been with the sheriff -- with
5 the Town Police Department?

6 **A** Twenty-four years.

7 **Q** Twenty-four years.

8 Like Investigator Collier, you have been to
9 Glynco, you've been to FLETC training?

10 **A** Yes, sir.

11 **Q** You have had a wealth of training beyond that
12 of a normal or ordinary line officer?

13 **A** Yes, sir.

14 **Q** Because you conduct training with your
15 department, and you stay up on that, don't you?

16 **A** Yes, sir.

17 **Q** What do you characterize the uniform that you
18 have on now? How would you describe that uniform as
19 it goes into the array of clothing that you wear
20 carrying out your job as a police officer?

21 **A** This is what we call a Class A uniform.

22 **Q** A dress uniform?

23 **A** Yes, sir. Class A dress uniform.

24 **Q** And you wear that when you come to court
25 because you dressed up; correct?

1 **A** Pretty much, yes, sir.

2 **Q** That's the equivalent --

3 **A** Coat and tie.

4 **Q** You see me on days when we don't have court,
5 and I've got blue jeans and a shirt on; right?

6 **A** Yes, sir.

7 **Q** But when we've got court, I wear my suit.
8 That's what you're doing here today with that
9 uniform?

10 **A** Yes, sir. This is what we have to wear to
11 court.

12 **Q** How about 5.11 Tactical gear, the same type of
13 gear that Bobby Rushton had on that night, that Nick
14 had on that night? You've got all that same gear,
15 don't you?

16 **A** Yes, sir. I wear those pretty much on a
17 regular basis.

18 **Q** So people that are around McCormick seeing law
19 enforcement officers see you all the time wearing
20 that same type of gear, don't they?

21 **A** Yes, sir.

22 **Q** How about we go over and talk to you about the
23 guys that work for Sheriff Adell Dobey over in
24 Edgefield County? All of them wear 5.11 Tactical
25 gear, the same kind of thing that Bobby had on that

1 same night; isn't that right?

2 **A** Yes, sir.

3 **Q** How about we go up the road to Saluda County
4 over here to the sheriff's office, we see those same
5 officers on the street all the time. What kind of
6 uniforms do you see them wearing?

7 **A** The majority in this area now are actually
8 wearing the more suitable for work uniform, which
9 will be the 5.11, Tru-Specs, BDU-type -- about what
10 they call BDU, battle dress uniforms.

11 **Q** Let's go across the street from the academy,
12 the law enforcement academy, and SLED up there on
13 Broad River Road. You go up there all the time,
14 don't you?

15 **A** Yes, sir.

16 **Q** Are you familiar with Lawmen's Safety up there?

17 **A** Yes, sir.

18 **Q** When you go in Lawmen's Safety and look around
19 in there, it's a doggone department store for 5.11
20 gear, isn't it?

21 **A** Yes, sir.

22 **Q** When you go in there, that's the majority of
23 all the clothing that you see on all the displays in
24 there, isn't it? 5.11 Tactical gear?

25 **A** Yes, sir.

1 **Q** And you go to meetings with sheriff's
2 departments and rural law enforcement all over this
3 state where they congregate and get together, don't
4 they?

5 **A** Yes, sir.

6 **Q** The overwhelming majority of them in South
7 Carolina in rural law enforcement are wearing 5.11
8 Tactical gear; isn't that right?

9 **A** Yes, sir.

10 **Q** This Police Magazine, they sponsor most of the
11 -- this contest -- this very contest in here about
12 the best-dressed police officer in the country shows
13 someone dressed just like Bobby Rushton?

14 **A** Yes, sir.

15 **Q** With the exception of shirts; right?

16 **A** Correct.

17 **Q** And you've seen Bobby wearing this same kind of
18 gear. You've known him for years, haven't you?

19 **A** Yes, sir. He actually started his law
20 enforcement career with us.

21 **Q** And he always wears his badge on the left side
22 of his clothing, doesn't he?

23 **A** Yes, sir.

24 **Q** And he's dressed just like this guy, isn't he?

25 **A** Yes, sir.

1 **Q** How about those old Maglite flashlights, what
2 somebody would refer to -- or if somebody referred
3 to it as a police flashlight, a five D-cell Maglite
4 flashlight? You've been in law enforcement for a
5 long time, do police carry five-cell or four-cell D
6 battery Maglite flashlights in the modern era?

7 **A** No, sir. We don't even issue Maglites anymore.
8 We actually issue what's called a Stinger.

9 **Q** So the standard police flashlight now is one of
10 these small, high-intensity flashlights; right?

11 **A** Yes, sir.

12 **Q** And y'all go for y'all's tactical training and
13 all. They even teach you how to shoot your gun
14 holding one of those smaller flashlights, don't you?

15 **A** Yes, sir.

16 **Q** Maybe in 1974 somebody carried a big ol' five
17 D-cell or D-battery flashlight; is that right?

18 **A** Yes, sir.

19 **Q** You've seen that in the old black and white
20 photos in the history books?

21 **A** Yes, sir. I actually used to have a -- well,
22 I've still got it; I don't use it anymore.

23 **Q** But it's memorabilia for you, isn't it?

24 **A** Yes, sir.

25 **Q** You got it at home and you might use it when

1 you go to get garbage out of the garbage can; right?

2 **A** I think actually my little boy plays with it.

3 **Q** Okay. In the modern era, you've got small
4 high-powered flashlights that have LED bulbs and
5 little cree chips in them that'll put out a
6 tremendous amount of light as compared to one of
7 those dinosaur old flashlights?

8 **A** Yes, sir.

9 **Q** Okay. So if somebody's talking about a police
10 flashlight and they're talking about one of those
11 old D-cell Maglite flashlights, that's ancient
12 history, isn't it?

13 **A** As far as I'm concerned, yes, sir.

14 **Q** Have you ever heard of one of those little
15 small flashlights being called a burglar flashlight?
16 Have you ever seen that?

17 **A** No, sir. I have a Streamlight that's about
18 this {indicating} big around that I carry on me at
19 work, when I'm working the shift all the time.

20 **Q** Do you go down to any of the stores like
21 Wal-Mart or even at Lawmen's Safety, do they have
22 any section over there where they've got a
23 flashlight that burglars carry? Do they have any
24 kind of display where this is a burglar flashlight?

25 **A** No, sir. Never heard of -- called burglar

1 flashlight.

2 **Q** So if someone was trying to compare and
3 contrast an old D-cell antique flashlight, that
4 design, to one of these modern flashlights that's
5 all through these magazines and what cops carry,
6 that's pure theatrics, isn't it, because it's just
7 not true, is it?

8 **A** I haven't seen anybody carry a Maglite in
9 years.

10 **Q** Okay. And you don't know that burglars carry
11 little ol' bitty flashlights, little high-tech
12 flashlights like that, do you?

13 **A** No, sir, I do not know if they carry those.

14 **Q** Investigator Willis, you went out there -- and
15 let me see. You don't work for the McCormick County
16 Sheriff's Office, do you?

17 **A** No, sir.

18 **Q** You're an outside agency, aren't you?

19 **A** Yes, sir.

20 **Q** And so when things happen with other
21 agencies -- often if something happens, if somebody
22 gets hurt, shot, or there's some issue, you go and
23 assist the McCormick County Sheriff's Department
24 because you're an outside independent agency; isn't
25 that right?

1 **A** Yes, sir. If we're called in to assist
2 McCormick County, we do it right away.

3 **Q** Okay. But the bottom line is, you are an
4 outside agency, so you are an independent body going
5 out there and looking and reviewing all of this;
6 right?

7 **A** Yes, sir.

8 **Q** Did you see any misconduct? Did you see
9 anything that looked like they were doing anything
10 wrong while you, as an outside independent
11 authority, were looking at this?

12 **A** No, sir.

13 **Q** Do you know who Mike Perry is?

14 **A** Yes, sir.

15 **Q** Who's Mike Perry?

16 **A** A SLED agent.

17 **Q** Okay. And a SLED agent, Mike Perry, came in
18 behind all of you and went back through all of this
19 too, didn't he?

20 **A** Yes, sir, he did.

21 **Q** Is he from an independent, an outside agency?

22 **MR. GARRETT:** Objection, Your Honor. That's
23 hearsay on that point as to what this other officer
24 told him.

25 **MR. MAYE:** I'm not asking what he told him.

1 I'm asking him if he came back in afterwards, just
2 like Investigator Willis did.

3 **MR. GARRETT:** How would he know?

4 **THE COURT:** Well, hang on. If he has
5 independent knowledge of it, then I'll let him
6 answer it. Go ahead.

7 BY MR. MAYE:

8 **Q** Don't answer unless you've got independent
9 knowledge of this. Didn't Mike Perry come back in,
10 just like you did, who works for the South Carolina
11 Law Enforcement Division?

12 **A** Mike Perry come in and spoke with me and looked
13 at the pictures that I took, yes, sir.

14 **Q** Okay. So he was reviewing all of this. He
15 even came back through you as an independent agency,
16 Mike Perry came back through and looked at what you
17 did; isn't that right?

18 **A** Yes, sir.

19 **Q** So you went out to the scene and looked at all
20 of this. Have you ever seen any bullets like this,
21 these homemade rounds like this?

22 You've been all over the country with
23 specialized training, haven't you?

24 **A** Yes, sir.

25 **Q** Have you ever seen any modified bullets like

1 that with steel cores put in them that some private
2 person had? Have you ever encountered that in all
3 the time you've been in law enforcement?

4 **A** No, sir. This is the first time I've ever seen
5 this in a private individual, yes, sir.

6 **Q** But you were in the military, weren't you?

7 **A** Yes, sir. Six years.

8 **Q** They got rounds like that in the military to go
9 through body armor, don't they?

10 **A** Go through body armor, go through steel,
11 whichever -- armor-piercing rounds is what it's
12 called in the military.

13 **Q** So to get in one of these covered positions
14 like they're talking about, getting in a door like
15 they were talking about up here, like this officer
16 right here, he's got himself in the crook of a door
17 right where the car -- do you see this picture right
18 here?

19 **A** Yes, sir.

20 **Q** Okay. Where an officer's up here in the crook
21 of the door, people use rounds like that to shoot
22 through the door and hit the officer, don't they?

23 **A** It would, yes, sir.

24 **Q** And people use rounds like that to go through
25 the body armor and the shock plate in body armor,

1 don't they?

2 **A** It would, yes, sir.

3 **Q** They don't shoot foxes with bullets like that,
4 do they?

5 **A** Not what I would assume they wouldn't, no, sir.
6 That's not a round you would shoot foxes with. I
7 wouldn't.

8 **Q** And if somebody stood up here and fired a round
9 down into the ground, how deep would that round go
10 in the ground right there?

11 **A** I couldn't say exactly, but you'd have to have
12 a backhoe or something to get it up.

13 **Q** You'd have to dig it up with a backhoe?

14 **A** Yes, sir.

15 **Q** Did you get you a backhoe out there and go dig
16 that up?

17 **A** No, sir.

18 **Q** Did you get all the background information in
19 this case about what was said and where everybody
20 was in this case?

21 **A** Yes, sir. After the evidence was collected, I
22 spoke with --

23 **Q** Don't go into what they said, but did you
24 gather all that information that you could about the
25 case out there at the time?

1 **A** Yes, sir. What I could at the time, yes, sir.

2 **Q** Okay. But some of it you had gaps and holes in
3 because Bobby was still in the hospital when you
4 went out there; right?

5 **A** Yes, sir.

6 **Q** So you couldn't even talk to him, could you?

7 **A** No, sir.

8 **Q** Okay. And you didn't have, at that point in
9 time, all of the information that was later in this
10 case. You didn't have all of it, did you?

11 **A** No, sir.

12 **Q** You just had a brief overview of what little
13 bit that you could gather at that particular time as
14 an assisting agency; right?

15 **A** Yes, sir.

16 **Q** So some of the information in here you have is
17 not exactly accurate, is it? It's just preliminary
18 information that you gathered?

19 **A** Yes, sir.

20 **Q** You don't know anything about the timing and
21 when the light came on and off up here, do you?

22 **A** No, sir.

23 **Q** Because you weren't there, were you?

24 **A** No, sir.

25 **Q** Who was in the best position out there to see

1 all of that?

2 **A** The deputies on the scene.

3 **Q** Absolutely.

4 So any information about whether or not you --
5 basically, there were four spent rounds recovered;
6 right?

7 **A** Yes, sir.

8 **Q** And, obviously, Bobby got shot?

9 **A** Yes, sir.

10 **Q** So you know one of those rounds went into him
11 so you can account for one of the four; right?

12 **A** Yes, sir.

13 **Q** But as to the actual timing of all of the rest
14 of the rounds being fired, you can't say anything
15 about that, can you?

16 **A** No, sir, I can't say when they were spent, no,
17 sir.

18 **Q** And you can only assume and part of what you've
19 got in here is just basically your assumptions?

20 **A** Correct.

21 **Q** There were four rounds?

22 **A** Yes, sir.

23 **Q** Spent rounds.

24 So you know that this .30-06 weapon got fired
25 out there from the evidence that you saw, at least

1 four times out there that night?

2 **A** Correct.

3 **Q** But as to the rest of the information,
4 basically just what you could garner from what you
5 looked at and what you saw?

6 **A** Yes, sir.

7 **Q** And some of it is just your assumptions; right?

8 **A** Yes, sir.

9 **Q** Did you go up inside the house and all when you
10 were there?

11 **A** Yes, sir. I went into the house to take
12 pictures from the balcony down.

13 **Q** Who was there?

14 **A** Ms. Worley, his mother.

15 **Q** His mother, Mrs. Worley, was there?

16 **A** Correct.

17 **Q** Okay. All right.

18 While you were there with Mrs. Worley, did you
19 have an occasion to leave and go back outside,
20 leaving her back upstairs in the house?

21 **A** Yes, sir. She was in the house, and I wanted
22 to go in and take pictures from the balcony down.

23 **Q** And the house was all closed up. All the doors
24 and windows were closed up and everything was shut
25 up; right?

1 **A** Yes, sir.

2 **Q** Okay. You decided that you needed to go back
3 in the house; right?

4 **A** Yes, sir.

5 **Q** Once you decided that you needed to go back in
6 the house and you had left and Mrs. Worley was
7 upstairs, what did you do?

8 **A** I spoke with Chief Deputy Gable, and I told him
9 that I'd like to go inside and get some shots from
10 the balcony down and the pictures of the chairs.
11 And so Deputy Gable said, Well, let's ask and see if
12 we could --

13 **MR. GARRETT:** Objection, Your Honor.

14 BY MR. MAYE:

15 **Q** Don't go into what he said, but what you did?

16 **A** Okay. Myself and Chief Gable went up to the
17 door. I knocked on the door. Ms. Worley answered
18 from within, told me it would be just a minute. She
19 came down, opened the door. We went in, went
20 upstairs, and I took pictures.

21 **Q** Let me get this straight: You're outside, the
22 house is all closed up, and you knocked on the door;
23 right?

24 **A** Yes, sir.

25 **Q** Did you ring the doorbell?

1 **A** Didn't know there was one there. Never looked.

2 **Q** Did you beat on it with a battering ram or did
3 you knock on it with your hands?

4 **A** I just knocked on the door.

5 **Q** And in response to you knocking on the door,
6 you heard Mrs. Worley, who you just left upstairs,
7 correct?

8 **A** Yes, sir.

9 **Q** Respond to you --

10 **A** Yes, sir.

11 **Q** -- It'll be just a minute, let me come down?

12 **A** Yeah. Words to that effect, yes, sir.

13 **Q** Mrs. Worley?

14 **A** Right.

15 **Q** Did you wait on her to come down?

16 **A** Yes, sir. We waited outside the door a few
17 seconds. She come down --

18 **Q** Could you hear her coming down and coming down
19 to you?

20 **A** Yes. She come down the steps.

21 **Q** And you knew that?

22 **A** Yes.

23 **Q** Okay. So she wasn't right behind the door
24 downstairs in here. She was upstairs where you had
25 left her; right?

1 **A** Yes, sir. She wasn't right behind the door.
2 She didn't immediately open the door.

3 **Q** And you heard her coming?

4 **A** Yes, sir.

5 **Q** And his elderly mother -- we're talking about
6 the same lady, an older lady that was his mother,
7 Mrs. Worley, his mother?

8 **A** The lady that was there that morning, yes, sir.
9 She said that was -- Ms. Worley. That's who I was
10 introduced as, as Ms. Worley.

11 **Q** Okay. All right. And she didn't have any
12 problem hearing you when you knocked on the door and
13 she came downstairs in response to your knock?

14 **A** No, sir, not as I know of she didn't hear it.
15 She heard -- she responded and come down and opened
16 the door.

17 **Q** Did you use a bullhorn to get her down there?

18 **A** No, sir. I just knocked on the door.

19 **Q** Did you go out to your car and use the
20 microphone on your PA to get her to come down there?

21 **A** No, sir. I just knocked on the door.

22 **Q** And she answered and she came to the door?

23 **A** Yes, sir.

24 **Q** And you're positive about that?

25 **A** Yes, sir. That's how I got back in the house.

1 **Q** She let you back in the house?

2 **A** Yes, sir. Went upstairs, took pictures and I
3 left.

4 **Q** You've been an investigator for a long time.
5 You've worked a lot of cases, haven't you?

6 **A** Yes, sir.

7 **Q** The gun in this case was recovered up under --
8 I believe you got in your diagram here that the gun
9 in this case was covered -- recovered underneath the
10 couch. You've seen those pictures and all, haven't
11 you?

12 **A** Yes, sir.

13 **Q** Hid up underneath the couch; right?

14 **A** Yes, it was put up under there, yes, sir.

15 **Q** And, in fact, you had some trouble with this
16 because somebody took Bobby's gun and moved it from
17 where it actually was at the area he got shot;
18 right?

19 **A** It wasn't there when we -- when I was there.

20 **Q** Wasn't there, was it?

21 **A** No, sir.

22 **Q** So somebody moved some of the evidence in this
23 crime scene, didn't they?

24 **A** Yes, sir. That was not there when I was there.

25 **Q** Strike you as odd, as an investigator, that

1 someone would move the evidence in a case like this?

2 **A** Yes, sir. I don't know why anybody would want
3 to move that.

4 **Q** Strike you as odd that somebody would hide a
5 .30-06 rifle up under the bottom of a couch in an
6 investigation of a case like this?

7 **A** Hide it under -- yes, sir.

8 **Q** Strike you as odd that that gun would be loaded
9 with four rounds, a full magazine, in a case like
10 this?

11 **A** Well, here, I don't know about -- no, sir, not
12 the gun being loaded, fully loaded here, no, sir.

13 **Q** But if you've got a gun fully loaded and you're
14 going to go out -- you're a trained law enforcement
15 officer. If you're going to go out to meet a
16 threat, you don't go out with just three or four
17 bullets in your gun, do you?

18 **A** No, sir, I don't personally, no, sir.

19 **Q** You load it all the way, don't you?

20 **A** Yes, sir.

21 **Q** To deal with whatever you need to deal with;
22 right?

23 **A** Yes, sir.

24 **Q** Let me ask you this: When did you get a
25 subpoena to come up here? What was the timing of

1 that? When was the first time you had any idea that
2 you were going to get subpoenaed by the defense?
3 And you're up here as a defense witness. When did
4 you get that?

5 **A** This morning.

6 **Q** This morning?

7 **A** Yes, sir. I was coming in this morning and
8 Deputy Collier brought it to me and give it to me.

9 **Q** This morning?

10 **A** Yes, sir.

11 **MR. MAYE:** Anything for the defense? If
12 they've got any redirect?

13 REDIRECT EXAMINATION

14 BY MR. GARRETT:

15 **Q** If somebody was trying to hide evidence, do you
16 think they would take it and go put it into a police
17 car?

18 **MR. MYERS:** That's leading, Your Honor. This
19 is his witness.

20 **THE COURT:** Sustained. Rephrase.

21 BY MR. GARRETT:

22 **Q** There was a question asked to you a few moments
23 by the prosecutor about does it strike you odd, and
24 I want to explore that a little bit with you. Okay?

25 **A** Okay.

1 **Q** All right. In most situations where somebody
2 is trying to hide something, what would they do?

3 **A** They'd hide it.

4 **Q** Would they hide it in a police car?

5 **A** Not normally, no, sir.

6 **Q** Not normally at all, would they?

7 If you're trying to hide it from the police,
8 what's the last place you would put it?

9 **A** Well, I've had people I arrested try to hide
10 dope in my patrol car, but not normally.

11 **Q** Not normally, like a gun?

12 **A** Right.

13 **Q** All right. And if you -- you were asked
14 questions about your loading or keeping a loaded
15 gun, if you still have something to meet. If
16 somebody thinks they still have something to meet,
17 would they load their gun?

18 **MR. MYERS:** Objection; calls for an opinion,
19 speculation.

20 **THE COURT:** Sustained.

21 BY MR. GARRETT:

22 **Q** All right. You were asked on cross-examination
23 about whether or not you would load your gun if you
24 had to go deal with something.

25 **A** Yes, sir.

1 **Q** All right. And the question is, is why would
2 you do that?

3 **A** If I knowingly was going to have a reason to
4 use my weapon, I'd want as much ammunition on me as
5 I could.

6 **Q** Okay. And so if there's a threat out there,
7 would that be -- would that cause you to want to
8 make sure you've got more ammunition?

9 **MR. MYERS:** Objection; speculation of opinion.
10 It's his witness.

11 **THE COURT:** Overruled.

12 **MR. MYERS:** Thank you.

13 **THE WITNESS:** Yes, sir. If I knew I was going
14 to go take out a threat, I'd have as much ammunition
15 as I could with me.

16 BY MR. GARRETT:

17 **Q** Now, did you actually go upstairs to make sure
18 that sliding glass door was closed before you
19 knocked on the door?

20 **A** No, sir. I went up -- I knocked, went up, took
21 pictures --

22 **Q** On this door?

23 **A** Right. The door downstairs, I knocked on the
24 door. She responded. She come down. She opened
25 the door. I went up and took pictures from inside.

1 **Q** All right. That's my point, though. Do you
2 recall specifically, Officer -- I'm asking you
3 specifically -- do you remember whether or not that
4 sliding glass door was open or closed when you --

5 **A** When I knocked on the door?

6 **Q** Yeah.

7 **A** No, sir. I don't know if it was open or closed
8 when I knocked on the door.

9 **Q** So it may very well have still been open?

10 **A** Yes, sir, it could have been, but it was
11 November.

12 **Q** And Ms. Worley knew you were there; right?

13 **A** Yes, she knew we was there.

14 **Q** She knew that you may want to come back in.
15 You had already told her that, that you may want to
16 do some more work?

17 **A** I don't know what they told Ms. Worley.

18 **Q** You didn't tell her that?

19 **A** No, I did not tell her that. I cannot testify
20 what --

21 **Q** Okay. Was she expecting you?

22 **A** She was in the house. I don't know what she
23 was expecting.

24 **Q** Now, on my direct questioning of you, you told
25 me, did you, that you were the investigator -- the

1 chief investigator or not?

2 **A** No, sir. I'm not the chief investigator.

3 **Q** So are you an independent chief investigator of
4 this crime scene or not?

5 **A** No, sir. I'm just an assisting agency that
6 helped out with the crime scene.

7 **Q** So as described by you in cross-examination,
8 were you an independent agency, chief over this
9 investigation?

10 **A** No, sir.

11 **Q** Who is chief over this investigation?

12 **A** As far as I know, it's Deputy Nick Moore.

13 **MR. GARRETT:** Thank you. No further questions.

14 **THE COURT:** Any recross?

15 **MR. MAYE:** That's it. Thank you, Your Honor.
16 I ask him to be released.

17 **THE COURT:** Any reason why this officer can't
18 be excused?

19 **MR. GARRETT:** None, Your Honor.

20 **THE COURT:** Thank you, sir. You're excused.
21 Call your next witness, please.

22 **MR. GARRETT:** Beg the Court's indulgence.
23 Your Honor, may we approach?

24 **THE COURT:** Yes, sir.

25 (Whereupon, a bench conference was held off

1 the record, in the presence of the jury, but out of
2 the hearing of the jury.)

3 **THE COURT:** All right. Mr. Garrett, we had a
4 little side bar. My understanding is, that's the
5 witnesses you intend to call right now; is that
6 correct?

7 **MR. GARRETT:** That's correct, Your Honor.

8 **THE COURT:** All right. Ladies and gentlemen of
9 the jury, what we're going to do is send you out for
10 a lunch break. I'm trying to get a little timing,
11 little logistical things. Both the State and the
12 defense have requested that I allow that you go out
13 to the scene and view the scene, and I've granted
14 that motion, and we're making the logistical
15 arrangements to allow you to do that.

16 And if you will bear with me just for a few
17 minutes, because I want to have some instructions
18 for you about that before we let you go. But if
19 you'll go back to your jury room, we'll bring you
20 back out here, and then we're going to excuse you
21 for lunch, and then bring you back to let you go
22 back to the scene. Okay? Go to your jury room,
23 please.

24 (The jury retires to the jury room.)

25 **THE COURT:** Mr. Worley, would you stand,

1 please, sir? You're still under oath from
2 yesterday. Have you had sufficient time to consult
3 with your attorney or with whomever you'd like to
4 consult with as to whether or not you wish to
5 testify in this matter?

6 **DEFENDANT:** I'm not going to testify.

7 **THE COURT:** You wish to exercise your rights
8 under the Fifth Amendment?

9 **DEFENDANT:** Yes.

10 **THE COURT:** And are you making that decision
11 freely and voluntarily?

12 **DEFENDANT:** Yes, sir.

13 **THE COURT:** Has anybody forced, threatened or
14 promised you anything to get you to exercise your
15 Fifth Amendment rights?

16 **DEFENDANT:** No.

17 **THE COURT:** Your own free will?

18 **DEFENDANT:** My own free will.

19 **THE COURT:** Thank you, sir.

20 So, at this point, is that the defense's case?

21 **MR. GARRETT:** It will be, Your Honor.

22 **THE COURT:** Any motions?

23 Just renew your motions from yesterday?

24 **MS. BALLARD:** I'd like to renew the motions
25 from yesterday, Your Honor; I just don't have them

1 in front of me at the moment.

2 **THE COURT:** Okay. Well, just make sure we put
3 that on the record.

4 **MS. BALLARD:** Okay.

5 **THE COURT:** You're doing me a favor and just
6 remind me.

7 **MS. BALLARD:** Yes, sir. Thank you, Your Honor.

8 **THE COURT:** Also, we're putting on the record
9 that Officer Willis was not on the State's list,
10 wasn't on the defense list, and the State agreed to
11 let him testify notwithstanding that fact.

12 **MR. MYERS:** Yes, sir.

13 **THE COURT:** Anything else I need to place on
14 the record, Mr. Myers, from the State's perspective?

15 **MR. MYERS:** Not as I can think of, Your Honor.

16 **THE COURT:** Just let me know from your side,
17 too, after we come back.

18 **MR. GARRETT:** Thank you, Your Honor.

19 **THE COURT:** Let's stand at ease, let Ms.
20 Ballard get her magic done and we'll go from there.

21 (Pause.)

22 **THE COURT:** While she's doing that, why don't
23 we let the jury go back and go to lunch and then
24 bring them back at 1:30. Any reason why we can't do
25 that?

1 **MR. HENDERSON:** No, not at all.

2 **THE COURT:** Go ahead and bring the jury in.

3 (The jury returns to the courtroom.)

4 **THE COURT:** Thank you, ladies and gentlemen.

5 What I'm going to do is go ahead and excuse you for
6 your lunch break. I'm going to ask that you be back
7 in your jury room by about 1:25, and then we'll
8 bring you in here for some brief instructions as to
9 your site visit, and then we'll send you back out to
10 the scene.

11 But, at this point, I'm going to excuse you for
12 lunch. Remind you that you're not to speak amongst
13 yourselves or with anyone else about this case.
14 Hope you have a nice lunch.

15 (The jury was excused for lunch.)

16 **THE COURT:** Let's just be in recess until 1:30.

17 And, Ms. Ballard, thank you. I'll get that
18 from you at 1:30.

19 **MS. BALLARD:** I almost got it.

20 **THE COURT:** Okay. Great. Thank you. I
21 appreciate you doing that.

22 (Whereupon, there was a luncheon recess.)

23 **THE COURT:** The only thing I was told is that
24 -- by Officer Willis is that they have -- the driver
25 is not exactly sure how to get there, so they're

1 going to have an officer lead them and then pull out
2 of the way going in. Any objection to that
3 procedure?

4 **MR. GARRETT:** None.

5 **MR. MAYE:** Absolutely not. Thank you, Your
6 Honor.

7 **MS. BALLARD:** And we'll call Mr. Robert Worley
8 when they're on their way so he pulls away. He just
9 doesn't want to leave the house unlocked.

10 **THE COURT:** Let's make sure -- let's go over
11 everything right now. We have the oath to the
12 bailiffs I'll give; directions; you may walk around
13 the garage apartment; you may go inside the garage
14 apartment; you may not conduct any experiments on
15 the premises; you may not ask questions of the
16 people escorting you or of anyone who may be there;
17 no more than six people or jurors on balcony/porch
18 at any one time; you may not discuss this case
19 amongst yourselves until I instruct you to begin
20 your deliberations.

21 **MS. BALLARD:** And Mr. Myers asked that you add
22 to that that they don't take notes while they're
23 there.

24 **THE COURT:** No notes.

25 Anything further, Mr. Maye?

1 **MR. MAYE:** Not from my perspective. I think
2 that should cover it. I don't want to speak for my
3 boss here, but not from the State, Your Honor.
4 Thank you.

5 **THE COURT:** Well, I'd assume Mr. Myers is
6 probably getting ready for closing.

7 **MR. MAYE:** I think that's got it covered. I
8 honestly do. As long as nobody's talking to them
9 and they're not conducting experiments, that would
10 be my primary concern.

11 And if Donnie's indicated that he'd object to
12 them taking notes, I think that's fine. I think
13 that basically covers it, Your Honor.

14 **THE COURT:** Okay. Good. And from my
15 understanding, none of the attorneys, the Court,
16 just going to let them -- we're going to stay here
17 at the courthouse and let them roll out there; is
18 that correct?

19 **MR. GARRETT:** Judge, we talked about that at
20 lunch and the doctrine of the 13th juror might
21 apply.

22 **THE COURT:** I'll tell you what I'll do, the
23 only thing that the 13th juror would apply to, if
24 they violate the instructions. I mean, all the 13th
25 juror has to do, with the facts of a supported

1 verdict.

2 **MS. BALLARD:** That's fine, Your Honor.

3 **MR. GARRETT:** We're just making sure we've
4 covered all of our bases.

5 **THE COURT:** And I thought the 13th juror was a
6 civil remedy. Is it a criminal remedy?

7 **MS. BALLARD:** It would only apply with
8 reference, I think, to your consideration of a
9 motion for a new trial, should it -- should it be
10 made.

11 **MR. MAYE:** Now, let me just make sure, do y'all
12 have an objection to the Judge not going and viewing
13 that evidence from a -- because if you're going to
14 object to that, we can remedy it now, and the Judge
15 can go if you insist. Or if you think that your
16 rights are being compromised, we'd like for you to
17 state that for the record because that way, if you
18 think the Judge should view it, we'd like for you to
19 raise it now or waive it.

20 **MR. GARRETT:** Your Honor, I think, out of an
21 abundance of caution, we have to raise it.

22 **THE COURT:** You want me to go?

23 **MR. GARRETT:** I think so.

24 **THE COURT:** All right. I'll do it.

25 Now, what that's going to do is just delay a

1 little bit of our charge conference that I was
2 hoping to hold. I have -- have any of -- I imagine
3 you probably have -- tried something in front of
4 Gary Hill?

5 **MR. GARRETT:** I have.

6 **THE COURT:** You know, Gary -- and I'll leave my
7 charge here, my basic charge, and let y'all look at
8 it. I mean, I have a laundry list of the
9 self-defense things, a lot of which will not be
10 applicable. I have the charge that's in three
11 parts. The first part is define and controls the
12 jurors' duties as jurors; then the substantive law,
13 which would be assault and battery with intent to
14 kill, possession of a weapon during the commission
15 of a violent crime; then I'd have self-defense. I
16 would also have the -- what's the term I was using
17 earlier? Is it self-defense and also you have a
18 around your house?

19 **MS. BALLARD:** Habitation?

20 **THE COURT:** Habitation. Thank you.

21 And I know -- and we'll do this more
22 particularly, Ms. Ballard and the defense asked that
23 I charge the Castle Doctrine statute, and I
24 respectfully decline under the Curry case, but we'll
25 put more of that on the record.

1 **MS. BALLARD:** Thank you, Your Honor.

2 **THE COURT:** This is the big part. Do you want
3 to get the -- the third section of my charge will be
4 considerations about your deliberations to the
5 jurors, and then go over the verdict form.

6 **MS. BALLARD:** Can I go ahead and give you our
7 proposed jury instructions?

8 **THE COURT:** Yes, please.

9 **MS. BALLARD:** Can I have the court reporter
10 mark one as well?

11 **THE COURT:** Yes, ma'am.

12 (Court's Exhibit Number 11, defendant's
13 requested jury charges, marked for identification.)

14 **THE COURT:** Do y'all want to see the basic
15 structure of the --

16 **MR. GARRETT:** Can we just have a copy of it
17 made so both sides can have it?

18 **THE COURT:** Yes.

19 Buffy, can you make me a copy of that?

20 And how about just the other instructions about
21 this goes -- I charge in every single case, do you
22 want that?

23 **MS. BALLARD:** No, Your Honor.

24 **THE COURT:** I didn't think you would.

25 Mr. Myers, I was confirming that the directions

1 to the jurors were as follows: That you may not
2 walk around -- you may walk around the garage
3 apartment, you may go inside the garage apartment,
4 you may not conduct any experiments on the premises,
5 you may not ask questions of your escorts or anyone
6 who may be there, no more than six jurors on the
7 balcony at one time, and they're not to discuss the
8 case amongst themselves until I tell them to begin
9 their deliberations, and they may not take any notes
10 out there. Do you agree with that?

11 **MR. MYERS:** Yes, sir.

12 **THE COURT:** Other than that, the defense has
13 asked that I be out there at the scene while they're
14 there; I told them I would. And if the attorneys
15 want to come, fine. If they don't, that's fine,
16 too.

17 **MR. MYERS:** We choose not to come and be out
18 there.

19 There's one officer not involved in the case.
20 Do you want him to lead y'all out there?

21 **THE COURT:** Well, we talked about that as well,
22 and whenever he does, if he would take us out to the
23 drive and just stay up on the road while we're up
24 there. I think the defense is concerned that there
25 might be some undue influence. I don't think

1 that'll be the case --

2 **MR. MYERS:** I agree.

3 **THE COURT:** -- but that's out an abundance of
4 caution, we'll do that.

5 **MS. BALLARD:** We just need to know when they're
6 about to arrive so we can have Mr. Robert Worley
7 leave the premises. So if somebody can call us and
8 let us know that.

9 **THE COURT:** Are we ready to go ahead and bring
10 the jury in and send them out there? Is the bus out
11 here and ready to go?

12 **MR. MYERS:** They tell me that the bus is out
13 there.

14 Right? The bus is out there?

15 **OFFICER:** Yes, they've advised me.

16 (The jury returns to the courtroom.)

17 **THE COURT:** All right. Do we have the driver
18 or the drivers that are going to be taking the
19 jurors to the scene?

20 **OFFICER:** Yes, sir. He's downstairs waiting.

21 **THE COURT:** Ask him to come up here, please,
22 sir.

23 While he's doing that, ladies and gentlemen of
24 the jury, there are a few instructions, and Madame
25 Forelady, I'm going to ask you to assist in

1 enforcing these instructions. I, likewise, will be
2 out there. Okay?

3 First, these are the rules, and the parties
4 have agreed on this, that, number one, you may walk
5 around the garage apartment -- if you don't get
6 them, I'll have a copy of them with me -- you may go
7 inside of the garage apartment. You may not, you
8 may not conduct any experiments on the premises.
9 You may not ask any questions of your escort or of
10 anyone who may be at the premises while you are
11 there. They have asked, for safety purposes, that
12 no more than six jurors be out on the balcony should
13 you choose to go out there at one time, just simply
14 for safety.

15 Also, as I've instructed you throughout this
16 case, you may not discuss this case amongst
17 yourselves while you're en route there or coming
18 back to the courthouse. You may not discuss this
19 case until I tell you you can begin your
20 deliberations.

21 Also, you may not take notes while you're
22 there. So out of an abundance of caution, I'm going
23 to instruct each of you, before we leave, to drop
24 your pad inside of the jury room. That way, we
25 don't have to worry about you taking a note, and you

1 don't have to worry about being tempted to take
2 notes.

3 Now, does the State agree or disagree with
4 those instructions?

5 **MR. MYERS:** The State agrees.

6 **THE COURT:** Does the defense?

7 **MR. GARRETT:** It does, Your Honor.

8 **THE COURT:** Any addition from either side?

9 **MR. GARRETT:** No, Your Honor.

10 **THE COURT:** Very good.

11 Sir, are you the man who's going to be driving
12 them?

13 **DRIVER:** I am, yes, sir.

14 **THE COURT:** Come around, if you don't mind.

15 **MS. BALLARD:** Is anybody -- any other bailiffs
16 going with them?

17 **THE COURT:** Are you the only person driving?

18 **DRIVER:** As far as I know, yes, sir.

19 **THE COURT:** If there is, I'll make sure we
20 administer the oath.

21 (Whereupon, the driver was duly sworn by the
22 Judge.)

23 **THE COURT:** Is there any additional
24 instructions to this driver from the defense?

25 **MR. GARRETT:** None from the defense, Your

1 Honor.

2 **THE COURT:** From the State?

3 **MR. MYERS:** No, sir.

4 **THE COURT:** All right, sir. I'm going to let
5 the jury drop their pads back down in the jury room,
6 and I'm going to ask you to follow this gentleman,
7 and I'll follow you in my vehicle. Okay?

8 **DRIVER:** Okay.

9 (A recess transpired.)

10 **THE COURT:** All right, guys, for the record,
11 everything was pretty much uneventful. I had one
12 juror, for the record, ask if they could knock on
13 the door, ring the doorbell. I said, No.
14 Otherwise, the only communication was, I directed
15 the Forelady to communicate only about when
16 everybody's ready to go, other than that
17 everything's uneventful.

18 Now, my question is, at this juncture, it's
19 almost three o'clock and I was hoping to get this
20 case to the jury today, do y'all still want to try
21 to do that?

22 **MS. BALLARD:** Yes.

23 **MR. MYERS:** That suits us.

24 **THE COURT:** Okay. That's fine for me.

25 Now, it was indicated to me by Mr. Myers that

1 my charge on habitation is incomplete.

2 MR. MYERS: It just looked like some pages were
3 omitted on mine, Your Honor.

4 THE COURT: Okay.

5 MR. MYERS: It was at the very end.

6 THE COURT: All right. Also, I always give the
7 attorneys the opportunity to let me charge the law
8 first, if they prefer, and then them charge -- and
9 then they do their closings after I get through or
10 if you want to do it the way we've always done it,
11 either way is fine.

12 MR. GARRETT: I prefer to do it the way we've
13 always done it.

14 THE COURT: Sir?

15 MR. GARRETT: I prefer to do it the way we've
16 always done it.

17 MR. MYERS: That's fine.

18 And the only reason I said that, Your Honor,
19 was -- is on the last three pages, it's habitation
20 and home, and it's got that page. The next to the
21 last page goes down to the bottom, and looks like
22 the sentence goes on, but the last page only says,
23 The question for you to determine. So maybe that
24 says, The victim attempted to eject -- eject the
25 victim is assault in the process is a question for

1 you to determine. So I leave it up to the defense
2 attorneys. I just thought it was incomplete. It
3 may be complete; it just looks kind of odd.

4 **THE COURT:** Okay. Well, let's do it this way:
5 The possession of a weapon during the commission of
6 a violent crime, is there any objection to that one?

7 **MS. BALLARD:** The only objection we thought
8 was, you know, you don't need to describe that it
9 might be a knife or, you know, there's no dispute
10 that it was a gun.

11 **THE COURT:** As far as the possession?

12 **MS. BALLARD:** Yes, sir. Your charge has, you
13 know, you define a knife, a machine gun, an
14 automatic rifle, and all that.

15 **THE COURT:** Okay.

16 **MS. BALLARD:** I don't think you need to go
17 through all that. I don't think there's any dispute
18 about what the item was.

19 **THE COURT:** Do you agree with that, Mr. Myers?

20 **MR. MYERS:** Yes, sir.

21 **THE COURT:** So I go down through expel a
22 projectile or not even that?

23 **MS. BALLARD:** Right. Take out a knife, visibly
24 displayed a knife.

25 The next paragraph: Firearm means any weapon

1 which is designed to -- the whole next paragraph
2 comes out. And then the "in order" paragraph stays.

3 **THE COURT:** Okay. Then assault with intent to
4 kill.

5 **MS. BALLARD:** Right.

6 **THE COURT:** Assault and battery.

7 **MS. BALLARD:** Right. We made no changes to
8 your charge on assault and battery with intent to
9 kill, although on the page that starts -- the first
10 full paragraph starts with the word malice.

11 **THE COURT:** Just one second. Let me catch up
12 with you.

13 **MS. BALLARD:** Okay. Looks like page 8.

14 **THE COURT:** So since self-defense is raised
15 under Belcher, we take out the inference from the
16 use of a deadly weapon?

17 **MS. BALLARD:** Right. And examples that are at
18 the bottom of that page, all of the next page.

19 **THE COURT:** Just take out all of the different
20 instrumentalities?

21 **MS. BALLARD:** Yeah. BB gun on the third page.

22 **THE COURT:** So go back to page 8, top of
23 page 8.

24 **MS. BALLARD:** Yes, sir.

25 **THE COURT:** And then start with, Inferred

1 malice may be -- may also arise from there on down.

2 **MS. BALLARD:** Take all that out.

3 **THE COURT:** Do you agree with that, Mr. Myers?

4 **MR. MYERS:** That's fine.

5 **MS. BALLARD:** And then you pick back up: If
6 facts are proved, on page 10.

7 **THE COURT:** So take out 9 totally?

8 **MS. BALLARD:** Yes, sir.

9 **THE COURT:** Pick back up with, The specific
10 intent -- no, excuse me, If facts were proved.

11 **MS. BALLARD:** If facts were proved, yes, sir.
12 I wasn't sure about the transfer of intent on page
13 11.

14 **THE COURT:** Transfer of intent is not
15 applicable to this case.

16 **MS. BALLARD:** I didn't think so. That's why I
17 struck it. Okay.

18 And the self-defense charge --

19 **THE COURT:** Hang on for a second. Hang on.

20 So let's go back and make sure we're clear on
21 the record of assault and battery --

22 **MS. BALLARD:** Yes, sir.

23 **THE COURT:** -- with intent to kill. Starting
24 on page 8, I'll go, Malice may be inferred from the
25 conduct showing a total disregard for human life.

1 Stop.

2 MS. BALLARD: Yes, sir.

3 THE COURT: Pick back up on page 10, beginning,
4 If facts.

5 MS. BALLARD: Yes, sir.

6 THE COURT: And then delete, Transferred
7 intent; correct?

8 MS. BALLARD: Correct.

9 THE COURT: Okay.

10 MS. BALLARD: Self-defense begins on page 13.

11 THE COURT: Okay. Just let me get with you.
12 I'm sorry. I appreciate y'all bearing with me since
13 my clerk's not here.

14 MS. BALLARD: I may not have them in the right
15 order.

16 THE COURT: Yeah, mine was kind of mixed up,
17 too. Let me get all my pages in order and make sure
18 I'm right.

19 MS. BALLARD: I put them in order based on the
20 fax pages.

21 THE COURT: Now, let's go back to self-defense.
22 Are you with us on that, Mr. Myers?

23 MR. MYERS: Yes, sir.

24 MS. BALLARD: I have no changes on page 13.

25 On page 14, the "without fault" paragraph I

1 think should be included, but the balance of that
2 page I think should be excluded.

3 **THE COURT:** First, the defendant must be
4 without fault in bringing on the difficulty?

5 **MS. BALLARD:** Yes, sir. That's clearly
6 applicable in this case.

7 **THE COURT:** Okay. I was going to say I think
8 that that is an element that I would charge.

9 **MS. BALLARD:** Yes, that's correct. But
10 beginning with contemptuous language going down, I
11 don't think that or the next --

12 **THE COURT:** I got you, okay.
13 Do you agree with that, Mr. Myers?

14 **MR. MYERS:** Yes.

15 **MS. BALLARD:** And the battered person syndrome,
16 of course, does not apply.

17 **THE COURT:** So all of -- the bottom third of 14
18 start with contemptuous and then all of 15?

19 **MS. BALLARD:** Yes, sir.

20 And on 16, pick up again with imminent danger.

21 **THE COURT:** Okay.

22 **MS. BALLARD:** And then everything's appropriate
23 until page 18, the battered person's syndrome comes
24 out. All of page 19 comes out.

25 **THE COURT:** 20 would come out.

1 **MS. BALLARD:** 20 would come out. The first
2 half of 21 would come out, and you would pick up
3 with number 3, no other way to avoid danger.

4 **THE COURT:** Would that be applicable -- there's
5 no duty to retreat if you're at your home, is it?

6 **MS. BALLARD:** Correct.

7 **THE COURT:** So doesn't that mean there's no
8 other way to avoid danger in that duty to retreat?

9 **MS. BALLARD:** So you would strike out all the
10 way down to duty to retreat. Is that what you're
11 saying?

12 **THE COURT:** Well, it seems to me that that
13 would be part -- the duty to retreat is no other way
14 to avoid danger.

15 **MS. BALLARD:** Right.

16 **THE COURT:** That's what I always thought. Do
17 you agree or disagree with that, Mr. Myers?

18 **MR. MYERS:** Whatever the other side wants is
19 fine with us.

20 **MS. BALLARD:** We would like the jury to be
21 reminded that he had no duty to retreat.

22 **THE COURT:** You want me to say no duty to
23 retreat?

24 **MS. BALLARD:** Yes, sir. At the bottom of page
25 21.

1 **THE COURT:** Okay. So I take out, No other way
2 to avoid danger --

3 **MS. BALLARD:** Correct.

4 **THE COURT:** -- and start with duty -- with, If
5 the defendant was on his own premises, et cetera, et
6 cetera.

7 **MS. BALLARD:** Correct.

8 **THE COURT:** Business is out. And increased
9 risk of harm is out. Unlawful guest.

10 **MS. BALLARD:** Unlawful guest is out.

11 **THE COURT:** So 22 in its entirety is out?

12 **MS. BALLARD:** Yes, sir.

13 **THE COURT:** How about degree of force?

14 **MS. BALLARD:** Degree of force, I had left in.

15 **THE COURT:** Okay.

16 **MS. BALLARD:** All of 24. All of 25.

17 **THE COURT:** How about defense of others? I
18 guess his mother was there.

19 **MS. BALLARD:** Yes, his mother was there.

20 **THE COURT:** Okay.

21 **MS. BALLARD:** On page 27 --

22 **THE COURT:** Hold on. 26, right to act on
23 appearances?

24 **MS. BALLARD:** I have no problem with that. The
25 right to act on appearances, I think, is a proper

1 charge.

2 **THE COURT:** Okay. Mr. Myers, if you disagree
3 with any of this, just let me know.

4 **MR. MYERS:** I will; otherwise, I agree with it.

5 **THE COURT:** Okay. And I'm going to go back
6 over it. Okay, go back.

7 **MS. BALLARD:** I'm on page 27, Words accompanied
8 by hostile acts, I think comes out.

9 **THE COURT:** And how about prior difficulties?

10 **MS. BALLARD:** That comes out as well.

11 Page 28 comes out.

12 **THE COURT:** The whole thing?

13 **MS. BALLARD:** Yes, sir.

14 **THE COURT:** Page 29, all except the duty to
15 retreat, that part, of course, stays.

16 And then on page 30, we will take out the
17 paragraph about business.

18 So I go back and start with duty to retreat
19 back on page 29?

20 **MS. BALLARD:** Yes, sir.

21 **THE COURT:** Okay. And then go back -- tell me
22 about 30 again, please.

23 **MS. BALLARD:** Page 30, the only portion I would
24 suggest taking out is the part about business, if a
25 person is in a place of business.

1 **THE COURT:** Okay. And guest will be out.

2 **MS. BALLARD:** Yes, the guest would be out.

3 Habitation was appropriate.

4 **THE COURT:** Now, let's take a minute and look
5 at the habitation, make sure -- mine consists of,
6 basically, a third of page 31, all of page 32, and
7 one sentence on 33.

8 **MS. BALLARD:** That's what I have, Your Honor.

9 **THE COURT:** Have you had a chance to look at
10 that, Mr. Myers?

11 **MR. MYERS:** Yes, sir.

12 **THE COURT:** Is that sufficient or do you
13 want --

14 **MR. MYERS:** If that suits the defense, it suits
15 me.

16 **THE COURT:** Okay. So let's go back and look at
17 -- make sure we're on the same page.

18 **MS. BALLARD:** Yes, sir.

19 **THE COURT:** Self-defense. And we're using the
20 fax numbers?

21 **MS. BALLARD:** Yes, sir.

22 **THE COURT:** All of page 13 is in.

23 Page 14, we take out contemptuous language and
24 mutual combat.

25 All of 15 is out.

1 **MS. BALLARD:** Yes, sir.

2 **THE COURT:** Page 16, we start back with
3 imminent danger.

4 **MS. BALLARD:** Correct.

5 **THE COURT:** All of page 17 is in.

6 **MS. BALLARD:** Correct.

7 **THE COURT:** Page 18, we take out starting with
8 battered person's syndrome.

9 **MS. BALLARD:** Correct.

10 **THE COURT:** All of 19 is out.

11 **MS. BALLARD:** Correct.

12 **THE COURT:** All of 20 is out.

13 **MS. BALLARD:** Correct.

14 **THE COURT:** On page 21, you'll start with duty
15 to retreat.

16 **MS. BALLARD:** Yes, sir.

17 **THE COURT:** All of 22 is out.

18 **MS. BALLARD:** Correct.

19 **THE COURT:** Page 23 start with degree of force.

20 **MS. BALLARD:** Yes, sir.

21 **THE COURT:** All of 24 is in.

22 25 is in.

23 **MS. BALLARD:** Yes, sir.

24 **THE COURT:** 26 is in.

25 On page 27, beginning with words, Accompanied

1 by hostile acts and prior difficulties, is being
2 out.

3 **MS. BALLARD:** Correct.

4 **THE COURT:** All of 28 is out.

5 **MS. BALLARD:** Correct.

6 **THE COURT:** On 29, start with duty to retreat.

7 **MS. BALLARD:** Correct.

8 **THE COURT:** And then on 30, you'll take out the
9 business section, then the rest of it will be in.

10 **MS. BALLARD:** Correct.

11 **THE COURT:** Okay. And that would include the
12 part on page 31 about lawful guest.

13 **MS. BALLARD:** That comes out.

14 **THE COURT:** Right. Habitation is as shown.

15 **MS. BALLARD:** Yes, sir.

16 **THE COURT:** Okay. Do you agree with that,
17 Mr. Myers?

18 **MR. MYERS:** Yes, sir.

19 **MS. BALLARD:** We would ask Your Honor to charge
20 some of our -- in addition, charge some of our
21 charges as well. There's a lot of them that's been
22 duplicated by your charge.

23 **THE COURT:** All right. Let me look at it.

24 Number one, let's go over the verdict form.

25 Any objection to the verdict form?

1 **MS. BALLARD:** No objection.

2 **MR. MYERS:** No.

3 And, Your Honor, if I can just ask one
4 question.

5 **THE COURT:** Yes, sir.

6 **MR. MYERS:** I've got down here, on
7 self-defense, you got one --

8 **MS. BALLARD:** What page are you on, Mr. Myers?

9 **MR. MYERS:** That will be on page 14.

10 **MS. BALLARD:** Got it.

11 **THE COURT:** 14?

12 **MR. MYERS:** The defendant's without difficulty
13 in bringing -- The defendant must be without fault
14 in bringing on the difficulty.

15 And then, number two, you've got imminent
16 danger. The defendant must have actually believed
17 he was in imminent danger of losing his life or
18 sustaining serious bodily harm.

19 And, number three, if the defense is based on
20 degrees of imminent danger, a reasonably prudent
21 person --

22 **THE COURT:** Hang on. Let me catch up with you.
23 Say that on number three.

24 **MS. BALLARD:** What page?

25 **THE COURT:** That will be 21, I believe.

1 **MR. MYERS:** I see what you've got here. It's
2 just under State versus Davis, they list four, and
3 you list three, but I think you combined two and
4 three together, so we're all right.

5 **THE COURT:** Well, what I did -- let me just
6 come down and show you so we're on the same page; it
7 may be better.

8 **MR. MYERS:** The first one is without fault in
9 bringing on the difficulty.

10 **THE COURT:** Right.

11 **MR. MYERS:** And, number two, The defendant must
12 have actually believed he was in imminent danger of
13 losing his life or sustaining serious bodily injury
14 or he actually was in such imminent danger.

15 **THE COURT:** Right.

16 **MR. MYERS:** Then under Davis, number three, is
17 that if his defense is based upon belief of imminent
18 danger, a reasonably prudent person of ordinary
19 firmness and courage would have entertained the same
20 belief. If the defendant actually was in imminent
21 danger, the circumstances were such that would
22 warrant a man of ordinary prudence, firmness, and
23 courage to strike the fatal blow in order to save
24 himself from serious bodily harm or losing his life.

25 Now, I think what you did was combine two and

1 three together, so that's all right. And then four
2 is the retreat; you're going to leave that out.

3 **THE COURT:** Right. And what I'm going to do is
4 say that he had no duty to retreat since he's in his
5 house.

6 **MR. MYERS:** That's good.

7 (Pause.)

8 **THE COURT:** Okay. Now, let me ask you,
9 Ms. Ballard, first, go ahead and place on the record
10 the request under the Castle Doctrine statute.

11 **MS. BALLARD:** Yes, sir. Yes, sir, Your Honor.
12 That's our request to charge number 11 --

13 **THE COURT:** Okay.

14 **MS. BALLARD:** -- which is in the packet that we
15 had marked.

16 Your Honor, I think, reading the case law, most
17 recently the Curry case, what I think the Supreme
18 Court has said is that the General Assembly codified
19 the Castle Doctrine in Title 16 by creating a
20 procedure whereby it can be decided as a form of
21 immunity pretrial. I don't think it was intended to
22 take away the common law defense of duty to retreat,
23 and I think Your Honor has agreed with me on that.
24 But I think the language of the statute also
25 provides language of the common law fear of imminent

1 peril, death, or great bodily harm, and that should
2 be charged as a defense.

3 My point is, I'm trying to say that the statute
4 provides it as immunity and it's also a defense. So
5 it's determined pretrial as immunity. And if it's
6 not determined pretrial -- in this case, it was
7 determined not to be immunity, it still can be
8 considered as a defense, and that was --

9 **THE COURT:** Separate and distinct from
10 self-defense for habitation?

11 **MS. BALLARD:** Yes, sir. That's our position.

12 And as I read the Curry case, the reason the
13 Curry case -- the court found that the charge should
14 not have been given in the Curry case is because the
15 defendant in that case was on another's premises.
16 He was not out at his own home. And the court then
17 said, Well, the charge wasn't appropriate under
18 those circumstances.

19 But we think that the common law Castle
20 Doctrine survives the adoption of the statute, and
21 the statute -- the language in the statute should be
22 charged as a defense even though it also applies for
23 an immunity.

24 The point I'm trying to make is that the
25 legislature said it should be looked at twice: Once

1 pretrial. And if the judge finds, as a matter of
2 law, that you're entitled to immunity, that's the
3 end of the day. But it doesn't prevent you from
4 also relying on the statute at trial as a defense.
5 And that's why I wanted Your Honor to include the
6 language of the statute, which I have set forth in
7 paragraph -- or request to charge number 11.

8 **THE COURT:** As I told you, you may be right,
9 and you did point out something the court said, you
10 know, we're in new area, and there's a lot of
11 unsettled issues. But the way I read Curry, the
12 fact that the legislature, by its expressed terms,
13 codified the common law, which basically was the
14 self-defense with exception to the duty to retreat,
15 then I just think I don't need to charge it. Okay?

16 **MS. BALLARD:** Just for the record, Your Honor,
17 the Curry case, they seem to go out of their way to
18 say the General Assembly purported to codify the
19 common law. That's on page 2 of the opinion.

20 And then they again, on page 5 of the opinion,
21 as the General Assembly stated its intent to codify.
22 It seems to be leaving open the possibility that
23 they didn't accomplish everything it was trying to
24 accomplish, and that's why I believe that common law
25 survives.

1 Most of the charges, Your Honor, that I handed
2 up to you are included in your standard charge, but
3 I would ask you to consider four other charges that
4 are included in our packet.

5 **THE COURT:** Yes, ma'am.

6 **MS. BALLARD:** Number 5, 6, 7, and 8.

7 **THE COURT:** Okay. Mr. Myers, do you have
8 those?

9 **MS. BALLARD:** I'm sorry. And also number 4.

10 **THE COURT:** Number 4?

11 **MS. BALLARD:** Yes, sir.

12 (Pause.)

13 **MS. BALLARD:** I think the first paragraph of
14 number 4 is in your general charge, but the second
15 paragraph is not.

16 **THE COURT:** I'm sorry?

17 **MS. BALLARD:** I think the first paragraph of
18 our number 4 is included in your general charge, but
19 the second paragraph is not. And we would ask that
20 that be included -- inserted on page 21 before we
21 get to the duty to retreat.

22 **THE COURT:** Well, 26 is where it comes up on --
23 page 26 is self-defense. No, on page 27, it says,
24 The defendant does not have to wait until the victim
25 gets the drop on the person defended. The defendant

1 has a right to act under the law.

2 **MS. BALLARD:** You're right. It's there. I see
3 it.

4 **THE COURT:** So we're okay with what we have?

5 **MS. BALLARD:** Yes, sir. Number 5, I don't
6 think it's covered by Your Honor's charge.

7 **THE COURT:** Okay.

8 (Pause.)

9 **MR. MYERS:** Number 5, we object to that. The
10 jury's never asked to put themselves in the shoes of
11 the victim or the defendant.

12 **THE COURT:** It sounds to me it's almost what
13 the golden rule argument almost.

14 **MS. BALLARD:** Well, I think it's an exception
15 in self-defense. I think the jury has to determine
16 what, you know, your standard charge is they use
17 their own common sense in looking at the facts. And
18 because of the self-defense issue, and that is being
19 charged, I think, by definition, they have to put
20 themselves in the defendant's shoes.

21 **MR. MYERS:** That's a charge on the facts. I
22 couldn't ask the jury to put themselves in the
23 victim's shoes. That's a violation of the golden
24 rule. In the same process, you can't ask the jury
25 to put themselves in the shoes of the defendant.

1 That's totally improper.

2 **MS. BALLARD:** That's a quote from State versus
3 Rash, Your Honor, which is attached earlier in the
4 packet.

5 **MR. MYERS:** It might be talking about the law,
6 but it's not taking about a charge to the jury.

7 **THE COURT:** I understand.

8 Well, it seems to me, number one, that it is
9 you're asking me to charge on the golden rule or
10 close to the facts. The last paragraph seems to be
11 injecting an element that's not part of
12 self-defense, and that is the State has to disprove
13 that a person of ordinary reason, coolness, and
14 prudence would not have acted as the defendant did
15 under the circumstances.

16 **MS. BALLARD:** I agree that the second paragraph
17 is not appropriate, but I think the first paragraph
18 is.

19 **THE COURT:** I'm going to respectfully decline
20 number 5.

21 **MS. BALLARD:** Thank you, Your Honor.

22 Number 6 may cover that charge, but again, it's
23 pulled from a Court of Appeals case.

24 **THE COURT:** Well, let me ask you this: So
25 you're saying, in this case, that from the

1 perspective of the defendant, that knocking on the
2 door or ringing of the doorbell made the person an
3 intruder?

4 **MS. BALLARD:** Yes, sir.

5 **THE COURT:** Did I not hear --

6 **MS. BALLARD:** He was under the -- in order to
7 ring the doorbell or knock on the door, you have to
8 come under --

9 **THE COURT:** Yeah, I was out there and I saw --

10 **MS. BALLARD:** Right. So you're actually in the
11 premises by the time you're knocking on the door,
12 ringing the doorbell just by virtue of the way it's
13 built.

14 **THE COURT:** Well, you're underneath the deck,
15 that's for sure.

16 **MS. BALLARD:** Yes, sir. You're within the
17 premises.

18 **THE COURT:** But did I not hear Mr. Garrett say
19 multiple times that we didn't try to say -- and
20 don't let me put words in your mouth, I know you
21 won't -- that Officer Rushton was trying to get into
22 the house? You didn't say that?

23 **MS. BALLARD:** I don't remember that.

24 **THE COURT:** Okay. Listen --

25 **MR. GARRETT:** I didn't say that he did, but I

1 didn't say he didn't. I didn't know.

2 **THE COURT:** Okay. Mr. Myers, what is your
3 position on number 6?

4 **MR. MYERS:** I don't have any problem with
5 number 6.

6 **THE COURT:** Okay. We'll do it. If y'all
7 agree, then that's fine with me. And where do you
8 think we need -- I'm going to add that at the end of
9 my self-defense charge.

10 **MR. MYERS:** I thought your charge talked
11 something about trespassing, and you may have this
12 language already in as defense of habitation, but
13 anyhow --

14 **MS. BALLARD:** It's on page 31 of your charge.

15 **THE COURT:** On habitation?

16 **MS. BALLARD:** Yes, sir. I think it's at the
17 end of that.

18 **THE COURT:** Okay. I'll add number 6 to -- at
19 the end of habitation. I'm not going to charge
20 number 7, because the law in this case under the
21 statute that I found is the testimony or the
22 evidence presented was it was a shooting at a fox.
23 Even if it's night hunting, even if he was shooting
24 at a fox, he can't use a .30-06; he's got to use a
25 .22 or less. He can't use a .30-06, the way I read

1 -- and y'all pull this up right quick and look at
2 it. And what I'm looking at, please -- and you
3 correct me if I'm wrong -- section 50-11-710,
4 Section A --

5 **MS. BALLARD:** A or 8?

6 **THE COURT:** A as in apple.

7 Oh, never mind. Let me finish reading the
8 charge first before I start declining it.

9 (Pause.)

10 **THE COURT:** Let me just say this: The second
11 paragraph, there's no evidence of trapping in this
12 case. I just don't see that being applicable.

13 **MS. BALLARD:** Correct.

14 **THE COURT:** Mr. Myers, as to the first
15 paragraph under Proposed Charge 7, it says, The
16 General Assembly has provided that night hunting in
17 this state is unlawful; however, the prohibition
18 does not prevent any owner of a property from
19 protecting the property from destruction by wild
20 game as provided by the law.

21 And then you cite my statute I'm looking at.

22 **MS. BALLARD:** Yes, sir.

23 **MR. HENDERSON:** Under subpart G, Your Honor.

24 **THE COURT:** Pop it up on your screen. Let me
25 come down and look at it, if you don't mind.

1 **MR. HENDERSON:** Your Honor, it's in the packet.

2 **THE COURT:** Oh, it is? Okay.

3 **MS. BALLARD:** It's subsection G, yes, sir.

4 **THE COURT:** So the cat being his property?

5 **MR. HENDERSON:** And the house, absolutely.

6 **THE COURT:** Okay. I don't have a problem with
7 it.

8 **MS. BALLARD:** Where are you going to put that
9 one, Your Honor?

10 **THE COURT:** Well, I can put it at the end of
11 habitation.

12 **MS. BALLARD:** That makes sense.

13 **THE COURT:** Mr. Myers, any objection to reading
14 the first paragraph of number 7?

15 **MR. MYERS:** No, sir.

16 **THE COURT:** All right. And so, basically, the
17 rest of yours, Ms. Ballard, including my standard
18 charge, except for number 11, which I have --

19 **MS. BALLARD:** The only other part is the last
20 portion of number 8. I've crossed out the first
21 part of it, because you -- well, that's not
22 applicable, but beginning with, A properly trained
23 police officer may reasonably be expected to
24 exercise a higher degree of restraint than the
25 average citizen. That's a United States Supreme

1 Court case.

2 **THE COURT:** I don't think that's applicable in
3 this case. I may be wrong with my other rulings as
4 well, but I'm not going to charge that. I just
5 don't see that it has applicability on the facts of
6 this case. There's no evidence they were
7 unrestrained. The only evidence was, allegedly,
8 they didn't follow standards and procedures.

9 **MS. BALLARD:** Okay. Just note our exception,
10 Your Honor.

11 **THE COURT:** And I just assume that if I'm not
12 charging it, that you except to my not charging it.

13 **MS. BALLARD:** Yes, sir.

14 **THE COURT:** And -- and by the way, the new
15 circumstantial evidence charge is what I charge.
16 Okay?

17 **MS. BALLARD:** Thank you.

18 **THE COURT:** And just to make sure...

19 **MR. HENDERSON:** Yeah, because our number 9 is
20 Logan verbatim.

21 **THE COURT:** Yeah.

22 **MS. BALLARD:** And I do need to preserve my
23 directed verdict motions on the record.

24 **THE COURT:** I thought you renewed them, but go
25 ahead and do it again.

1 **MS. BALLARD:** I just wanted to make sure that I
2 had done that. Again, with reference to not only
3 what Mr. Henderson argued, but also Your Honor's
4 finding as a matter of law that Mr. Rushton was not
5 a law enforcement officer, and therefore instructing
6 the jury accordingly.

7 **THE COURT:** Anybody disagree that intent is
8 clearly a proper charge -- basic charge in this
9 case?

10 **MR. HENDERSON:** I couldn't hear you, Your
11 Honor.

12 **THE COURT:** I said intent, just the general
13 rule of intent.

14 **MS. BALLARD:** It's in here. Is that something
15 other than the pages that you -- oh, I'm sorry.
16 It's on page 11.

17 **THE COURT:** No. This is on Judge Hill's
18 standard charge.

19 **MS. BALLARD:** Yes, sir.

20 **THE COURT:** If you want me to just give you
21 just kind of a highlight on it so you can make --
22 y'all are welcome to look at anything I have. It
23 says, In order to establish criminal liability,
24 criminal intent is required. For example, the
25 mental state required to be proven by the State for

1 a particular crime might be purpose, intent,
2 knowledge, recklessness or criminal negligence, and
3 go down.

4 **MS. BALLARD:** That's fine.

5 **THE COURT:** Is that okay?

6 **MS. BALLARD:** Yes, sir.

7 **THE COURT:** Is that okay with you, Mr. Myers?

8 **MS. BALLARD:** Yes, sir.

9 **THE COURT:** All right. So if I understand it
10 -- you presented evidence; right?

11 **MR. GARRETT:** I did, Your Honor.

12 **THE COURT:** You did. Okay. So you're going to
13 require them to open on the law?

14 **MR. GARRETT:** I do.

15 **THE COURT:** Okay.

16 **MR. GARRETT:** Fully, Your Honor, on the law and
17 the facts, and then we close and then they rebut.

18 **THE COURT:** Okay.

19 Mr. Myers, are you ready to proceed for the
20 State?

21 **MR. MYERS:** Yes, sir.

22 **THE COURT:** Are you ready to proceed?

23 **MR. GARRETT:** I am, Your Honor.

24 **THE COURT:** Would you bring the jury in,
25 please?

1 (The jury returns to the courtroom.)

2 **THE COURT:** All right. Madame Forelady, ladies
3 and gentlemen of the jury, if you'll recall at the
4 beginning of this case, I told you that in every
5 trial, civil or criminal, there are five phases, and
6 we've been through the opening statements. We have
7 now concluded the presentation of the evidence. The
8 third phase will be closing arguments by the
9 attorneys. After which, I'll give the jury an
10 option to take a quick break or not; up to you,
11 Ms. Forelady, at the end of that, and we'll go over
12 that then. Then I'll charge you on the law. We'll
13 have a brief break after that to see whether I made
14 a mistake or need to add something to what I told
15 you, and then you'll be given word to begin your
16 deliberations. Okay?

17 State ready to proceed?

18 **MR. MYERS:** Yes, sir.

19 **THE COURT:** Defense ready to proceed?

20 **MS. BALLARD:** Your Honor, could we approach one
21 second?

22 **THE COURT:** Yes, ma'am.

23 (Whereupon, a bench conference was held off
24 the record, in the presence of the jury, but out of
25 the hearing of the jury.)

1 **THE COURT:** All right. With that being done,
2 is the defense ready to proceed as well?

3 **MR. GARRETT:** Yes, Your Honor.

4 **THE COURT:** All right. Mr. Myers.

5 **MR. MAYE:** May it please the Court.

6 **THE COURT:** Mr. Maye, excuse me.

7 CLOSING ARGUMENT

8 **MR. MAYE:** Ladies and gentlemen, we're now
9 Thursday, well into the hour of three o'clock. We
10 certainly are cognizant and very mindful of the fact
11 that you've been taken away from what you would have
12 normally been doing this week, to come up here and
13 sit as judges of the facts in this case.

14 We're being required to open on the law in this
15 case. And I'm going to tell you right from the
16 outset, this is going to be exceedingly brief from
17 the State's part, because at the conclusion of all
18 the argument in this case, Judge McIntosh is going
19 to charge you in great detail with what the law is
20 in this case.

21 But I know it seems like a long time ago, but
22 when I first got up and began talking with you in
23 this case, we talked about the defendant in this
24 case, Joe Ross Worley, as he sits over there at that
25 table, is charged with two charges. And they're not

1 complicated, but the Judge is going to charge you
2 with great detail what they are.

3 He's charged with, the first of them, assault
4 and battery with intent to kill. And the first part
5 of that: Assault. The Judge will give you a much
6 greater description of it, but it's basically an
7 offer or an attempt to commit a violent injury upon
8 another person. Just an offer and an attempt. It's
9 not necessary that somebody actually see it. It's
10 just someone offers or attempts to do it.

11 And it's accompanied with a battery. And a
12 battery is simply the unlawful touching of another
13 person.

14 One of the elements of it is malice. I submit
15 to you the Judge will charge you that malice is ill
16 will or hostility. The old cases used to say malice
17 was a depraved heart bent on wickedness. We submit
18 to you malice is nothing more than meanness.

19 With malice aforethought. What's aforethought
20 mean? Just means simply thought about it. And it
21 doesn't have to -- the thought of doing something
22 doesn't have to occur for any appreciable length of
23 time. It can be just an instant before it occurred,
24 just that he thought about it before he did it.

25 That assault and the battery with malice

1 aforethought just has to be accompanied by at least
2 a general intent to commit serious bodily injury.
3 It doesn't have to be a specific intent to kill
4 someone, but at least just a general intent to
5 commit serious bodily injury. And that's the charge
6 of assault and battery with intent to kill for which
7 Joe Ross Worley faces in this case.

8 The next charge is exceedingly simple:
9 Possession of a weapon during the commission of a
10 violent crime. All that is, if a person is in
11 possession of a firearm or visibly displays what
12 appears to be a firearm during the commission of a
13 violent crime, one's guilty of possession of a
14 weapon during the commission of a violent crime.
15 That's all that it takes in this case. And the
16 Judge is going to tell you that assault and battery
17 with intent to kill is most certainly a violent
18 crime.

19 With that little bit said about the two charges
20 for which Joe Ross Worley faces in this case, I'm
21 going to sit down, and the defense is going to have
22 an opportunity to give their closing arguments. And
23 after that, Solicitor Myers is going to get up and
24 give you a full closing argument in this case. And,
25 again, we appreciate your close attention in this

1 case.

2 **THE COURT:** Mr. Garrett.

3 **MR. GARRETT:** May it please the Court.

4 **THE COURT:** Yes, sir.

5 **MR. GARRETT:** Ladies and gentlemen, I
6 appreciate y'all being here. Y'all have been a very
7 good and attentive jury, and I appreciate you taking
8 time away from your homes, your jobs, and your
9 families to hear this case.

10 You know, Joe has been charged with two very
11 serious crimes, you know, assault and battery with
12 intent to kill, possession of a weapon during a
13 violent crime. And he's pled not guilty to those
14 charges because he's not guilty.

15 You see, our law also says that if someone is
16 trying to kill you, you have a right to use
17 self-defense, and you have a right to act upon
18 appearances. If it appears someone's trying to kill
19 you, you have a right to use your self-defense.

20 And what's very interesting in our law, we have
21 something called the defense of habitation. In
22 other words, defense of your house. You also have
23 something called defense of your home and your
24 mother. You have an absolute right to stand firm,
25 fight fire with fire.

1 Now, the State has to prove beyond all and any
2 reasonable doubt that he had malice when this
3 happened. Joe Worley, ladies and gentlemen, didn't
4 even know Bobby. Bobby didn't even know Joe. So
5 how could Joe have some malice against Bobby?

6 You know, I don't want a second -- I don't want
7 not even for a second for you to think that I
8 disrespect or I don't have the greatest respect and
9 admiration for Mr. Rushton. I do. And I appreciate
10 the job he and the law enforcement officers of
11 McCormick County do, but I've got a job to do here
12 as well.

13 I appreciate the Sheffield family, but I also
14 appreciate the Worley family. These three families
15 came upon the worst tragedy that I've ever seen 30
16 years of my law practice, and it was a combination
17 of a lot of mistakes being made.

18 First, you have the Sheffields apparently not
19 getting in touch with the Worleys and letting them
20 know about this cat and a fox. Excuse me. You had
21 the Worleys -- the Sheffields not getting in touch
22 with Joe personally and saying, Joe, I don't
23 appreciate that shooting and yelling; whatever
24 you're doing, I don't appreciate it. And instead of
25 calling Joe and the Worley family, they called law

1 enforcement.

2 Law enforcement, unfortunately, Mr. Rushton
3 wasn't wearing a uniform that night. Not his fault.
4 He just wasn't wearing a uniform. Unfortunately,
5 for the Worley family, they had problems with a fox
6 bothering their cat. So we had a combination of all
7 kind of problems, and that's kind of the way this
8 case gets started.

9 So we need to look at it, ladies and gentlemen,
10 in view of all of these three families and go
11 through and look at this case to try to determine
12 what really happened out there that night so you can
13 examine the evidence. And our Constitution says
14 that we have a right to a trial by jury.

15 You know, the power of the government up here
16 has to go through you to get at us as private
17 citizens, and the State has to prove its case beyond
18 a reasonable doubt. It's the greatest system that's
19 ever been created by mankind. It is a civil way to
20 settle our disputes.

21 And as we began this case, when I first read
22 this case, when I read this case file, I decided, in
23 30 years of practice, this is the worst tragedy I've
24 ever seen. I immediately picked up the phone, and I
25 called my son-in-law. Now, I also have the greatest

1 respect and admiration for law enforcement. My
2 son-in-law is a DNR officer or was a DNR officer, a
3 Department of Natural Resources officer at the time
4 of this. I got on the phone, and I called, I said,
5 Son, I said, Does your uniform, does it have places
6 on it to show that you're a DNR officer on the front
7 and the back? And he responded, It does.

8 **MR. MYERS:** Objection. That's not in evidence,
9 Your Honor.

10 **MR. GARRETT:** I called my nephew, who used to
11 work as a department officer right here in McCormick
12 County, Shane Martin, make sure he had the same
13 thing to just belay my fears because it scared me to
14 death that we have law enforcement officers over
15 here who aren't protected, who don't have proper
16 uniforms, or don't have enough or weren't wearing
17 one on that night in question. So it concerns me.

18 This is not only -- this is a community thing
19 here. This is a community problem. It's not just
20 the Worleys and it's not just the Sheffields and
21 it's not just the Rushton family; it's all of us.
22 We're all involved.

23 So let's get talking about this tragedy. The
24 dark of night, November of '09. Rushton doesn't
25 have his uniform on yet. The Sheffields chose not

1 to talk to Joe directly about his yelling and firing
2 the gun. They call dispatch. Worleys having a
3 problem with a fox trying to kill or injure their
4 cat, Sweet Pea. Joe shoots at the fox and yells.

5 **MR. MYERS:** Objection. Objection. He can't
6 quote what the defendant -- he can't quote the
7 defendant's statement.

8 **MR. GARRETT:** Your Honor, I'm --

9 **THE COURT:** Just one second.

10 Madame Forelady, let me clear up something.
11 Would you take the jury to the jury room, please?

12 (The jury retires to the jury room.)

13 **THE COURT:** Mr. Myers.

14 **MR. MYERS:** Yes, sir. I'm objecting because he
15 is making a statement from facts not in the record.
16 He's testifying what the defendant did. The
17 defendant didn't testify. I didn't want to say that
18 in front of the jury, but he can't get up here now
19 and put himself in the place of the defendant.
20 There's no testimony a fox was out there. There's
21 no testimony the defendant shot at a fox.

22 **THE COURT:** I agree with you. I mean, your
23 statement is not evidence in this case, and that's
24 the only evidence we have that a fox was out there,
25 that he was shooting at a fox. You have to make

1 your argument based on facts in evidence.

2 **MR. GARRETT:** I understand that.

3 **THE COURT:** And those aren't in evidence, so
4 I'll sustain the objection.

5 **MR. GARRETT:** That he was yelling?

6 **THE COURT:** Well, there is evidence that he was
7 yelling.

8 **MR. MYERS:** He's yelling, but nobody understood
9 what he said.

10 **MR. GARRETT:** Okay. That's fine.

11 **THE COURT:** That he was yelling is fine. And,
12 you know, I hate to mess with somebody during their
13 closing argument, but he's correct.

14 **MR. GARRETT:** I understand. I understand.

15 **THE COURT:** All right. You need a second?

16 **MR. GARRETT:** I'm good.

17 **THE COURT:** Okay. Bring the jury back in.

18 (The jury returns to the courtroom.)

19 **MR. GARRETT:** May I continue?

20 **THE COURT:** Yes, sir.

21 **MR. GARRETT:** Thank you.

22 So we've got the Sheffields saying that Joe is
23 yelling and apparently discharging a weapon, and all
24 this culminates in between the time that the deputy
25 gets over to see the Rushtons -- the Worleys --

1 excuse me -- gets to the Sheffields within a very
2 short period of time, 107 seconds, Deputy Rushton's
3 shot.

4 In our Exhibit Number 2, State's 2 {sic}, it's
5 very important, as we said from the very beginning,
6 for you folks to recognize that they're talking
7 about Bobby couldn't find them. Dispatch: I'm not
8 getting any response. Headquarters: I'm speaking
9 with them.

10 So we know at 4:29:35, Mr. Rushton is over
11 there with them. And we know that at 4:31:22,
12 Melissa called out, Shots fired, we need an
13 ambulance.

14 Now, how is it possible for this to happen?
15 Well, when you got Mr. Rushton aiming this loaded
16 weapon, it's very clear which way he was aiming it
17 based on the hole in it. And you've got Mr. Worley
18 -- and I won't take it out of the box, but y'all
19 know what it looks like -- aims this high-powered
20 rifle at him. Both of them loaded. Somehow, as a
21 result of somebody pulling on somebody first,
22 somebody gets hurt. And in this case, Mr. Rushton
23 pulled that weapon, and he got shot. The only
24 difference is Mr. Rushton pulled the weapon on
25 Mr. Worley first.

1 Now, that's the way this case began. And let's
2 kind of go through the evidence, if we will. Let's
3 try to think about how that happened in 107 seconds.
4 Let's just go through all the evidence as we can and
5 look at it.

6 Y'all have been out to the house now and you've
7 looked at it, and I hope you recognize it is a
8 rather strangely put together house. It's a little
9 different from the average house. Y'all got to go
10 and look at all the environment around the house.
11 You got to see all the catwalks and things that they
12 have there at that house that are a little bit
13 unusual, and the lay of the land and the lay of the
14 trees and how this thing happened the way it did.

15 Now, the evidence that's shown is that Bobby
16 goes over and talks to the Sheffields. Nick
17 allegedly goes down and knocks on the door, and he
18 rings the doorbell. We've got an incident report in
19 here that y'all ought to look at. Take your time
20 and look at it, because it lays out the facts.
21 There's some different facts. It's going to be up
22 to you as a trial jury to decide whether or not
23 those facts fit together. Has the State proven to
24 your satisfaction beyond all and any reasonable
25 doubt that that whole puzzle fits together? If it

1 doesn't, then you must acquit Mr. Worley of this
2 crime, because the State has the burden of proof.
3 You're not here to reward anybody or hurt anybody.
4 Your job is to find the facts based upon the
5 evidence presented to you.

6 So as we go through this evidence and look at
7 it, I don't think there's any question that this is
8 a deadly weapon. I don't think there's any question
9 that this is a deadly weapon. I don't think there's
10 any question that these bullets right here are
11 deadly weapons that was in Mr. Worley's gun. I
12 don't think there's any question that all these
13 bullets that was in Mr. Rushton's gun are deadly and
14 would kill. I think all the testimony has been
15 that. You had two people sharing guns, pointing
16 them at each other.

17 Now, you've got these brass cartridges.
18 There's no evidence as to what type of bullet was
19 fired out of them based on their own forensics, and
20 the location of one of them is not quite sure, but
21 we do know that two of them were found up on the
22 top, and, allegedly, two were found on the ground,
23 outside of the house. That's pretty
24 straightforward.

25 One of those bullets that rang out ended up in

1 Bobby's hand. Instead of Mr. Worley killing him
2 dead on the spot, shot the gun out of his hand.
3 There's no evidence whatsoever that this second
4 shot, even if they had a bulldozer, if the case is
5 so important to them, that it would have taken a
6 bulldozer to go in and around that area where they
7 allege he was to clean it up to find it. But they
8 know that the bullet fired out through the trees,
9 over their heads.

10 Now, within 107 seconds, all the way over here,
11 Mr. Rushton's got a transverse from here, the garage
12 corner, where he said he was talking to the
13 Sheffields, transverse through those woods, down to
14 this corner, where he allegedly meets Mr. Moore and
15 Melissa. And they allege then that they go in and
16 they're knocking.

17 And I would suggest to you, ladies and
18 gentlemen, that you've heard testimony that, from
19 this position, if all you do is knock, you can't
20 hear on the inside of the house all the way up in
21 the room where Joe was. So -- but if you ring the
22 doorbell, you can hear it. That's what's been
23 testified to.

24 But somehow he had to get here to here.
25 Whatever happened, happened. And then Melissa has

1 to run where she was back in this area right here,
2 back in this area right here. She had to run all
3 the way over here to the car to make the call. If
4 you'll remember, they said she had to go make the
5 call.

6 So y'all have to sit down and think about how
7 many seconds it took her to run all the way over
8 here to the other driveway, not the Worley driveway,
9 to get there. All of that had to happen inside of
10 1.7 seconds. All of that. And he had to finish
11 speaking with them before the 1.7 seconds started.

12 So all of this happened {snapping fingers} just
13 like {snapping fingers}, almost, you know, light
14 came on, shot, boom.

15 Now -- now, what problem did Mr. Worley have
16 with Rushton? He didn't even know him. So there's
17 some questions. There's some questions here about
18 this light. Why is that light important? Well, the
19 light was on, according to the Sheffields, when
20 Mr. Worley shot. When he fired earlier that
21 evening, the light was on. Okay.

22 Some hour or so between the time they said that
23 he was -- or they called in the shots, if it started
24 at 3:15 -- the Sheffields allege that it started at
25 3:15 -- and 20 minutes later, they heard another

1 shot, and thinking they were going to hear another
2 shot, they called the law at 4:06. And we know they
3 called at 4:06 because we've got that on the
4 dispatch, and y'all got the list on all of it.

5 McCormick 9-1-1, what's your emergency?

6 Yes, my name is Alan Sheffield. We reported --
7 I/we -- and I'm assuming that he was talking about
8 his wife having reported something earlier. Nobody
9 told Joe about it. They talked to his mama about
10 it. Nobody knows whether the mama talked to Joe
11 about it.

12 We reported about a month or so ago -- I need
13 to speak to the sheriff or something. My neighbor
14 sits outside and talks at the top of his lungs,
15 sounds like he's firing a gun.

16 Notice it doesn't say anything in here about
17 cussing. Doesn't say a word about cussing.

18 Okay. I'll let you speak with law enforcement
19 dispatch. Hold on.

20 Thank you.

21 Sheriff's office: Yes?

22 Good morning. My name is Alan Sheffield. I
23 live out at [REDACTED] Presidents Drive. My wife has
24 reported our neighbor about a month or so ago, sits
25 outside at night talking very loudly, occasionally

1 what appears to be discharging guns. He does it
2 twice tonight, and he's out on the deck again.

3 Okay. That's 4:06.

4 Then it says: Okay. The name of the house is
5 Worley, I think, [REDACTED]. We're at [REDACTED].

6 I'll send someone down.

7 Thank you.

8 The county unit it's announcing dispatcher: Be
9 advised, caller says that he and his wife have
10 complained before about the neighbor.

11 Now, this is her relaying his message back to
12 these officers. Sometimes he says he comes outside
13 and talks very loudly and discharges firearms. He
14 says, He's on his deck doing that now.

15 When Nick calls back: He's discharging the
16 firearm now?

17 So now it's a firearms call because all he
18 knows, that he's out there firing the firearm right
19 now.

20 Now, I've had Dr. Kirkham come in, a renowned
21 specialist, one of the top criminologists in,
22 frankly, the world, who's got all the years of
23 experience. And I'll you this, ladies and
24 gentlemen, he doesn't have anything but the greatest
25 respect for law enforcement. He likes law

1 enforcement. That's what he does. He works
2 practices and procedures to protect law enforcement
3 officers. He writes books on the subject. He knows
4 his science, and he's an excellent scientist. He
5 knows what he's doing. And he's different from
6 other scientists; he's actually works in the field
7 as a police officers.

8 Affirmative. She says he's discharging his
9 firearm now.

10 So it's a gun call.

11 Subject's at [REDACTED], complainant is 3-0, 3-0.
12 10-4.

13 I'm still looking for Presidents Road. That's
14 Melissa.

15 Did you have complainant ask them if they live
16 next door to the right-hand side of the -- with
17 their lights on in the garage?

18 Dispatch: 113 be advised, I'm not getting any
19 response from that residence. Bobby.

20 Notice that. They call the Sheffields'
21 residence. They didn't call the Worley residence.
22 Maybe it would have been nice to call the Worley
23 residence and talk to Ms. Worley. Never had a
24 problem with this family. The sheriff didn't even
25 know them. The sheriff never had a problem with

1 them in all their lives now.

2 Would you have the complainant ask them if they
3 live next door?

4 Then he says: Be advised, I'm not getting a
5 response.

6 Headquarters: I'm speaking with them. Shots
7 fired. We need an ambulance.

8 Then we go down to where Mr. Nick Moore decides
9 that -- and this is the person that led this
10 investigation, as told to us by Officer Willis:
11 We'll get this son of a bitch later.

12 Now, who's using vulgarities at this point?

13 So now we got to go figure out what happens
14 during that span of 107 seconds, and we've got to
15 use this evidence to do it.

16 Well, the first thing: Where did he get shot?
17 There's two pieces of evidence that seem to be
18 conflicting and contradictory. State's 25, I
19 believe, Officer Collier's testimony was 20 feet.
20 And then, here, Defendant's Exhibit 11, what we put
21 in this morning from Mr. Bo Willis, says it was
22 eight feet.

23 I want y'all to look at that kind of close, if
24 you would. Pass that down together and look at it.
25 Y'all look at that for just a minute.

1 (Pause.)

2 **MR. GARRETT:** Ladies and gentlemen, while
3 you're looking at that, I just want to say that this
4 is a real serious case. And measurements, times and
5 distance is very important to the defense of this
6 case, and I want you to listen to it, so we can try
7 to get through it, but I want you to look at that
8 first because I think that sets up the initial
9 problem with this investigation.

10 And I'll tell you, while you're looking at
11 that, these measurements, according to State's
12 Exhibit 24, were obtained on 5/13/2011, the 20-foot
13 precise measurement he's talking about here, Rushton
14 indicated he was standing when shot on November
15 15th, 2009. And you'll have all this back in
16 evidence when you go back there, but I wanted to
17 point it out to you because of the importance of it.

18 And that 20-foot measurement is all laid out
19 there on this report, and I'm just going to lay it
20 right there so y'all can look at it. He's saying
21 it's 20 foot out there. Y'all are welcome to do
22 that. I'm going to let y'all pass that around while
23 I talk a little bit.

24 Now, this State's Exhibit Number 5 shows the
25 location, the path -- the picture from the ground up

1 to the light, and then it goes back a little bit and
2 shows a picture without the light. And I, to be
3 honest with you, let this slip my attention, but
4 there appears to be a big ol', I guess, towel or
5 sheet or something hanging over that balcony on the
6 far left side, and that'll become important in just
7 a little bit.

8 But you'll see that was taken on the morning,
9 according to the evidence. And those big rails
10 right there are important, and that rail right
11 there, all your rails -- see, I'm sure y'all saw
12 those rails while you were out there -- but those
13 rails become important because two things: From
14 Mr. Rushton's point of view, from the down looking
15 up, and from Mr. Worley's point of view, from top
16 looking down, you got to see through that stuff to
17 be able to see each other.

18 I'd like to go to the incident report, talk to
19 you about what Mr. Nick Moore, the investigator who
20 says we'll go back later and get this son of a
21 bitch -- Mr. Worley's a resident of this fine
22 county, and I don't think referring to him in that
23 fashion is appropriate, but I'll leave that up to
24 y'all.

25 And the question about ringing the doorbell and

1 not ringing the doorbell and the light coming on,
2 the light going off, and whatnot are important, and
3 that is what you're going to have to decide in this
4 case. The timing of the light, the knocking and the
5 ringing, the knocking and the ringing. You compare
6 the testimony of the two officers that you heard
7 from that were out there that night.

8 Now, the first thing they're talking about is
9 that when they arrived on the scene, the Worley
10 light was off. Melissa and Mr. Moore went down the
11 side. Melissa stayed back. Mr. Moore says, in his
12 testimony, in his statement, and in the incident
13 report, I knocked and announced, Sheriff's
14 department, sheriff's department; knocking. And, at
15 that time, he said he rang the doorbell. Well,
16 Mr. Worley can hear the doorbell. He said he did it
17 for several seconds.

18 Now, I'm not sure if our 107 seconds has
19 started yet because we know that Mr. Rushton is over
20 across. And where is he at? Mr. Rushton is over
21 with the Sheffields, and he's trying to get some
22 information from the Sheffields. Now, I don't know
23 how much time he spent with the Sheffields or how
24 much information he got because it's not clear. He
25 doesn't report that.

1 But I'm sure -- what I'm assuming is that Nick
2 Moore and Mr. Rushton, by the time they got there,
3 they knew, number one, that there was no lights on,
4 and number two, there was nobody out there shooting
5 a gun. Okay. So let's move on from there.

6 While they're there, the light comes on. While
7 they're there, the light comes on in the Worley
8 residence. Stays on very briefly and goes out.
9 They decide to walk back down there. They had
10 already made the decision to leave. They walk back
11 down there.

12 And in the incident report -- and y'all will
13 have this back there with you -- went to the door
14 and rang the doorbell and knocked. After several
15 seconds, I rang the doorbell and knocked again.
16 After several more seconds with no response, I
17 started to leave the residence, advised the other
18 deputies of that also.

19 So I'm not sure at that second whether or not
20 all of them had gotten together or he advised or
21 hollered to them or how he told Mr. Rushton, who was
22 supposed to be with the Sheffields, that he had
23 decided to leave because nobody was coming to the
24 door.

25 While leaving, we noticed that the porch light

1 came on. I then announced, Sheriff's office, and
2 the light went off.

3 Now, as I heard his testimony, it sounded like
4 he had already started walking towards the back or
5 towards a meeting place with the other officers,
6 officers Moore -- Melissa McAllister and Nick Moore.

7 Then he said: I then knocked on the door
8 again, and the light came back on.

9 Now, that's very important. If all he did was
10 knock on the door and he didn't ring the doorbell
11 and this house is built as it is, Mr. Worley could
12 not have heard it, not even upstairs, not even
13 upstairs in his -- in the living area of the house.
14 He could not hear the knock on the door.

15 And then he says: The light came back on, and
16 I did hear the door open from the upper deck.

17 So now we've got a sliding glass door open.
18 The light came on, sliding glass door opens.

19 I once again announced, Sheriff's office, and
20 then heard the subject say, What do y'all want? I
21 then announced again, Sheriff's office, and the
22 subject yelled, I don't give an F.

23 Now, I went through great detail with Deputy
24 Rushton about what he saw and what he heard as each
25 step of this transpired. According to Rushton, they

1 were both underneath at the door. According to
2 Rushton, he was knocking and yelling to the
3 right-hand side of the door. And notice Mr. Nick
4 Moore, in this statement, doesn't say that.

5 And then I again announced, Sheriff's office,
6 and he yelled out, I don't give an F. And then
7 Deputy Rushton then yelled, Gun. I then drew my
8 weapon and noticed that Rushton had also drawn his
9 weapon. Then I heard a gunshot and saw Mr. Rushton
10 go down.

11 Now, according to Mr. Rushton -- and, you know,
12 they have to prove their case beyond all and any
13 reasonable doubt, and you have to give any benefit
14 of any doubt to Mr. Worley. And this is basically a
15 gunfight.

16 So if you follow Mr. Rushton's versions of what
17 happened, the light never came on. He, Nick Moore
18 -- Nick Moore went to the left side; he went to the
19 right side. They both rang and knocked on the door.
20 They're both underneath the deck. He says the light
21 didn't come on. He said the door opened, somebody
22 stepped out, they heard that. And then the door is
23 opened, the light's still out, and they have this
24 conversation: What do y'all want? I don't give an
25 F.

1 Then he says he starts walking backwards, and
2 he sees what he said he was able to see, in the dark
3 without any lights on, a man standing there,
4 salt-and-pepper hair, holding a gun, not in an
5 aggressive position. He says he announced,
6 Sheriff's department -- or, excuse me, he hollers
7 gun first. He hollers gun first, then sheriff's
8 department, and then put your gun down, is what he
9 says he said.

10 In the process of him coming up -- he didn't
11 know what he did with his flashlight, whether he
12 dropped it or what he did with it. In the process
13 of coming up to shoot or what appeared -- what one
14 may infer to be the shot, as he's coming up to aim,
15 Mr. Worley, not recognizing he's a sheriff's deputy,
16 through all these -- shoots. And Mr. Rushton is
17 injured forever, and the Worley family is injured
18 forever.

19 If you look at Nick Moore's statement of
20 events, the light was on, but at some point in his
21 testimony, he said the light blinded Mr. Rushton.

22 Now, what happened out there? Has the State
23 proven to you beyond all and any reasonable doubt
24 what happened within that 107 seconds, other than we
25 know -- that thing is nasty -- and I know this --

1 this is a deadly weapon. Nobody wants one of these
2 things pointed at you. I don't care if you're a
3 police officer or you're God, you don't want one of
4 these things pointed at you.

5 The officers have testified that it's important
6 that you recognize that the placement of that bullet
7 -- and I hope that some of you folks are firearms
8 people and have used firearms in your past -- but in
9 order for that to happen, he would have had to be
10 holding it like that {indicating} to get shot right
11 there. That's about the place where your middle
12 finger would be. So that bullet ripped through his
13 finger and ripped through the gun and exploded the
14 gun.

15 You know, as I thought about this tragedy, my
16 mama told me something one time a long time ago, she
17 said, Son, in your whole life, what I want you to
18 do, no matter how bad something is, you got to look
19 for something good. And I'm looking for something
20 good here. I'm looking for the -- I'm looking for
21 the practices and procedures to be looked at to make
22 sure this never happens again to anybody, because
23 this is awful and it's so easily preventable.

24 And Dr. Kirkham has given y'all a host of
25 things, not as a Monday morning quarterback or

1 something like that. He sincerely believes in
2 helping law enforcement and their lives. He doesn't
3 want to see somebody shot and killed. Why would
4 anybody want to do that? Why would you not want to
5 protect a police officer?

6 When a police officer comes out and, you know,
7 and he'd just got back from Iraq. I'm not picking
8 on him. What he did, he did, but, you know, the
9 moment that he drew -- he called, Gun, and drew down
10 on somebody, a fellow citizen that he's supposed to
11 be serving and protecting, you know, it's not just
12 the Sheffield family he's supposed to be serving and
13 protecting; he's supposed to be serving and
14 protecting the Worley family. You don't just go in
15 and shoot somebody in their house.

16 You know, couldn't he have just said, whoa, you
17 keep your gun up there, I'm going to keep mine up
18 here, and we're not going to be pulling our guns on
19 each other. Let's talk.

20 You know, if he was exposed like that and a
21 light came on, why do you want to come up and pull
22 up on somebody? Why do you want to be the first to
23 pull on somebody? Why do you need to do that?

24 And if you look at Nick Moore's version, it's
25 almost that they had this conversation, and he went

1 out into the light, looked up, was blinded by the
2 light, then he was shot.

3 But there's a lot of fishy things going on
4 here, and I don't know whether they're just
5 unexplainable or whether they're -- it was a tough
6 night, and the officer did say -- Nick Moore said,
7 you know, I just seen my friend shot and I was upset
8 when I was doing all this, so maybe that had
9 something to do with it. Okay. Maybe the reporting
10 and whatnot.

11 But from Mr. Worley's standpoint, I mean,
12 you've got people throughout, Get that son of a
13 bitch. I mean, the son of bitch he's talking about
14 happens to be Mr. Joe Worley, a member of our
15 society. I mean, he's a lawful member of our
16 society. No reason being called that.

17 And I must tell you that if Mr. Worley said
18 those words, those aren't fighting words, and those
19 aren't words about me killing you, and that ain't
20 words threatening you.

21 Now, if they said Mr. Worley said something
22 like, Y'all better get out of here, I'm going to
23 kill you, I'm going to shoot you, or something like
24 that, then we might have a different discussion.
25 But those words don't give somebody the right, if

1 they were said even. And I submit to you, based on
2 the time, a lot of that wasn't said.

3 When he walked out there and he saw a gun, he
4 hollered, Gun, he went up to shoot, got shot, and
5 fell flat on the ground.

6 Now, if you want to talk about intent to kill,
7 if Joe Worley -- and y'all saw that weapon right
8 there -- if Mr. Joe Worley had wanted to kill that
9 man, kill whoever he was, whether he was a burglar
10 or officer or just Bobby Rushton, he had him dead to
11 rights. He's on top of him. He's got his gun.
12 He's just shot the gun out of his hand and he's down
13 on the gun. The gun's reloaded because it reloads
14 automatically. The safety's off. How hard would it
15 have been for him to put one in him?

16 And they want to say, oh, yeah, he shot at him
17 and missed him. It's interesting that he hit him in
18 the hand the first shot, but that doesn't show an
19 intent to kill. If you want to kill somebody, you
20 shoot them in the head at that distance. Whether it
21 was eight yards, eight feet, or 20 yards, with the
22 high-powered rifle that he had, he could have killed
23 him where he stood or where he fell.

24 And I'm assuming that when he had -- he got up,
25 he was making his way back towards the corner. And

1 this is important. If he's making his way from
2 where he's alleged to have been shot at, this way
3 where Nick Moore was, how easy would it have been
4 for him to kill him? If he stood right here, how
5 easy would it have been for him to kill him?

6 Because he had him laying on the floor,
7 allegedly, in this area right here. And the reason
8 I'm talking about the gun pile -- the pile of
9 materials and whatnot, is we contend that, more
10 likely than not, based upon all of the gun material,
11 probably got shot in here.

12 The problem is, is no matter where he got shot,
13 when he started running in this direction towards
14 that door, that is the only way in and out of that
15 place. And why would you load another -- why would
16 you put another one into your magazine unless you
17 were still worried about the potential of getting
18 hurt?

19 If somebody's, you know, somebody's been shot,
20 shot somebody, you load up your gun again waiting to
21 shoot whoever you've got to shoot, do whatever
22 you've got to do to protect yourself and your
23 family. I'm submitting to you, if he had wanted to
24 kill him, he was right there to kill.

25 He ran towards the door and then a shot rang

1 out. And I submit to you the State has not proven
2 beyond a reasonable doubt -- haven't proved it at
3 all -- that the bullet is in this area, this area,
4 or any of this area right here. And it's easy. We
5 have technology today, if they wanted to go out
6 there. They know it's not there. They know it's
7 not there, if they would have taken a bulldozer and
8 went out there and dug in there and looked.

9 Y'all have seen these metal detector shows
10 where people go out and find metal? How hard would
11 it have been to find that piece of metal?

12 Well, they couldn't find it, because he got
13 shot up here in the trees, and it wasn't down here
14 on the ground.

15 Now, what's Nick Moore doing while all this is
16 going on? I have thought about that and thought
17 about it for the longest. Nick Moore alleges that
18 he's still under there, knocking. As Bobby walks
19 out, he steps out to the side. And y'all went out
20 there, and I'm glad you did, and I hope some of you
21 walked back out this way to see how far you'd have
22 to walk to be able to see out there.

23 According to Nick Moore, he saw a silhouette,
24 didn't see a man, just saw the silhouette of a man
25 standing up there in the complete dark, the

1 silhouette of a man.

2 Well, if he's standing right here and he's just
3 shot my partner, I'm going to kill him. I'm going
4 to kill him where he stands. I'm sorry. Okay? If
5 it happened like they said it happened and he's
6 standing here and Joe's here, I'm going to kill him.
7 And that's just what you got to do.

8 I submit to you, ladies and gentlemen, that he
9 was probably closer to here and he could not see
10 Joe. I submit to you, now that I've seen that
11 picture with the sheet up there, it's even less
12 likely because he'd have to have seen up through the
13 sheet and seen up through these boards that are on
14 the side, these baseboards, these big boards that
15 are up on the top of the deck, and then the lower
16 board, he'd have to have seen through that. That's
17 from his perspective.

18 So I don't know about his testimony, and I
19 don't know whether I keep going back to that -- as
20 to why he said those things.

21 Now, if you read his incident report, after he
22 says, I then drew -- excuse me -- Deputy Rushton
23 yelled gun, I drew my duty weapon, and noticed that
24 Rushton had also drawn his weapon. Then I heard a
25 gunshot and saw Rushton go down, and Rushton stated

1 he'd been hit. Rushton then made it to me and we
2 both found cover due to the fact that we were all in
3 an unknown location, I wanted to get Rushton and
4 myself away from the residence. We started to
5 create distance between us and the shooter.

6 Notice there that he didn't say anything about
7 hearing a second shot. That's important. The
8 second shot, according to the Sheffields, who were
9 right across the way and could see -- couldn't see
10 the officers, but they could see -- excuse me --
11 they could see Mr. Rushton, they couldn't see
12 anybody else, but they could see Mr. Rushton, and
13 they saw him go down. They said within two seconds,
14 another shot was fired.

15 So he's on the ground, he's up, and within two
16 seconds, another shot's fired. Two shots fired.

17 Now, again, had Joe Worley wanted to take his
18 life, he could have very easily taken his life, and
19 thank God that he didn't.

20 But it's interesting that nowhere in here does
21 it say, you know, that there was a shot. At some
22 point, he says, he's coming around, he's coming
23 around what appears to be this side of the house,
24 saying, Where are you at, you SOB?

25 I submit to you that, as he's throwing off the

1 second round, he's motivating that person to get
2 away from him. He's coming towards his door.
3 Instead of running away, the officer's running
4 towards his door, he thinks he's a burglar running
5 towards his door. He lets off one through the trees
6 and that's what happened.

7 Now, what happens after that? Joe, thinking
8 he's just been -- he's just shot somebody, I'm
9 assuming, apparently, had to, based on the evidence
10 you've heard here, apparently had to load his
11 weapon, put one more in the chamber, put one more in
12 to go out because there was still a threat in his
13 mind. That's what a prudent person would do under
14 same or similar circumstances. A person of ordinary
15 courage.

16 Go down, opens the door, sees out there.
17 Somebody removed the gun and the flashlight, picks
18 it up, and starts going around. Well, unfortunately
19 for Joe, his mistake, on the other side of the house
20 was a police car.

21 And in relationship to where that is, Joe, in
22 order for him to have seen it, would have had to go
23 up on the catwalk, up over there by the cat thing,
24 and stuck his head out to look. No blue lights. No
25 sirens. No nothing to help Joe know that these

1 people were friendlies; they're not here to harm me.
2 There's no way for him to know that.

3 If the man had a full uniform on, ladies and
4 gentlemen, I wouldn't be standing here with you
5 today. If he had a uniform on to identify himself
6 properly -- nobody has an obligation to believe
7 somebody is even if they said they were police
8 officers. And I submit to you, until such time as
9 the window -- the door window -- the sliding glass
10 window opened, he wouldn't have been able to hear it
11 anyway.

12 The other part of that is is that the moment,
13 according to Rushton, the light came on {snapping
14 fingers}, the gunshot was just that fast. How is it
15 possible -- y'all go into the mind of the shooter,
16 Joe Worley. How is it possible for him to have made
17 out this man holding a gun at you through that
18 banister to be able to see him or a gun or see a
19 badge or try to make out that this person was a
20 friendly?

21 According to Mr. Rushton, less than a fraction
22 of a second did it happen: Gun, light came on,
23 boom. But, in the process, he left out one thing:
24 I was aiming at him. And he aimed at Joe first, and
25 Joe responded with the proper force, live force.

1 He gets out here and he sees this. You know,
2 and they keep saying, why would you try to hide a
3 gun -- hide your gun under your couch? Well, we
4 don't know where he kept his gun anyway, but if he
5 was trying to hide and trying to get away from the
6 police, why would he have put the gun in the car?

7 And by the time he gets around here and he sees
8 that it's a deputy's car, Oh, my God, I have shot a
9 deputy. Oh, my God.

10 So when he goes to talk, as he comes up, I'm
11 sure he's -- this family's upset. His mother's out
12 there with him. And then Sheriff Reid comes up and,
13 you know, Dr. Kirkham doesn't know Sheriff Reid, but
14 even Sheriff Reid, he's worried about him, worried
15 about his safety, to think that somebody might shoot
16 Sheriff Reid because Sheriff Reid, you know,
17 everybody knows Sheriff Reid. He walks down there
18 and he isn't worried about a whole lot.

19 But from a police practices and procedures
20 standpoint, it's dangerous for him to do that. It's
21 just dangerous because you have two people down
22 there with flashlights, and you just had a deputy
23 shot. So he's saying that not as a means of
24 criticism, but as a means of a statement to help in
25 the future for these kinds of things never to

1 happen, to protect Sheriff Reid, not to say anything
2 to disparage him, to help him.

3 And then there's some allegations that he said
4 something about ringing a doorbell. All I can tell
5 you about that is, ladies and gentlemen, you never
6 -- we have not heard any of this stuff. There's
7 supposed to be mics out there, various people,
8 sundry people having mics and radios. We never hear
9 them say that or what else he might have said in
10 addition to that, explaining what had happened out
11 there that night.

12 You know, I mean, from his perspective, he sees
13 the car -- think about it. You've just shot
14 somebody who was not wearing a uniform. Is the
15 police officer chasing the guy that I just shot or
16 did I shoot him? I mean, how does he know?

17 So he goes up there and he says, I put the
18 deputy's gun -- he realizes it was a policeman. He
19 drops -- he puts the gun in the car, he walks up
20 there with his mother, and as the sheriff and those
21 folks came down, he surrendered to them without any
22 difficulty.

23 Mama consented to them to go into the house,
24 the Worley family complied with the law, allowed
25 them to go in the house and look at it once they

1 realized it was law enforcement.

2 You know, there are so many things that could
3 have been done to have prevented this. For
4 instance, had the police car just went on down the
5 driveway a little bit, if the police car had went on
6 down the driveway down towards the house property
7 they were talking about that they use sometimes as a
8 driveway right there, and if the police officer had
9 come down there like that and then he could see it
10 was a marked car, he would have been able to see it.

11 You know, Bobby Rushton didn't know that. You
12 know? When you go back and you look at it after the
13 fact, you see it. But, you know, I know with all my
14 heart that if Mr. Rushton had known that he could
15 have pulled his car down on further and Mr. Worley
16 would have been able to see it, that this probably
17 wouldn't have happened.

18 If a phone call had been made, this probably
19 wouldn't have happened. If a blue light was turned
20 on, this probably wouldn't happen.

21 There's been a lot of discussion about what
22 police wear, what they should wear, what they
23 shouldn't wear. I would prefer to use caution,
24 prevail on the side of caution under all
25 circumstances. Frankly, I was shocked to hear that

1 our budget is only \$3,000 for our police officers
2 for uniforms. That's disgusting. That's
3 disgusting.

4 I understand it's tough here in McCormick.
5 That ol' window up there, the clerk over there, she
6 had to get a lawyer to write a letter to the county
7 council because that window looked like it was about
8 to fall in. Y'all see these lights around here?
9 Our government is supposed to be here to protect all
10 of us. If those lights don't work, we need lights
11 in here. We're going to have to write some letters.
12 I'm not complaining, I'm just telling you the
13 purpose of government is not to hurt us, it's to
14 help us, it's to assist us, it's to not call us
15 those words.

16 And in this incident report, you got Nick Moore
17 calling these people by this name. And he was
18 telling this to -- to the sheriff and the chief up
19 here, he says in his statement that he told them
20 to -- and you'll have these back there -- to watch
21 them. And he called Ms. Worley and Mr. Worley a bad
22 name. And it seems to me the only real evidence
23 that we have of people using vulgarities out there
24 that evening was the police officer.

25 And I understand he was mad, I understand he

1 was upset. And to be honest with you, if I were out
2 there and I was backing him up and a man shot him,
3 I'd probably have shot him. And I would be mad at
4 him.

5 Police officers, ladies and gentlemen -- and I
6 believe His Honor will instruct you of this -- has a
7 responsibility. They have a responsibility to use
8 more caution than we do, because we're not trained.
9 We're not trained, they are.

10 I'm just trying to find the language. Well, I
11 can't put my hands on it right now. I'm sorry about
12 that.

13 But y'all are going to have that all back there
14 with you. And as you look at it, think about --
15 think about this case in a way that's fair to both
16 sides, both the State and the defense.

17 And this is interesting. In this report by
18 Mr. Nick Moore, he says, Upon arrival back at the
19 scene, we saw two suspects -- or subjects in the
20 yard walking around with a flashlight. I took cover
21 behind the patrol car, and the sheriff called out to
22 the subjects. The subjects started coming towards
23 us, and I told the sheriff to watch the F'ers.

24 So here we have a police officer who's supposed
25 to be serving and protecting, and he's calling

1 Mr. and Ms. Worley F'ers. And he's in charge of
2 this investigation? And, again, is that
3 professional? Is that the standard that we want to
4 hold law enforcement to, to serve and protect us?

5 I don't know. Maybe you folks are going to
6 have to think about that a little bit. What message
7 are we sending?

8 The other thing I wanted to point out to you
9 about this -- the lay of the land, so to speak, is
10 that there was a question about where he was shot.
11 This is State's Exhibit 18. And there was some
12 question about some tree branches hanging over that
13 cross tie. And, again, I'm not sure those tree
14 branches are hanging over the -- as you know, it's
15 that time of year. So it's fall. So if the trees
16 were where they were at and there were leaves and
17 whatnot hanging over there, there's a chance that,
18 again, those leaves might have obstructed, again,
19 Mr. Worley from seeing Officer Rushton. Those will
20 be back there in evidence with you.

21 In close, hold the State to its burden of proof
22 beyond a reasonable doubt in this case. All of
23 these families have hurt. This is truly -- this
24 should have never even been brought as a criminal
25 case. Mr. Rushton, he's proven that; he's brought a

1 civil case. Why not let a civil jury take care of
2 this? And they will. A civil jury is going to
3 listen to this case and is going to settle it.

4 But because of the right of self-defense, the
5 right of self-defense, mama's defense, the defense
6 of others, and the defense of his habitation, in the
7 split second that Joe Worley had to make a decision
8 whether or not to shoot or not, power against power,
9 he was going to die he thought, or Rushton was going
10 to die, and instead, he shot the gun out of his
11 hand.

12 Thank you.

13 **THE COURT:** Mr. Myers.

14 **MR. MYERS:** Can we take a break, Your Honor?

15 **THE COURT:** Yes, sir.

16 Madame Forelady, we'll take a few-minutes
17 break, then we'll bring you back out here.

18 (The jury retires to the jury room.)

19 **THE COURT:** I anticipate this will be fairly
20 significant after 5:00 before it even comes close to
21 me charging the jury. I'm going to give the
22 Forelady an option to go forward or come back
23 tomorrow. I just think that's the proper thing, and
24 I can tell you that's what Columbia wants us to do,
25 too. So that's what I'm going to do.

1 We'll be in recess for a few.

2 (Brief Recess.)

3 **MR. MYERS:** The State's ready, Your Honor.

4 **THE COURT:** Defense ready?

5 **MR. GARRETT:** Defense is ready.

6 **THE COURT:** Would you bring the jury in,
7 please?

8 (The jury returns to the courtroom.)

9 **THE COURT:** All right. State ready?

10 **MR. MYERS:** Yes, sir. Thank you, Your Honor.

11 **THE COURT:** Yes, sir.

12 **MR. MYERS:** Oh, what a tangled web we weave
13 when first we begin to deceive. Some smart man
14 wrote that when I was in school when I read about
15 it. But, you know, when you get caught, you got to
16 start doing something. You've got to start
17 deceiving.

18 Billy, who broke that glass?

19 I didn't do it.

20 It's broke, Billy. Who broke that?

21 The cat did it.

22 Well, the cat's outside.

23 Johnny did it.

24 Johnny's playing basketball.

25 Suzie did it.

1 But we've got to deceive. And oh, man, we're
2 trying the wrong people. I ought to be trying Nick.
3 He messed up horribly. I ought to be trying
4 Melissa. She's bad. And Bobby, I ought to cut off
5 his other hand. He ain't got the right uniform.
6 And George Reid, let's impeach him. And while we're
7 at it, let's shoot the county council. Got to blame
8 somebody.

9 Oh, what a tangled web we weave when first we
10 start to deceive.

11 Self-defense. Defense of habitation. Well,
12 you know, if a police officer does something, he
13 shouldn't have done it. If a police officer didn't
14 do something, he should have done it. A police
15 officer's life is not a happy one.

16 Now, let's get all these, you know, like the
17 traveling medicine man from Florida. All these
18 hypotheticals and all these what ifs, and, of
19 course, he's going to give everybody the benefit of
20 the doubt. He's going to give these law enforcement
21 officers the benefit of the doubt, the standards and
22 the procedures man.

23 And what did he tell you? Well, what about
24 this? Well, what about that?

25 Well, let's look at what's not here. First of

1 all, didn't that medicine man -- that traveling
2 medicine man talk about a fox? There's a fox out
3 there. There's an old country and western song, A
4 fox on the run. Who saw a fox? Who got on that
5 stand and said, on November the 15th of 2009,
6 between two o'clock in the morning and four o'clock
7 there was a fox out there?

8 Well, the brother testified, and he's in
9 Florida. The traveling medicine man is in Palm
10 Beach in that big ol' house down there. Bo Willis
11 testified. That's their three witnesses. Who said
12 there was a fox out there?

13 If y'all heard it, disregard what I say and
14 hold it against me. I'm bad, too; I'm the
15 Solicitor. But who said there was a fox out there?
16 I'm half deaf, but I swear I didn't hear it.

17 Oh, but the fox been out there before, the fox
18 on the run. I just didn't hear anybody say there
19 was a fox out there that night.

20 You know, they said at the beginning,
21 Mr. Worley had only shot one other time, in
22 September. Well, that ain't right.

23 Mr. Sheffield right here, what did he say? He
24 started coming out, cussing, yelling, shooting
25 around the lake. They didn't want to confront Joe

1 Worley because he said Joe Worley's eccentric.

2 We'll talk to the reasonable person. We'll talk
3 with Mrs. Worley.

4 Mrs. Worley, your son's been out there at night
5 shooting, yelling, cussing. Please talk with him
6 about that. That's disturbing the peace. We're
7 trying to sleep over here, two, three, four o'clock
8 in the morning.

9 Was the matter resolved? No, it wasn't
10 resolved.

11 We went to the responsible person, Mrs. Worley.
12 It wasn't resolved. And then it kept on about every
13 weekend. Two, three, four o'clock in the morning,
14 cussing, yelling, shooting.

15 You know, you'd think after two months, he'd
16 shot that fox. He's such a good shot, isn't he?
17 Seems like the fox on the run would be dead if the
18 fox was out there. That's for you to decide, but I
19 ain't heard it. I tried to listen. I tried to
20 listen.

21 November the 15th, here we go again: Cussing,
22 yelling, shooting. And I think -- and y'all take
23 this right -- I think, from what I heard
24 Mr. Sheffield say, it started about 2:30, three
25 o'clock in the morning. You take what he heard.

1 Here we go again. Light's on. Twenty minutes
2 later, shooting again, cussing again. I ain't going
3 to wait for the third shot. We have filed a report
4 with the sheriff and said, don't do anything, we
5 just want y'all to know what hell we're living under
6 out there in our neighborhood on the weekends. The
7 rest of the time, everything's nice, but on the
8 weekends, we just want to let you know what's going
9 on.

10 Well, he ain't going to wait for the third
11 shot. And you know what? Alan Sheffield, what a
12 scoundrel he is, because he didn't go over there and
13 talk with Joe Worley. What good would it have done?
14 Already talked with mama. Already begged and
15 pleaded.

16 So they call the sheriff's department. The
17 light's still on. When the officers get out
18 there -- now, how can a man, in 20, 25 minutes, calm
19 down from cussing and yelling and shooting, come in
20 and get undressed and go fast asleep? I don't know
21 because there ain't no testimony to that.

22 **MR. GARRETT:** Objection, Your Honor. I object,
23 Your Honor.

24 **THE COURT:** Just one second.

25 Madame Forelady, will you go to the jury room,

1 please?

2 (The jury retires to the jury room.)

3 **MR. GARRETT:** Your Honor, we move at this time
4 for a mistrial. The State has earlier got close,
5 but this time stepped over the boundary where he's
6 specifically speaking about the fact that Mr. Worley
7 didn't offer any testimony, nor did he present any
8 evidence.

9 **MR. MYERS:** No, sir. Had he not stopped me, I
10 was going to say the brother didn't testify to it,
11 the traveling medicine man didn't testify to it, Bo
12 Willis didn't testify to it. That's the three
13 defense witnesses. He stopped me before I could get
14 it.

15 **MR. GARRETT:** Those -- they weren't in the
16 house. They wouldn't have had that knowledge.

17 **THE COURT:** This is really close. I tell you
18 what I'm going to do, I'm going to take it under
19 advisement and think about it, because I think it's
20 very, very close, and it concerns me. I'm not going
21 to try any curative because there's nothing you can
22 do to cure it. I'm going to take it under
23 advisement. I'm going to let him finish up.

24 I can tell both what I'm going to do: We're
25 not going to -- the jury's not going to get this

1 case tonight anyway. It's just too late. I'm going
2 to do -- research a little bit this evening. I'll
3 give you my decision in the morning.

4 **MR. GARRETT:** Yes, sir.

5 **MR. MYERS:** Thank you, sir.

6 **THE COURT:** Yes, sir.

7 Bring the jury back, please

8 (The jury returns to the courtroom.)

9 **THE COURT:** Mr. Myers.

10 **MR. MYERS:** Thank you.

11 What happened out there that night? What
12 happened out there? A man's creating a disturbance,
13 and the officers are appropriately responding. And
14 they responded out there -- I think the testimony
15 was that Nick went to the door, and I don't know
16 whether Bobby went there with him at that time or
17 not; you'll have to recall.

18 But Nick went to the door and he started
19 ringing the bell. He started knocking. He started
20 yelling, Sheriff's department. He was at the door
21 down here.

22 We know that Bobby ended up over here at the
23 Sheffields talking with them, as he was supposed to
24 do according to the medicine man, but he didn't stay
25 away long enough. But he stayed over there long

1 enough to find out cussing, shooting, talking loud
2 late at night, going on and on and on. Report filed
3 with the sheriff's department.

4 So he heads back over, and that light comes on.
5 Now, somehow they want that light to be on all the
6 time, but I don't know why, because it goes against
7 them. If the light's on all the time, well then
8 certainly Mr. Worley could see it was officers out
9 there. But if that's the case, let's cut it back
10 off.

11 The officers said they go there and knock on
12 the door again. They knock on the compound, but you
13 can't hear anything. Soundproof, airtight. Can't
14 hear anything at all. Sheriff's department.
15 Sheriff's department.

16 But you know something, if somebody's in that
17 house and it's a compound -- and, you know, the
18 brother testified they had a burglar alarm. So
19 what? Nobody can't get in. You got a burglar
20 alarm. And if you wake up and somebody's beating
21 and knocking at your door, there's no 9-1-1 call to
22 the sheriff's department. If somebody's breaking
23 into your house, seems like you'd call the sheriff,
24 but that wasn't done because there wasn't any
25 break-in. It wasn't anything but people yelling,

1 Sheriff's department, ringing the doorbell, and
2 knocking. You believe -- you're the judges of the
3 facts, and you take it as you deem it appropriate,
4 and you make that determination.

5 I know their witness, Bo Willis, the last
6 witness they called saying the next day after
7 everything was over with, he and Junior Gable were
8 out there, and he goes and knocks on the door
9 downstairs, and Mrs. Worley responds from inside.

10 Now, that's the same Mrs. Worley who's older
11 son testified she's stone deaf. Remember that? I
12 asked him. She's stone deaf. She can't hear, but
13 she responds. And Bo don't ring the bell; he knocks
14 on the door. And she comes down and opens the door
15 for him to come back in. That was their witness, Bo
16 Willis. That's up to you to decide on that.

17 But, you know, the officers again, they're
18 wearing the wrong clothes. They ain't got bell,
19 whistles, and Christmas lights on their uniform.
20 Everything they did was wrong. Nothing they did was
21 right. Whatever they did, they shouldn't have done;
22 whatever they didn't do, they should have done.
23 That's for you to decide.

24 But we know one thing: We know that that light
25 comes back on. Knocking, ringing, Sheriff's

1 department. And then the light comes on. And by
2 this time, Bobby's back over there. The door opens.
3 And when the sliding door opens, Bobby steps out a
4 little bit, and a man -- he's upstairs, the door is
5 open, and he's got a gun, and he's easing to the
6 right.

7 Now, one of the officers said somebody yelled
8 out, What do y'all want? I think Bobby said that.
9 Nick said somebody yelled out, Who is it? But, What
10 do y'all want, or, Who is it, there's no doubt, it's
11 uncontradicted, that both of them yelled, Sheriff's
12 department.

13 Now, when they yell, Sheriff's department, and
14 somebody's up here and the officers are down there,
15 ain't no soundproofed open-air porch, is it? I
16 hadn't heard anybody testify to a soundproof
17 open-air porch. The brother didn't say anything
18 about it.

19 Sheriff's department. And you know what?
20 Didn't make any difference what those officers said,
21 because what was the response? I don't give a
22 blank.

23 Now, that shows malice right there. That shows
24 callousness. It doesn't make any difference who
25 they are. I don't give a blank.

1 And they said, Well, you know what, he was over
2 here by this towel. That's not what Bobby said.
3 Bobby said he was inching over this way.

4 See, the towel, folks, or the blanket or
5 whatever that is, it might have been a cat blanket,
6 I don't know, it's over here {indicating}. Bobby
7 steps out back over here by this cross tie.
8 Mr. Worley's up here. The towel ain't got nothing
9 to do with it. Reckon it's a smoke screen? I don't
10 know.

11 And then when Bobby's shot and the light comes
12 on, they said, Well, the reason Mr. Worley shot him
13 -- they said that -- is because Bobby was pointing
14 his gun at him. Well, he had a right to. He's a
15 law enforcement officer.

16 And when you say, Police, sheriff's department,
17 the fellow says, I don't give a blankety-blank and
18 he's got a gun and he's aiming, what's the officer
19 supposed to do? I guess he's supposed to get a
20 uniform with a big red and white bulls-eye so he can
21 see that light up like a Christmas tree. That's
22 what we got. That's what we got.

23 Bobby's shot, and Nick says, Come to me, come
24 to me. Now he's trying to talk Bobby into coming to
25 him because it knocks Bobby down. Now we've got a

1 situation. And Bobby falls over here somewhere, and
2 he's trying to get to Nick so they can get out of
3 there.

4 Well, they said Bobby, for some reason, starts
5 charging the house. Does that make sense? A man
6 whose hand's blown off is then going to charge the
7 house right where he's been shot? Does that appeal
8 to your common sense, folks, or does it appeal to
9 your common sense like they said, he was trying to
10 get away?

11 And then a second shot. Oh, the mysterious
12 second shot. Oh, it's in the ground, on the ground,
13 two inches down, a foot down, ten feet down, halfway
14 to China. Well, what difference does it make? He
15 shot it. Why is he shooting again? That shows
16 malice again.

17 They said, Oh, if he wanted to kill him, he
18 would have shot him. Well, I don't know how good a
19 shot the man is. I don't know whether he shot at
20 his head and missed. I don't know whether he's
21 shooting at the fox again, but he shot a second time
22 at police officers. Oh, the mysterious second shot.

23 Now, let's talk about some more confusion.
24 They want to bring Bo Willis up here, their witness,
25 and they say, Well, Bo -- he -- he puts this diagram

1 up after he talks to people. And on the diagram, Bo
2 measures from the cross tie to the porch downstairs.
3 See right here? This is what they tried to tell you
4 a little while ago. Right here he says, eight feet
5 from where Bobby was shot. Over here to the edge of
6 the porch, eight feet. And they said, Well, that
7 can't be right because Joe Collier said it was 20
8 feet.

9 Well, where does Joe measure it? Joe ain't
10 measuring to the downstairs. He's measuring to the
11 upstairs. He ain't measuring down here. He's
12 measuring up there. Trying to confuse you, you
13 reckon, folks? Trying to put a little smoke there?
14 I don't know. That's for you to decide. That's for
15 your determination.

16 But we know one thing: What kind of things are
17 these? Well, daddy made them. Well, you know, if
18 daddy made them, you ain't got to shoot them three
19 years later. If daddy made them, he couldn't have
20 put them in the gun. He's been dead for three
21 years.

22 And for whatever reason daddy made them, the
23 brother said, why in the world would you use
24 something like this? Y'all go in there and hold
25 these things. Something like that went through

1 Bobby's hand. That's some bad stuff here, folks.
2 That'll go through most anything. That's malice.
3 That's evil intent.

4 And we know this: You got four here that they
5 took out the gun. You've got four over here that
6 were fired. That's eight shells. The gun holds
7 five. Three more shells had to be reloaded that
8 night. And if it held five and he shot Bobby and
9 that mysterious second shot, he had to reload at
10 least one more. That's malice, folks. That's
11 malice. That's a mind hellbent on evil, intending
12 to do harm.

13 Then he comes out of the house and yells:
14 Where are you at, you SOBs?

15 Now, I recall that Nick said that the defendant
16 came out and went around this way {indicating}. If
17 you think he said the defendant came out that way,
18 you take that for what you heard; don't take it for
19 what I say, because I can't testify. But if the
20 defendant came out and around this way, what was
21 parked right there? A sheriff's department car.
22 Because the mama's car was even with the porch right
23 here, and Bobby parked right behind it.

24 Now, did somebody say, Wait a minute, let me
25 help you. I didn't know you were -- I didn't know

1 you were police, and I shot one -- let me take you
2 somewhere. Let me help you out. Let me do
3 something. Let me call 9-1-1. Let me call the
4 sheriff. What can I do? I've made a mistake. But
5 no: Where are you at, you SOB?

6 Is that malice? Is that an evil heart?

7 And why did he come out anyhow? If he's afraid
8 of somebody and his poor ol' mama is upstairs in a
9 compound with a burglar alarm, what's he doing
10 outside leaving her inside?

11 I don't know whether he had the keys on him.
12 Did he leave the door open? Does that make sense to
13 you?

14 And then they get Bobby away. They get him
15 some help, and they call in reinforcements. And
16 Sheriff Reid, he comes up there. Sheriff Reid comes
17 up there, who violated every standard and procedure
18 known to modern American law enforcement. I don't
19 know how y'all put up with him for 27 years.
20 Violates everything.

21 Did he send his deputies down there? No. Did
22 he send in something else? No. He's going to find
23 out who shot his deputy. Give him a hard time? I'd
24 give him a medal.

25 And some people are coming up in their yard.

1 Now, what is Ms. Worley doing out there? And why
2 did she leave the compound and why did they come out
3 there? And the defendant ain't got no gun. They
4 got flashlights. And they ain't calling 9-1-1.
5 They ain't called nobody in this world. No one.
6 Why is that? Why is that?

7 Don't shine that flashlight in my eyes. Get
8 that flashlight out of my eyes. I guess he violated
9 some procedure, too.

10 And the first thing anybody says is the
11 defendant says, I put your deputy's gun in the
12 patrol car. I put your deputy's gun in his patrol
13 car.

14 The sheriff says, There's been shooting down
15 here. Somebody shot my deputy. Who's shooting?

16 The defendant said, I was. I was. I'm the
17 shooter.

18 You shot my deputy. Why you shot my deputy?

19 The deputy had no business ringing my damn
20 doorbell.

21 Did he say, I didn't know who he was? Did he
22 say, I couldn't tell because he didn't have a
23 Christmas tree uniform on? I couldn't tell because
24 he didn't have a badge plastered to his forehead? I
25 couldn't tell because he didn't have on the blue

1 lights and he didn't have on the sirens and the
2 bullhorn and yelling out and he didn't call me?

3 The deputy had no business ringing my damn
4 doorbell.

5 That's malice. That's bad, folks. That's
6 evil. That's evil. No apologies. No saying this
7 is what happened. No calling anybody. No seeking
8 any help. No doing anything.

9 But you know that traveling medicine man, said
10 he felt sorry for the defendant. That surprised me
11 when he said that. He wants to give everybody the
12 benefit of the doubt. He wants to give the officers
13 the benefit of the doubt. He wants to give the
14 sheriff the benefit of the doubt. But he's sorry
15 for Mr. Worley.

16 He said he testified over 1200 times, and he
17 gets \$6,000 a case, plus in court and expenses.
18 That's over seven million dollars for that traveling
19 medicine man. Give him a buck and he'll travel.

20 Do you believe him? If you do, that's up to
21 you.

22 You know he's so good on his traveling show, he
23 even brings the questions for them to ask. Remember
24 he said, Yeah, I prepared the questions. The
25 traveling medicine man.

1 But he's got those standards and procedures.

2 Now, they're going to say it's self-defense,
3 and self-defense, folks, is a good defense, and
4 we've got to disprove it. And the Judge is going to
5 tell you about self-defense. He's going to read you
6 what the law is on self-defense, and he's going to
7 tell you, number one, that the defendant must be
8 without fault in bringing on the difficulty.

9 If it hadn't been for Joe Worley, none of this
10 would have happened. Is he blameless? Did he have
11 anything to do or fault in bringing on this
12 difficulty? He caused it. The deputies wouldn't be
13 there if it weren't for him.

14 But if you think that he's blameless, he's pure
15 as Ivory soap, and he didn't bring on this
16 difficulty, find for him.

17 Now, if you find that he was at fault in
18 bringing out on the difficulty, self-defense goes
19 out the window. Ain't nothing for self-defense.
20 It's gone.

21 And number two is a long one, it's a very long
22 one: The defendant must have actually believed he
23 was in imminent danger of either losing his life or
24 suffering serious bodily harm. A defendant must
25 actually have believed he was in imminent danger of

1 losing his life or receiving serious bodily harm or
2 that he actually was in imminent danger.

3 How was he in imminent danger of being killed
4 or hurt? He's in a compound. He's got a burglar
5 alarm. Nobody can get in. What kind of danger is
6 he in?

7 You fold up the compound, the burglar alarm's
8 on, and you pick up the phone. Come help me.

9 Did that happen? No, ma'am. No, sir.

10 So how was he in danger from being hurt? He
11 didn't have to go out on that porch. He's in his
12 home. He's in his habitation. What kind of danger
13 is he in?

14 And you know what? Ain't nobody breaking in.
15 The officers are merely knocking on the door and
16 ringing the bell. Knocking on the door and ringing
17 the bell. Ain't got an ax chopping on it. They
18 ain't got nothing trying to drive into it and break
19 in.

20 But if you think the defendant actually
21 believed that he was in imminent danger of being
22 killed or suffering serious bodily harm, y'all find
23 for him.

24 And, number three, folks, it's a long one here.
25 I'm not going to even write it all out. But it goes

1 with number two, and it says this: If the defense
2 is based upon his belief of imminent danger, a
3 reasonably prudent man of ordinary firmness and
4 courage would have had the same belief. Not him,
5 but a man with common sense.

6 If this defense is based upon his belief that
7 he's in imminent danger, it must be such that a
8 reasonably prudent man of ordinary firmness and
9 courage would have had the same belief. A
10 reasonable person would have believed that; if so,
11 find for him.

12 And if self-defense -- and all we've got to do
13 is prove one of these ain't right. If you think he
14 wasn't at fault in bringing on this difficulty, then
15 find for him, but if he was at fault, it ain't
16 self-defense.

17 If you think that he actually believed he was
18 in imminent danger or was in danger, find for him.
19 Don't -- find for self-defense. Or if you think a
20 reasonably prudent man of ordinary firmness and
21 courage would have entertained the same oath, find
22 for him. But if we prove one of those is wrong, it
23 ain't self-defense.

24 And he doesn't have to retreat, by the way.
25 He's in his own home, so he doesn't have to retreat.

1 But he doesn't have to come outside either and bring
2 on the difficulty.

3 And then there's something called defense of
4 habitation, and that means where you're defending
5 your home of a trespasser. Remember that word:
6 Trespasser, trespasser.

7 If a trespasser's coming in and trying to get
8 in somebody's house, then a person can defend their
9 home, their habitation, and they can use force and
10 kill people to get them out. That's reasonable law.

11 But who is the trespasser here? Nick? Is he a
12 trespasser? Bobby? Is he a trespasser? Were they
13 trying to break into his home? That's for you to
14 decide. That's your decision.

15 It doesn't do any good for me to talk anymore.
16 This is a common sense case. Use your good ol'
17 common sense and just do what's right.

18 Who brought on the difficulty? Who wasn't in
19 any danger? Who was in a position that a reasonable
20 man, ordinary prudence, would have believed he
21 wasn't in any danger? And it wasn't self-defense.
22 And he wasn't defending his house from a trespasser.
23 He was out to shoot somebody, and he did.

24 Bobby's lucky to be alive. Even his career is
25 ruined. And you know what, Bobby was out there

1 around some trees, so that gave Mr. Worley the right
2 to shoot him, because they put in these photographs.
3 They got a little flimsy little dead branch up here.
4 And I don't know what the heck that is. I can't see
5 a cross tie or nothing in there. I guess it's a
6 picture of the woods. But so what? If a tree was
7 around there, is that justification for trying to
8 kill a man?

9 I know one thing, State's Exhibit Number 17
10 with that cross tie, and here's the porch right
11 here, that's where Bo measured from, there to the
12 porch, not up to the top. Where is that tree? This
13 was taken that same day. Where is that tree?

14 See that tree in there? I don't see the tree.
15 If you see it in there, then give it whatever weight
16 you deem appropriate.

17 You folks are the judges of the facts. That's
18 intent to kill, folks. Can't even tie his
19 shoelaces. Can't even tie a fishing hook. Can't
20 hold a gun. But they say he can learn to shoot with
21 his left hand. That's like saying, Well, he should
22 lose some weight, let's shoot off another finger.
23 Does that make sense to you? Does that make sense
24 to you?

25 They were giving Andy Griffith a rough time,

1 letting people check themselves in the jail, not
2 doing the right things, not following the standards
3 and procedures. But in a small town, medium-size
4 town, any size town, it's a whole lot better not to
5 follow the book, but to follow your heart.

6 **THE COURT:** All right. Madame Forelady, ladies
7 and gentlemen of the jury, it's 5:30. I'm going to
8 call it a day. I'm going to use my privilege to do
9 that. I don't see us doing anything constructive
10 after -- my charge is going to be 40 minutes, and
11 then I want you to have a fresh mind when I charge
12 you on the law and not feel like you're in a rush to
13 go through these facts and evidence, because this is
14 an important case to both the State and to this
15 defendant.

16 So I'm going to excuse you for the evening with
17 my instruction that you do not speak with anybody,
18 do not read, hear or see anything about this case.
19 Probably -- I'm going to delay getting you back till
20 10:00 tomorrow morning. And, again, I'm going to
21 ask you, before we get started, if anybody's read,
22 heard or seen anything about this case. But thank
23 you for being here and good night.

24 (The jury was excused for the day.)

25 **THE COURT:** All right. Let me tell the

1 parties, I'm going to look for a way not to grant a
2 mistrial. I'm going to be candid with you, that's
3 my job, because it's a drastic remedy.

4 With that being said, that is very, very close
5 to the mark. I'm going to get -- I asked my court
6 reporter to get me the language. I'm going to take
7 it home; I'm going to research it. I'd ask all
8 sides to give me indications that supports their
9 respective sides of the case, and then I'll make my
10 call in the morning. Okay?

11 **MS. BALLARD:** Thank you, Your Honor.

12 **MR. MYERS:** And, once again, I was cut off
13 before I got to finish.

14 **THE COURT:** I got you. And I got that point,
15 too.

16 Anything else from the State before we recess
17 for the day?

18 **MR. MYERS:** Nothing from the State, Your Honor.

19 **MR. GARRETT:** Nothing from the defense.

20 **THE COURT:** All right, guys. Thank you.

21 Let me just say this one thing: Regardless, to
22 all the attorneys, and I say this for your
23 respective clients not for you because you know it,
24 I try cases all over South Carolina, and it is a
25 pleasure, regardless of how hard you fight it, when

1 you have somebody or lawyers who are professional,
2 who are prepared and ready to go forward, both sides
3 in this case were in this matter, and so regardless
4 of whether I grant a mistrial or regardless what the
5 jury does, I want to thank everyone concerned for
6 you being professional and prepared.

7 **MR. GARRETT:** Thank you, Your Honor.

8 **MR. MYERS:** Thank you.

9 **THE COURT:** All right, guys. See you tomorrow
10 morning.

11 (The proceedings were concluded for December
12 19, 2013.)

13 (The following proceedings were held on
14 December 20, 2013.)

15 **THE COURT:** All right. I'll be glad to hear
16 from the defense on the mistrial motion.

17 **MS. BALLARD:** Your Honor, as you know, last
18 night when we recessed, we had made a motion for a
19 mistrial based on the Solicitor's comment on the
20 defendant's silence in failing to take the stand.
21 And we researched the issue last night in some
22 detail. And I want to refer the Court to the State
23 versus Williams case out of the Court of Appeals in
24 2012. The citation is 731 S.E.2d 338. There are a
25 lot of other cases as well. But, essentially, what

1 those cases all say is that, in some cases, a
2 curative instruction might solve the problem.

3 I think we all agreed yesterday a curative
4 instruction would not solve the problem.

5 **THE COURT:** Well, I thought about that. I
6 don't mean to interrupt you, but I thought better of
7 it, and if you would ask me to do it, I'd be glad to
8 do it.

9 **MS. BALLARD:** I think the cat's out of the bag
10 at this point. I think a curative instruction would
11 have had to have been made right then and there in
12 order to solve the problem. And I think our
13 reaction was the same: Solving it -- giving the
14 curative instruction at that point would merely
15 highlight it and make it worse.

16 And so I think -- we know that we have to start
17 at that point, you know, that cat is gone. We can't
18 put it back.

19 In deciding whether or not the Solicitor's
20 error was prejudicial, we've got to look at a couple
21 of different things. Number one, the Doyle versus
22 Ohio case, United States Supreme Court in 1976, made
23 clear what this law was. However, our South
24 Carolina Supreme Court in State versus Myers in
25 1990, specifically warns Solicitors that they cannot

1 comment on silence of the defendant in taking -- in
2 not taking the stand.

3 The Williams case says that in order to employ
4 harmless error analysis, you have to find that the
5 error was harmless beyond a reasonable doubt. But
6 the Williams case specifically found that it can't
7 be harmless -- and I'm quoting from the Williams
8 case -- If the Solicitor's comment directly tied the
9 defendant's silence to his claim of self-defense,
10 the error could not be harmless.

11 And here's what happened: In the earlier part
12 of his closing statement, the Solicitor said
13 something to the effect of, Who said there was a
14 fox, or something like that. He even wrote it on
15 his board up there. That, in itself, was a comment
16 on his failure to take the stand, but we let that
17 go. We didn't say anything about it.

18 A few minutes later, we have the part that
19 Stacy e-mailed us last night where he, again,
20 directly commented on his failure to take the stand
21 when he said, When the officers got out there, how
22 can a man, in 25 minutes, calm down, come in, and
23 get undressed and go fast asleep; I don't know
24 because there ain't no testimony to that.

25 His supposed explanation for that is he was

1 going to ask -- he was going to refer to Bo Willis
2 or Robert Worley, neither of whom were there,
3 neither of whom could have answered that question
4 the way he posed it.

5 **THE COURT:** Well, may I ask you a question?

6 **MS. BALLARD:** Yes, sir.

7 **THE COURT:** What would be the appropriateness
8 of a Solicitor making comments on the issues that
9 have been interjected into the proceedings by the
10 defense, even if the defendant does not take the
11 stand?

12 **MS. BALLARD:** That's exactly what the Williams
13 case addresses, Your Honor. In the self-defense
14 context, what we have introduced, that is our
15 defense, the Solicitor commented on -- he's trying
16 to say -- he's trying to argue that their case is
17 that Mr. Worley laid in wait, you know, waiting for
18 an opportunity to shoot this individual because he
19 said, How could he calm down in 25 minutes?

20 He's suggesting malice. He's suggesting that
21 the evidence shows malice because Joe did not take
22 the stand. He's suggesting it was our burden to
23 show that there was no malice. And, in fact, we
24 don't have a burden to show that. And so not only
25 is it a comment on his right to remain silent, it's

1 a comment, which is almost burden shifting, on our
2 defense, directly on our defense. They're trying to
3 now argue that he laid in wait. He couldn't calm
4 down and go to sleep. There ain't no testimony to
5 that.

6 Well, Mr. Worley's the only one that could have
7 testified to that. It is a direct comment on
8 Mr. Worley's failure to take the stand, and it is a
9 direct undermining of our claim of self-defense,
10 which they have to disprove, and the way they're
11 attempting to disprove it is by pointing out his
12 failure to testify.

13 I don't think there's any question but that
14 we're well past the possibility of a curative
15 instruction being appropriate at this point. I
16 think the only possible remedy at this point is a
17 mistrial.

18 **THE COURT:** All right. Let me say this: I got
19 from Stacy last night the same language that you
20 have, and it is: How can a man, in 25 minutes, calm
21 down from cussing, yelling, and shooting, come in
22 and get undressed and go fast asleep? I don't know
23 because there ain't no testimony to that.

24 When I heard it, I think everybody in here
25 jumped.

1 **MS. BALLARD:** We did.

2 **THE COURT:** And I tell you, if you were to look
3 at that language in isolation, I would agree with
4 you 100 percent that a mistrial would be the
5 appropriate remedy.

6 I think, on the other hand, going through my
7 notes -- and I have not looked through what my court
8 reporter's or my clerk has to verify that my notes
9 are not incorrect -- the defense, in opening
10 statement in this case, made the comment -- and let
11 me -- and I highlighted it -- when he's talking
12 about -- he mentioned that the Sheffields have
13 complained to the defendant's mother, and she did
14 not relate that, the complaints to Mr. Worley, and
15 he said that the defendant goes back to bed and the
16 mother was already asleep.

17 Also, another point in opening statement, he
18 says that, you know, the knocking at the door and
19 the doorbell woke up the defendant. So it seems to
20 me, and I may be wrong, but it seems to me, from a
21 totality of the evidence or issues that have been
22 foisted in this case by the defense, that -- not
23 taking that comment out of context or in isolation,
24 but looking at it and all the evidence presented in
25 this trial, along with the fact that, you know, we

1 had the soundproof nature of the house testified by
2 Mr. Worley's brother, the fact that it's multiple
3 times stated you could not hear knocking at the door
4 when you're upstairs, all this all added together,
5 it seemed to me to be a common sense extrapolation
6 of the issues put into evidence by the defendant,
7 not necessarily a comment on his failure to testify
8 or trying to shift the burden on him to disprove it.
9 I may be wrong. I know it is a very close call.
10 Okay?

11 **MS. BALLARD:** Your Honor, if I could respond
12 just briefly to that.

13 **THE COURT:** Yes, ma'am.

14 **MS. BALLARD:** I agree with you that you can't
15 look at it just in isolation. You have to look at
16 the whole record. And I think we have to look at
17 the fact that the Solicitor, earlier in his closing
18 statement, made reference to the fact, Who said
19 there was a fox, which, again, could only have been
20 Mr. Worley.

21 **THE COURT:** Right, but the fox was interjected
22 -- same basis there, you know, nobody in the State
23 testified to anything about any fox. Mr. Worley
24 testified that Sweet Pea had been injured by a fox,
25 and I think, in opening statement, that was also

1 brought up as well.

2 **MS. BALLARD:** The Sheffields testified that
3 they were aware of the fox issue.

4 **THE COURT:** Right.

5 **MS. BALLARD:** Our expert witness testified
6 that, based on his review of the file; he didn't say
7 anything about his review of any statement of
8 Mr. Worley's. There was testimony in the record
9 about the fox, but Mr. Myers said, Who said there
10 was a fox?

11 And, obviously, the only person who could have
12 said that night there was a fox was Joe Worley.
13 It's a direct comment on his failure to testify, as
14 is the second statement, the direct statement on
15 his, Who could say he was asleep? Nobody but him
16 could say that.

17 **THE COURT:** And, listen, I'm with you. I agree
18 with you, and I know you disagree with me. You
19 know, my goal, obviously, is to avoid a mistrial, if
20 possible, and also not trample on somebody's
21 constitutional rights. I mean, certainly, that's
22 more important than any retrial of any matter.

23 But it just seems to me, in looking at it and
24 thinking about it -- and, quite frankly, to
25 everybody concerned, I called a couple of my

1 brethren on the way home last night and ran the
2 factual scenario by them, and we all kind of came to
3 the same conclusion, although that's here nor there,
4 that while it's a very close call, that it likely is
5 a fair comment on issues that were put into the
6 trial by the defense.

7 **MS. BALLARD:** Your Honor, I think in order to
8 not grant my motion for a mistrial, Your Honor has
9 to find beyond a reasonable doubt that the
10 Solicitor's comments could not be harmless as a
11 matter of law. Beyond a reasonable doubt you have
12 to find that. And if you can't find that, then a
13 mistrial must be granted. So I'm requesting Your
14 Honor to --

15 **THE COURT:** Give me that case. I want to look
16 at it, please.

17 **MS. BALLARD:** Yes, sir. I believe that's in
18 Williams.

19 **THE COURT:** If you'll give us a cite.

20 **MS. BALLARD:** Yes, sir. It is 731 S.E.2d 338.

21 **THE COURT:** Can you write that down? 731 338?

22 **MS. BALLARD:** Yes, sir.

23 **THE COURT:** And that's southeastern?

24 **MS. BALLARD:** Yes, sir. 2012.

25 And I would also point out that opening

1 statements are not evidence -- evidence in the
2 record came --

3 **THE COURT:** I agree, but at the same time -- I
4 agree that it's not evidence, but the defense has
5 done a masterful job in this case in interjecting
6 issues into this matter without having any testimony
7 to really support it. And although it is not
8 evidence in the classical sense, those issues have
9 been foisted upon this jury, and they've heard them.
10 And the case -- if not by direct, by innuendos, as
11 to -- whether or not Mr. Worley is up there
12 sleeping, whether or not he could have been roused
13 from sleep from the knocking on the door, all that.
14 And so I disagree with you on that aspect of it.

15 I want to look at this case. And if I'm wrong,
16 I'll be wrong and I'll correct myself, because my
17 initial thought was I am not going to grant a
18 mistrial. I'm going to look at this case and let me
19 say -- look at it and then come back again. Okay?

20 **MS. BALLARD:** Well, let me just tell you --

21 **THE COURT:** Please, I want you to have a good
22 record.

23 **MS. BALLARD:** First of all, I don't think it's
24 accurate to say that your obligation is to do
25 anything you can to prevent a mistrial. I think

1 your obligation is to see that justice is done for
2 Mr. Worley.

3 **THE COURT:** Right. That's -- you're correct.
4 And let me just say this: I guess that was a poor
5 way of wording it is that, you know, the old
6 terminology we used to use, manifest necessity, I
7 know that's kind of -- we've gotten away from, but
8 the idea of being, you know, it's a drastic remedy,
9 and we try not to do that. And I think everybody
10 will agree. First and foremost, to see that justice
11 is done, you're obviously right, and that
12 constitutional rights are protected and not trampled
13 upon.

14 **MS. BALLARD:** And the only other thing is I
15 would ask once again that Your Honor make a finding
16 that it's harmless beyond a reasonable doubt.
17 That's the only basis upon which you cannot grant a
18 mistrial under these circumstances, which enables me
19 to argue on appeal that that finding was made and it
20 was error.

21 **THE COURT:** Sure. I want you to have a good
22 record.

23 Let me read that case and whatever findings I
24 need to make or if I'll make them. Let me look at
25 it and then I'll come back.

1 **MS. BALLARD:** Thank you very much, Your Honor.
2 I appreciate it.

3 **THE COURT:** Mr. Myers, anything in response to
4 that?

5 **MR. MYERS:** Certainly. As I said last night, I
6 was cut off. I did not finish what I was going to
7 say. And you said you wanted to hear arguments this
8 morning.

9 Let's talk about the law a little bit. In
10 State versus -- well, Michael A. Johnson versus the
11 State of South Carolina, a PCR case, Opinion 24561,
12 decided January 27, 1997. In that case, the
13 prosecutor said the defendant didn't present any
14 evidence and the defendant didn't testify, and the
15 judge will tell you, you can't hold that against
16 him.

17 The PCR judge ruled that was improper. The
18 Court of Appeals and the Supreme Court reversed him
19 and said that was not improper. And they said --

20 **THE COURT:** What case is that?

21 **MR. MYERS:** It's Michael --

22 **MS. BALLARD:** The citation is 480 S.E.2d 733,
23 Your Honor.

24 **MR. MYERS:** Here the PCR court's conclusion
25 that the jury could have drawn an adverse inference

1 from the Solicitor's comment is not supported by the
2 evidence.

3 In context, the comment was simply a statement
4 of the evidence which was before the jury rather
5 than a comment on Johnson's failure to testify. As
6 such, it is distinguishable from the typical comment
7 in which the clear implication is that the defendant
8 has failed to explain the circumstances of the
9 crime.

10 And that's Michael A. Johnson. And in that
11 case, Your Honor, no evidence was put up by the
12 defense.

13 Then we go, Your Honor, to this case. It's the
14 State versus David Lee Meggett, M-e-g-g-e-t-t,
15 Opinion 4994, decided June 27th of 2012. The
16 defendant didn't put up any evidence. And the
17 Solicitor made a statement, There was no evidence
18 the victim was a prostitute as the defense claimed.

19 It says here, The state -- the victim was a
20 prostitute -- no evidence the victim was a
21 prostitute was a comment on the evidence or lack
22 thereof presented during the trial. The Solicitor's
23 comment did not improperly shift the burden of proof
24 or suggest that Meggett's guilt could be inferred
25 from his failure to testify.

1 Here again, no evidence put up by the defense.

2 The comment was made in reply to allegations
3 defense counsel made in opening and closing
4 arguments that Meggett and the victim were involved
5 in a sex-for-money arrangement. The Solicitor did
6 not state that Meggett failed to put up any
7 evidence.

8 Furthermore, the Solicitor did not suggest to
9 the jury that an adverse inference should be drawn
10 against Meggett based on his failure to testify.
11 The Solicitor only commented on the lack of evidence
12 presented. The comment -- the Solicitor's remark
13 was not improper as it was made to urge the jury to
14 avoid drawing an inference not supported by the
15 record.

16 Now, this clearly says, Even when the defense
17 does not put up any evidence, that the Solicitor can
18 respond to defense counsel's opening and closing
19 comments. That's clear. That's the law, the basic
20 law.

21 Now, State versus Posey, that's 238 S.E.2d 176,
22 a 1977 case, they call it the Posey Doctrine or the
23 Posey Law. It is never permissible for the
24 prosecutor to suggest to the jury that it draw an
25 adverse inference when the defendant fails to

1 present any evidence at trial or testify since the
2 defendant may let the case go to the jury on the
3 basis that the prosecution did not meet its burden
4 of proof.

5 However, where the defendant presents evidence
6 at trial and there are witnesses seemingly
7 accessible to the accused or under his control who
8 are or should be cognizant of material and relevant
9 facts and competent testimony to testify and whose
10 testimony would presumably aid him or substantiate
11 his story if it were true, it is not improper for
12 the prosecuting attorney to comment upon the
13 defendant's failure to testify.

14 **THE COURT:** Well, let me ask you this: What if
15 those material facts could only, only come from the
16 defendant in the matter, such as this case?

17 **MR. MYERS:** That is not this case, and I'm
18 going to get to that.

19 **THE COURT:** Okay.

20 **MR. MYERS:** I'm going to get to that.

21 It says here, the Posey case, the Posey
22 Doctrine, does not apply when the defense presents
23 evidence. That is an exception.

24 **THE COURT:** So what's the distinction there?
25 And you were saying like --

1 **MR. MYERS:** The distinction is this: If they
2 don't offer any witnesses, it's the strict test. If
3 they offer witnesses, that doctrine doesn't reply.
4 It's relaxed.

5 Now, in the opening statement, Mr. Garrett
6 said, The defendant shot twice. He went to bed, and
7 the defendant and his mother were asleep, thought a
8 burglar was coming in. In his closing statement, he
9 said, The defendant went to bed, and he and his
10 mother were awakened by a burglar.

11 Their mother was on the witness list. I didn't
12 get to say that. You look at their witness list.
13 Mrs. Worley was a potential defense witness.

14 Now, not only that, I didn't ask them to take
15 an adverse inference. And I was going to use
16 State's Exhibit Number 28, Nick Moore's incident
17 report. There's nothing in here about that. I was
18 going to say Bo said nothing about that. The
19 brother said nothing about that.

20 But the man from Florida, Hickman {sic}, he
21 did. He testified they were awakened in the middle
22 of the night by a burglar, and Mr. Worley went out
23 and shot him. And he said, I would have shot him.
24 The man from Florida. You remember, I jumped on him
25 earlier. I jumped on him about the fox. How could

1 he know about that? How could he know that he was
2 asleep? I didn't get to say all that. I was
3 prevented from that. It wasn't referring to him.
4 The mother was there. The mother could have
5 testified. She was on the defense list.

6 To say I was talking about him is totally
7 wrong. I was going to go after the expert from
8 Florida, and I was going to tell about the mother.

9 **THE COURT:** Anything further?

10 **MS. BALLARD:** Briefly, Your Honor.

11 Mrs. Worley could not testify as to what awoke
12 Mr. Worley. If she knew anything, she knew it
13 because Mr. Worley would have told her that, so it's
14 a direct comment. It could only have come from
15 Mr. Worley.

16 The Posey Doctrine, we respectfully -- does not
17 allow the Solicitor to comment on the defendant's
18 side simply because we put up other witnesses,
19 simply because we chose to put up a defense. We
20 still chose to invoke our right to remain silent.

21 And the State versus Myers case, 1990,
22 certainly overruled any inference from the Posey
23 case that suggested that it was permissible for a
24 Solicitor to comment on the defendant's silence.

25 The Meggett case, I don't have it in front of

1 me, but my recollection from the Meggett case is
2 that the argument had to do with witnesses who did
3 testify, but none of them specifically testified
4 that the woman was a prostitute, and that was not --
5 that was not a comment on the defendant's right to
6 remain silent. That was a comment on whether
7 something was or was not in evidence. So I don't
8 think that case is applicable at all.

9 And, again, I think that the argument that
10 Mr. Myers suggests was what he was about to say is
11 that nobody who did testify could say he was asleep.
12 There's nobody else but Mr. Worley who could have
13 said whether he was asleep or not, and it is a
14 direct comment on his failure to take the stand to
15 say that he personally was asleep. Thank you, Your
16 Honor.

17 **MR. MYERS:** When the defense presents
18 evidence --

19 **THE COURT:** Sir?

20 **MR. MYERS:** When the defense presents evidence,
21 I can comment -- I can comment on what they say in
22 opening and closing, and I can comment on their
23 failure to call a witness. There was another person
24 there. Mrs. Worley was there. She came out and met
25 the sheriff with him.

1 **THE COURT:** I got you.

2 Let me say this: It seems to me that the
3 better part of the valor at this stage would be for
4 me to go ahead charge the jury, take this under
5 consideration while the jury is deliberating and let
6 me read these cases further. I know that sounds
7 kind of backwards, but I hate to sit a jury back
8 there waiting while our research is going to take
9 awhile. So --

10 **MS. BALLARD:** One moment, Your Honor.

11 (Pause.)

12 **MS. BALLARD:** Well, obviously, Your Honor, we
13 have to have your ruling before the jury returns or
14 indicates they're ready to return.

15 **THE COURT:** Well, I will assure you if they say
16 they have a verdict and I have not ruled, I will
17 give you a ruling on the record before we do. Okay?

18 **MS. BALLARD:** Thank you, Your Honor.

19 **THE COURT:** Okay. Anything else other than
20 that at this stage?

21 **MR. MYERS:** Nothing from the State, Your Honor.

22 **THE COURT:** Thank you, ladies and gentlemen.
23 Would you bring the jury in, please?

24 (The jury enters the courtroom at 10:21
25 a.m.)

1 **THE COURT:** All right. Good morning, ladies
2 and gentlemen. I hope you had a nice evening. As I
3 told you I would do, let me ask if anyone, during
4 the evening, has spoken or have been spoken to about
5 this case or whether you've read, heard, or have
6 seen anything about this case during the break; if
7 so, raise your hand.

8 Let the record reflect that no one responded.

9 CHARGE OF THE COURT

10 **THE COURT:** All right. Ladies and gentlemen,
11 it's now the part of the case or the fourth phase of
12 the case where I charge you on the law. I will do
13 my best to minimize the amount of reading I do to
14 you, because nobody likes to have anybody read to
15 them, but I apologize to you in advance that because
16 of the serious nature of this case and the law
17 involved, some of it will be. So I apologize to you
18 in advance.

19 Madame Forelady, if, during the course of this
20 charge, any of your jurors would like to take a
21 break -- I anticipate it will be around 40 minutes
22 -- I'll be glad to do so. Okay?

23 With that being said, ladies and gentlemen, now
24 that you have heard all the evidence, you've heard
25 the arguments of the attorneys, it is my job to

1 instruct you on the law. My instructions will be in
2 three parts. The first part of my instructions will
3 be the general rules that define and control your
4 duties as jurors. The second will be the
5 substantive law that must apply to this case, in
6 other words, what the State must prove in order to
7 make its case. And the third aspect will be some
8 considerations about your deliberations.

9 Excuse me, I have a little bit of a head cold
10 I'm coming down with. If you don't understand
11 anything I say, raise your hand.

12 Now, ladies and gentlemen, as I told you at the
13 beginning of this case, it is your duty to find the
14 facts from the evidence that has been presented here
15 in this courtroom. To those facts, you must and you
16 shall apply the law as I give it to you now, and you
17 must follow it. You must not be concerned with what
18 you would like the law to be, but what it is.

19 Also, you may not and shall not be influenced
20 by any personal likes or dislikes or opinions,
21 prejudice, or undue sympathy that you may have for
22 one side or the other in this case.

23 What that simply means is that you are to
24 determine -- you can make your findings of fact
25 based on the testimony and evidence presented here

1 in this courtroom and according to the law as I give
2 it to you now. And if you will recall at the
3 beginning of this case, you gave an oath where you
4 agreed to do just that.

5 Now, in following these instructions this
6 morning, you must follow all of them. You can't
7 pick out or single out certain aspects of my charge
8 that you like and apply those and disregard other
9 aspects of my charge you may not like. They are all
10 equally important.

11 And, again, I'll remind you that if I have said
12 or I have done anything throughout the course of
13 this trial that seems to indicate how you are to
14 find the facts, i.e., which verdict you would reach,
15 I'm going to ask you and I'm going to instruct you
16 to disregard that.

17 Again, I have no feeling one way or the other,
18 and our Constitution of South Carolina does not
19 allow any trial judge to make a comment on the facts
20 or to have an opinion on the facts. That is a
21 matter that is entirely up to you, the jury, to
22 decide, and you alone are the judges of the facts.
23 And you determine what those facts are by evaluating
24 and weighing the evidence that you heard during this
25 trial.

1 Now, there's no way for me to give you a set of
2 scales where you can weigh the evidence in the
3 literal sense. This is entirely a mental process.
4 And you evaluate and weigh the evidence by using
5 your good common sense and your sound judgment that
6 you brought here with you when you became jurors.

7 Now, in this case, there's -- this is what the
8 evidence is, and I'll give you a little bit more
9 about it: The sworn testimony by witnesses who came
10 up here on the witness stand, whether it be on
11 direct examination or cross-examination. Also, any
12 exhibits that have been admitted into evidence is
13 evidence. I remind you that the comments and the
14 questions of attorneys is not evidence.

15 Now, Counsel, is there any stipulation of fact
16 in this case? I don't believe there is, is there?

17 **MR. MYERS:** No, sir.

18 **MR. GARRETT:** No, Your Honor.

19 **THE COURT:** So, ladies and gentlemen, that is
20 the only evidence. The testimony, whether it's
21 cross or direct, and the exhibits that you will have
22 back there with you in your jury room is the
23 evidence. That's it.

24 Now, let me go over with you certain things
25 that are not evidence. And, again, the arguments of

1 these attorneys in their opening and their closing
2 statements to you is helpful, but it's not evidence.
3 They have not been sworn. They have not been
4 subjected to cross-examination by one side or the
5 other.

6 So if the facts as you remember them to be
7 differ from what you're told by either or both these
8 sides during this trial, in opening or closing, then
9 your memory will prevail over what you're told.

10 And let me give you a side note to that.
11 Remember that just because something may appear in
12 somebody's notes doesn't mean that it trumps
13 somebody's memory. Okay?

14 Now, questions and objections by lawyers is not
15 evidence either. Again, attorneys, have an ethical
16 duty to object any time that there's something that
17 goes on in a courtroom that they feel is improper.
18 And as you know, in this case, it was no different.
19 I told you that you may feel like cattle sometimes,
20 being herded in and out of the courtroom, and, in
21 fact, sometimes you kind of appeared to be that way.

22 Madam Forelady, if, during your deliberations,
23 somebody raises the fact that there was an objection
24 and my ruling on that, the extent I have let you see
25 it, you are to stop that. And if the juror refuses

1 to stop going into that area, then you are to let us
2 know by way of written note. Okay?

3 Now, also, ladies and gentlemen, anything that
4 you may have seen or heard when court is not in
5 session is not evidence. The bottom line, ladies
6 and gentlemen, is this: The only evidence on which
7 you are to decide this case is what you heard from
8 this witness stand and by the exhibits which have
9 been admitted.

10 Now, in South Carolina, we recognize two types
11 of evidence. The first is called direct evidence,
12 and it's pretty straightforward. Direct evidence is
13 the testimony of a person who asserts or who claims
14 to have actual knowledge of a fact, such as an
15 eyewitness.

16 Circumstantial evidence is the other type of
17 evidence, and I'm going to tell you a little more
18 about that in a second. But circumstantial evidence
19 is indirect evidence, or put another way, it is
20 proof of a chain of facts and circumstances from
21 which you can infer that another fact exists,
22 although that fact has not been proven directly.

23 And I'll tell you that the law makes absolutely
24 no distinction between the weight or value to be
25 given to either direct or circumstantial evidence.

1 You, the jury, are entitled to consider both.
2 There's not a greater degree of proof required for
3 circumstantial evidence to be considered; however,
4 you may not infer something by speculation or
5 surmise.

6 Now, also, to repeat the two types of evidence:
7 We have direct and circumstantial evidence in this
8 case, or evidence that we recognize in South
9 Carolina, rather. Direct evidence directly proves
10 the existence of a fact and does not require
11 deduction at all. Circumstantial evidence is proof
12 of a chain of facts and circumstances indicating the
13 existence of a fact.

14 Crimes may be proven by circumstantial
15 evidence, ladies and gentlemen. The law makes no
16 distinction between the weight or value to be given
17 to either direct or circumstantial evidence;
18 however, to the extent the State relies on
19 circumstantial evidence, all of the circumstances
20 must be consistent with each other, and when taken
21 together, point conclusively to the guilt of the
22 accused beyond a reasonable doubt.

23 If the circumstances merely portray -- excuse
24 me -- if the circumstances merely portray the
25 defendant's behavior as suspicious, the proof has

1 failed.

2 The State has the burden of proving the
3 defendant guilty beyond a reasonable doubt. This
4 burden rests with the State regardless of whether
5 the State relies on direct evidence, circumstantial
6 evidence or a combination of both.

7 Now, ladies and gentlemen, in deciding what the
8 facts are, you must consider all the evidence in
9 this case, and in doing this, you have to decide
10 which testimony that you want to believe and which
11 testimony you wish not to believe. You have a right
12 to disbelieve all or part of any witness' testimony
13 who appeared before you. You have a right to
14 believe all of any witness' testimony.

15 In making the decision of witness credibility,
16 you may, but, Madame Forelady, are not required to
17 take into account some of the following factors, and
18 let me give those to you:

19 You may ask yourself how well was a witness
20 able to see or hear or know about the things about
21 which that witness testified? How well was the
22 witness able to recall and describe those things by
23 which they testify? What was the witness' manner
24 while they're on the witness stand? In other words,
25 what was their demeanor like? Is there any reason

1 that a witness would want to give testimony that
2 would help or hurt one side or the other? Did that
3 witness have interest in the outcome of this case,
4 or did they have any bias or prejudice towards any
5 party or any matter or issue involved in this case?
6 You may ask yourself how reasonable was the witness'
7 testimony considered in light of all the testimony
8 in the case, and whether the witness' testimony was
9 contradicted by what that witness had said or done
10 at another time or by the testimony of other
11 witnesses or the other evidence that has been
12 admitted in this case.

13 Now, Madame Forelady, ladies and gentlemen of
14 the jury, those are some, but certainly not all the
15 factors that you may consider in making this
16 determination of witness credibility. And, of
17 course, as jurors, you do not check your common
18 sense at the door when you report for jury duty.
19 And so you can and you should use those things in
20 your day-to-day lives that you find indicative of
21 truthfulness or indicative of lack of truthfulness
22 when you make this determination of witness
23 credibility.

24 In making this determination, you can believe
25 as much or as little of any witness' testimony as

1 you think proper. You may believe all or part of
2 any witness' testimony. You may believe one witness
3 over several or several over one. But one thing you
4 cannot do and you shall not do is add up the number
5 of witnesses who may appear for one side or the
6 other in making this determination of witness
7 credibility because it does not matter to you which
8 side or where the truth comes from, but your search
9 is to try to find the truth from the evidence
10 presented in this case.

11 Also, ladies and gentlemen, you have heard
12 testimony from persons described as experts. As I
13 told you during the trial, persons who, by their
14 education or their experience, have become expert in
15 some field may state their opinion on matters in
16 their field of expertise and also state their
17 reasons for their opinion.

18 Expert testimony should be judged just like any
19 other testimony in this case. You may accept it,
20 you may reject it or give it as much weight as you
21 think it deserves considering the witness'
22 education, their experience, the reasons given for
23 their opinion, and all the other evidence in this
24 case.

25 I remind you, ladies and gentlemen, that the

1 fact that this defendant has been charged, arrested,
2 and indicted is not evidence of his guilt. These
3 are the documents I have in my hands, and they will
4 not go back with you to the jury room. These are
5 merely the documents which the State of South
6 Carolina uses to bring a defendant before you, the
7 jury, for a trial and a determination of their guilt
8 or innocence.

9 Also, the fact that they are self-indictments
10 means that you'll have to consider each indictment
11 on its own. In this case, they are somewhat
12 interrelated because one of the charges -- the
13 charges are, rather: Assault and battery with
14 intent to kill and possession of a weapon during the
15 commission of a violent crime. I will tell you now
16 and I'll tell you again that you may not find the
17 defendant guilty, if you think that is appropriate,
18 based on the testimony and evidence, of possession
19 of a weapon during the commission of a violent crime
20 unless you find him guilty of the other charge of
21 assault and battery with intent to kill. I will
22 tell you more about that in just a minute.

23 Now, in this case, ladies and gentlemen, the
24 defendant has pled not guilty to both the
25 indictments; therefore, that puts the burden on the

1 State of South Carolina to prove his guilt by proof
2 beyond a reasonable doubt.

3 A person charged with committing a criminal
4 offense in South Carolina is never, is never
5 required to prove himself or herself innocent. And
6 I'll charge you that it is an important rule of law
7 that a criminal defendant, no matter how serious or
8 not serious the charge may be, will always, will
9 always be presumed to be innocent of the crime for
10 which the indictment or indictments have been issued
11 unless guilt has been proven by evidence satisfying
12 you of that guilt beyond a reasonable doubt.

13 The presumption of innocence does not end when
14 you go back in your jury room and begin your
15 deliberations, but it accompanies this defendant
16 until you, the jury, reach a verdict of guilt based
17 on evidence satisfying you of his guilt beyond a
18 reasonable doubt.

19 It has been said that the presumption of
20 innocence is like a robe of righteousness that's
21 been placed upon the shoulders of the defendant
22 where it remains until it has been stripped from his
23 shoulders by evidence satisfying you of his guilt
24 beyond a reasonable doubt.

25 Now, ladies and gentlemen, the presumption of

1 innocence is not a mere legal theory. It is not
2 just a legal phrase. It is a substantial right
3 which every defendant is entitled unless you, the
4 jury, are satisfied from the evidence of guilt
5 beyond a reasonable doubt.

6 So that leaves me to what is a reasonable
7 doubt? I gave you a short version at the beginning
8 of this trial, and I'm going to redefine it for you
9 now. A reasonable doubt is the kind of doubt that
10 would cause a reasonable, sincere, and honest and
11 conscientious person to hesitate to act in an
12 important matter in their own affairs. Proof beyond
13 a reasonable doubt is proof that leaves you firmly
14 convinced of the defendant's guilt.

15 Now, there are very few things that we know in
16 this world with absolute certainty, and in criminal
17 cases, the law does not require proof that overcomes
18 every possible doubt. If, based on your
19 consideration of the evidence, you are firmly
20 convinced that the defendant is guilty of the crime
21 or crimes charged, you must find the defendant
22 guilty.

23 If, on the other hand, you think there is a
24 real possibility that the defendant is not guilty,
25 then you must give the defendant the benefit of the

1 doubt and find him not guilty.

2 A reasonable doubt may arise from the evidence
3 or from the lack of evidence.

4 And I further instruct you that a defendant is
5 entitled to every reasonable doubt that may arise in
6 a case. What that simply means is this: That if,
7 upon any issue essential to a conviction and a
8 verdict of guilt of the offense for which this
9 defendant has been charged, if you have any
10 reasonable doubt as to how that issue should be
11 resolved, it'll be your duty to resolve that in
12 favor of the defendant.

13 Now, ladies and gentlemen, in order to
14 establish criminal liability, criminal intent is
15 required. For example, the State -- excuse me --
16 for example, the mental state required to be proven
17 by the State for a particular crime might be
18 purpose, intent, knowledge, recklessness, or
19 criminal negligence. Criminal intent may be proven
20 by the State -- excuse me -- criminal intent must be
21 proven by the State beyond a reasonable doubt.

22 Criminal intent is always a matter that must be
23 determined by you, the jury, from the circumstances
24 shown to be surrounding the situation. There's no
25 way to prove intent to a mathematical certainty.

1 There's no way that medical science can dissect a
2 person's brain and determine what that person had in
3 their mind. So the law says that criminal intent
4 may be inferred from the circumstances shown to have
5 existed.

6 Now, ladies and gentlemen, this is how you make
7 the determination of whether or not the element
8 requiring intent was present. It is not necessary
9 to establish intent by direct and positive evidence,
10 but intent may be established by inference in the
11 same way as any other fact by taking into
12 consideration the acts of the parties and all of the
13 facts and circumstances of the case.

14 Criminal intent is a mental state, a conscious
15 wrongdoing. And, ladies and gentlemen, it'll be up
16 to you to determine what the defendant intended to
17 do based on the circumstances shown to have existed.
18 Criminal intent can arise from action or a failure
19 to act. It may arise from negligence, recklessness,
20 or an indifference to duty or to the consequences
21 that is considered by the law to be the equivalent
22 of criminal intent.

23 Ladies and gentlemen, I'll also instruct you
24 and tell you that -- and emphasize to you the fact
25 that the defendant in this case did not testify is

1 not and shall not be a factor that may be considered
2 by you in any manner whatsoever in your
3 deliberations.

4 Madam Forelady, if anyone attempts to interject
5 that fact into the deliberations, you stop it
6 immediately. Okay?

7 Now, that is the first aspect of my charge. I
8 notice that your eyelids are getting a little heavy
9 and I'm sorry for that. Would you like to stand up
10 a minute and kind of get a little break?

11 (Pause.)

12 **THE COURT:** Would anybody like any water or
13 coffee?

14 All right. Ladies and gentlemen, this is the
15 second aspect of my charge. This is the substantive
16 law that applies in this case. It will be the law
17 of assault and battery with intent to kill, the law
18 of possession of a weapon during the commission of a
19 violent crime, the law of self-defense and
20 habitation.

21 Now, ladies and gentlemen, in this case, the
22 defendant has been charged with assault and battery
23 with intent to kill. In order to prove assault and
24 battery with intent to kill, the State must prove
25 beyond a reasonable doubt that the defendant

1 committed an unlawful act of a violent nature to the
2 person of another with malice aforethought.

3 An assault occurs when a person unlawfully
4 attempts or offers to commit a violent injury upon
5 another person and have the present ability to
6 complete the attempted injury.

7 An assault is the intentional creation of a
8 reasonable fear of immediate bodily harm. It is not
9 necessary that the attempted injury or harm actually
10 take place. For example, if I walk up to you and
11 when we are within arm's length, if I were to draw
12 back to hit you, that is an assault.

13 A battery, on the other hand, is the unlawful
14 touching of another person by a person who has
15 committed the assault. An unlawful touching can be
16 caused by a part of the accused's body or by any
17 object that the accused puts in motion. A battery
18 is the completion of the assault by using or
19 applying force to another person, however slight, in
20 a rude, angry, or resentful manner without legal
21 justification for doing so. Using my earlier
22 example, if I carry through the assault by hitting
23 you, then that is the battery.

24 Ladies and gentlemen, malice is hatred, ill
25 will or hostility towards another person. It is the

1 intentional doing of a wrongful act without just
2 cause or excuse and with an intent to inflict an
3 injury or under circumstances that the law will
4 infer an evil intent.

5 Malice aforethought does not require that
6 malice exist for any particular time before the act
7 is committed, but malice must exist in the mind of
8 the defendant just before and at the time the act is
9 committed. Therefore, there must be a combination
10 of the previous evil intent and the act.

11 Malice aforethought may be expressed or
12 inferred. These terms, expressed or inferred, do
13 not mean different kinds of malice, but merely the
14 manner in which malice may be shown to exist, that
15 is either by direct evidence or by inference from
16 the facts and circumstances which are proved.

17 Expressed malice is shown when a person speaks
18 words which express hatred or ill will for another
19 or when the person prepared beforehand to do the act
20 which was later accomplished. For example, laying
21 in wait for a person or any other acts of
22 preparation going to show that the deed was within
23 the defendant's mind would be expressed malice.

24 Malice may be inferred from conduct showing a
25 total disregard to human life.

1 Ladies and gentlemen, if facts are proved
2 beyond a reasonable doubt sufficient to raise an
3 inference of malice to your satisfaction, this
4 inference would simply be an evidentiary fact to be
5 considered by you, along with the other evidence in
6 this case, and you may give it the weight you decide
7 it should receive.

8 A specific intent to kill is not an element of
9 assault and battery with intent to kill, but there
10 must be a general intent to commit a serious bodily
11 injury.

12 Intent means intending the result which
13 actually occurs not accidentally or involuntarily.
14 Intent may be shown by acts and conduct of the
15 defendant and other circumstances from which you may
16 naturally and reasonably infer intent.

17 Evidence of the character of the assault, the
18 character of the instrument used, the manner in
19 which it was used, the purpose to be accomplished,
20 and the resulting wounds or injuries may be
21 considered in determining the intent which -- with
22 which the assault was committed. Intent may be
23 inferred when it is demonstrated that the defendant
24 voluntarily and willfully commits an act, the
25 natural tendency of which is to destroy another's

1 life.

2 All right. Ladies and gentlemen, this is the
3 law of possession of a weapon during the commission
4 of or attempt to commit a violent crime. The
5 defendant is charged with possession of a weapon
6 during the commission of or attempt to commit a
7 violent crime. The State must prove beyond a
8 reasonable doubt that the defendant was in
9 possession of a firearm or visibly displayed what
10 appeared to be a firearm.

11 A firearm means any machine gun, automatic
12 rifle, revolver, pistol, or any weapon which will,
13 is designed to or may be readily converted to expel
14 a projectile.

15 In order to find the defendant guilty of
16 possession of a weapon during the commission of a
17 violent crime, you must first find the defendant
18 guilty of either committing a violent crime or
19 attempting to commit a violent crime.

20 I will charge you, ladies and gentlemen, that
21 assault and battery with intent to kill is, in fact,
22 a violent crime. The State must prove beyond a
23 reasonable doubt that the weapon furthered, advanced
24 or helped in the commission of the crime.

25 Now, in this case, ladies and gentlemen, the

1 defendant has raised the defense of self-defense and
2 habitation. And I'll tell you this: Self-defense
3 is a complete defense, and if it is established, you
4 must find the defendant not guilty.

5 The State has the burden of disproving
6 self-defense by proof beyond a reasonable doubt. If
7 you have a reasonable doubt of the defendant's guilt
8 after considering all the evidence, including the
9 evidence of self-defense, then you must find the
10 defendant not guilty.

11 On the other hand, if you have no reasonable
12 doubt of the defendant's guilt after considering all
13 of the evidence, including the evidence of
14 self-defense, then you must find the defendant
15 guilty.

16 The following elements are required to
17 establish self-defense: Number one, first, the
18 defendant must be without fault in bringing on the
19 difficulty. If the defendant's conduct was the type
20 which was reasonably calculated to and did provoke a
21 deadly assault, the defendant would be at fault in
22 bringing on the difficulty and would not be entitled
23 to an acquittal based on self-defense.

24 The second element of self-defense is that the
25 defendant was actually in imminent danger of death

1 or serious bodily injury or that the defendant
2 actually believed he was in imminent danger of death
3 or serious bodily injury.

4 If the defendant was actually in imminent
5 danger, it must be shown that the circumstances
6 would have warranted a person of ordinary firmness
7 and courage to strike out the fatal blow to prevent
8 death or serious bodily injury.

9 If the defendant believed he was in imminent
10 danger of death or serious bodily injury, it must be
11 shown that a reasonably prudent person of ordinary
12 firmness and courage would have had the same belief.

13 In deciding whether the defendant actually was
14 or believed he was in imminent danger of death or
15 serious bodily injury, you should consider all of
16 the facts and circumstances surrounding the crime,
17 including the physical condition and characteristics
18 of the defendant and the victim.

19 Now, ladies and gentlemen, the defendant does
20 not have to show that he was actually in danger. It
21 is enough if the defendant believed he was in
22 imminent danger and a reasonably prudent person of
23 ordinary firmness and courage would have had the
24 same belief. The defendant has the right to act on
25 appearances even though the defendant's belief may

1 have been mistaken. It is for you to decide whether
2 the defendant's fear of immediate danger of death or
3 serious bodily injury was reasonable and would have
4 been felt by an ordinary person in the same
5 situation.

6 If the defendant was on his own premises, the
7 defendant had no duty to retreat before acting in
8 self-defense.

9 Ladies and gentlemen, a person cannot be
10 required to make an exact calculation as to the
11 degree or amount of force which may be needed to
12 avoid death or serious bodily injury or bodily harm.
13 Therefore, in self-defense, the defendant has the
14 right to use the force needed to avoid death or
15 serious bodily harm.

16 The force used in self-defense does not have to
17 be limited to the degree or amount of force used by
18 the victim. The defendant has a right to use so
19 much force as appeared to be necessary for complete
20 self-protection and which a person of ordinary
21 reason and firmness would have believed to be needed
22 to prevent death or serious bodily injury.

23 If the defendant is justified in defending
24 himself or others and in firing the first shot, then
25 the defendant is also justified in continuing to

1 shoot until it is apparent that the danger of death
2 or serious bodily injury has completely ended.

3 Also, under the law of self-defense, the
4 defendant may take another's life in the defense of
5 others. The right to intervene to protect another
6 person is subject to the same rights and limitations
7 as the right of self-defense. The defendant may
8 take the life of a person who assaults a friend,
9 relative or bystander if that friend, relative or
10 bystander would have had the same right of
11 self-defense.

12 To show that the person being defended had the
13 right of self-defense, it must first be shown that
14 the person being defended and the defendant were
15 both without fault in bringing on the difficulty.
16 If the conduct of the person defended or the
17 defendant was the type which was reasonably
18 calculated to and did provoke a deadly assault, the
19 person would be at fault in bringing on the
20 difficulty and would not have the right of
21 self-defense; therefore, the defendant would not
22 have the right to use deadly force in defending that
23 person.

24 The defense of another person is excusable if
25 the defendant had reasonable grounds to believe and

1 in good faith did believe that the person being
2 defended was in imminent danger of death or serious
3 bodily harm from the victim. In deciding whether
4 the person defended actually was or that the
5 defendant actually believed the person was in
6 imminent danger of death or serious bodily injury,
7 you should consider all the facts and circumstances
8 surrounding the crime, including the physical
9 condition and characteristics of the parties.

10 The defendant does not have to show that the
11 person the defendant defended was actually in
12 danger. It is enough if the defendant believed the
13 person was in imminent danger. The defendant has a
14 right to act on appearances even though the
15 defendant believes he may have been mistaken. The
16 defendant must show that, under the circumstances as
17 they appear to the defendant, the defendant believed
18 the person needed was in danger -- excuse me -- let
19 me do that again.

20 The defendant must show that, under these
21 circumstances as they appeared to the defendant, the
22 defendant believed the person defended was in danger
23 and that a reasonably prudent person of ordinary
24 firmness and courage would have had the same belief
25 under the same circumstances.

1 Ladies and gentlemen of the jury, it is for you
2 to decide whether the defendant's fear of immediate
3 danger or serious bodily injury to the person
4 defended was reasonable and would have been felt by
5 an ordinary person in the same situation. The
6 defendant does not have to wait until the victim
7 gets the drop on the person defended. The defendant
8 has a right to act under the law of
9 self-preservation to prevent the victim from getting
10 the drop on the person defended.

11 In order to be entitled to defend another, the
12 person defended must have had -- excuse me -- where
13 the person being defended had no duty to retreat,
14 the defendant, likewise, would have no duty to
15 retreat.

16 The defendant had no -- the defendant had no
17 duty to retreat if, by doing so, the danger of being
18 killed or suffering serious bodily injury would
19 increase.

20 Now, ladies and gentlemen, that is the law of
21 self-defense. Let me let you have a break. I know
22 it's long and somewhat involved, so take a break
23 again, and I'm about at the close of my charge.
24 Okay?

25 May I see the attorneys over here right quick?

1 (The jury retires to the jury room.)

2 **THE COURT:** Counsel for the defense has
3 requested -- and don't let me put words in your
4 mouth, but the question as to the proper disposition
5 of the jurors' notes. It's been my practice to let
6 the jurors either take their own notes home or get
7 the Clerk to dispose of them and destroy them at the
8 end of the case, not to make them a part of the
9 record. I mean, I don't know that you were asking
10 that I make it a part of the record --

11 **MS. BALLARD:** No, sir, I was not asking to make
12 it part of the record. What I did want to ask is
13 that the Clerk take possession of them and destroy
14 them.

15 **THE COURT:** I'll definitely do that.

16 I assume that, Mr. Myers, you don't have any
17 problem with that, do you?

18 **MR. MYERS:** No, sir.

19 Now, as to the notes, you made a charge and I
20 think you said something about the notes shouldn't
21 trump something.

22 **THE COURT:** I'm sorry?

23 **MR. MYERS:** You made a charge on the notes, the
24 juror notes.

25 **THE COURT:** Right.

1 **MR. MYERS:** And I didn't quite get it, but it
2 was at the very beginning. You said something about
3 those notes should not trump what they heard. I
4 didn't get --

5 **THE COURT:** What I told them is what I told
6 them at the beginning of the case is this: That
7 just because something may appear in somebody's
8 notes doesn't trump some other juror's memory of
9 what happened in this case. They have to hash that
10 out.

11 **MR. MYERS:** Yes, sir. We submit to you the law
12 is that the one juror cannot share those notes with
13 other jurors, and they can't use their notes to try
14 to convince other jurors in deliberation. They're
15 personal notes for themselves.

16 **THE COURT:** I'm not familiar with that. I
17 don't know how in the world, from a practical
18 aspect, if they're going to deliberate anything, how
19 that can be the case. I mean, it may well be. Give
20 me the thing about it.

21 **MR. MYERS:** I'll try to find it, but I've tried
22 many condemnation cases where they had to take notes
23 because of figures and everything. But the charge
24 has always been, they are personal to the individual
25 juror and one juror can't bring those notes out to

1 argue with others and rely on those notes. They are
2 personal and can't be revealed to other jurors.

3 **MS. BALLARD:** Your Honor, I just think that's
4 absurd.

5 **THE COURT:** Well, I think that's totally
6 impractical, but if you have it, Mr. Myers, I'll be
7 glad to give them a further instruction, but right
8 now, I'm not going to limit them to that. Okay?

9 **MR. MYERS:** Okay. I'll try to look for it.

10 **THE COURT:** All right. Let me go back. From
11 your text pages, it's page 29 and 30. I'm going to
12 start there and then go back to habitation.

13 **MS. BALLARD:** You're starting at duty to
14 retreat?

15 **THE COURT:** Right.

16 **MS. BALLARD:** Okay. Thank you.

17 (Brief recess.)

18 **THE COURT:** All right. Is the State ready to
19 proceed?

20 **MR. MYERS:** Yes, sir.

21 **THE COURT:** Defense ready?

22 **MR. GARRETT:** Yes, Your Honor.

23 **THE COURT:** All right. Very good.

24 Would you bring the jury back in, please,
25 ma'am?

1 (The jury returns to the courtroom.)

2 **THE COURT:** All right. Ladies and gentlemen,
3 we're not too terribly far, so bear with me. I need
4 to go back over one thing and it won't be long.
5 This has to do with duty to retreat.

6 In order to be entitled to defend another, the
7 person defended must have had no other probable way
8 to avoid the danger of death or serious bodily
9 injury than to act as the defendant did in this
10 particular case. Where the person being defended
11 had no duty to retreat, the defendant, likewise,
12 would have no duty to retreat. The defendant had no
13 duty to retreat if, by doing so, the danger of being
14 killed or suffering serious bodily injury would
15 increase.

16 Now, ladies and gentlemen, that concludes the
17 law of self-defense, but also, I'm going to charge
18 the law of habitation of defense.

19 If the defendant or a member of the defendant's
20 household is attacked in the defendant's own home,
21 the defendant may use the force which appears to be
22 needed to protect himself or his household from
23 death or serious bodily injury.

24 If a trespasser refuses to leave the home when
25 asked to leave, the defendant may use the necessary

1 force to eject the trespasser. If, in the effort to
2 eject the trespasser, the life or safety of the
3 defendant or a member of the household is
4 jeopardized, the defendant may take the life of the
5 trespasser. The kind and degree of force which are
6 justified depend on the conduct of the trespasser.

7 If a person entitled to -- if a person entered
8 the dwelling at the invitation of a member of the
9 household, the person becomes a trespasser if the
10 person refuses to leave when asked.

11 If, while legitimately exercising in good faith
12 the right to eject a trespasser, the defendant is
13 assaulted by the trespasser and fears death or
14 serious bodily injury, the defendant would be
15 without fault in bringing about the difficulty.

16 Whether the defendant was acting in good faith
17 in attempting to eject the victim and was assaulted
18 in the process is a question for you to determine.

19 Ladies and gentlemen, a person who attempts to
20 force himself into another person's dwelling is a
21 trespasser. And the law permits an occupant of the
22 dwelling to use as much force as may be reasonably
23 necessary to prevent the obtrusion or to accomplish
24 the expulsion.

25 Finally, ladies and gentlemen, the General

1 Assembly has provided that night hunting in this
2 state is unlawful. However, this prohibition does
3 not prevent any owner of property from protecting
4 the property from destruction by wild game, as
5 provided by law.

6 Madam Forelady, ladies and gentlemen of the
7 jury, that is the substantive law that you must
8 apply in this case. I do not send my charges back
9 to the jury, so if any time you have a question, if
10 you have a question, we'll bring you back out here,
11 and I'll be glad to explain it in as much detail as
12 many times as you need. Okay?

13 Now, with that being said, ladies and
14 gentlemen, let me give you a few final points to
15 consider before we excuse you: Number one, you
16 don't serve as jurors to be partisans or advocates
17 for either side. In fact, you were chosen by both
18 sides because each believed that you could be fair
19 and impartial and decide this case solely on the
20 evidence and according to the law without bias or
21 prejudice towards one side or the other.

22 So when you go back and when you begin your
23 deliberations, which we will instruct you in just a
24 few minutes, I want you to use your good experiences
25 in life and your common sense and your sense of

1 logic and reason in engaging in your deliberations.

2 So let me say something about deliberations.

3 Deliberations is defined as this: It's a careful
4 consideration weighing up with a view to a decision.

5 Regardless of what you may think about our
6 judicial system, I would submit to you that the
7 genus of our judicial system is it allows 12 good
8 men and women who come from different backgrounds,
9 who have different life experiences and perspectives
10 to sit through a trial, to listen to the evidence,
11 to listen to the law, then to go back to talk about
12 that evidence thoroughly and courteously and to
13 ultimately reach a verdict.

14 And we call them deliberations for a reason.
15 You are to consider all the evidence in a careful
16 and deliberate manner, and you're supposed to do so
17 and you shall do so in a calm and courteous manner.
18 Again, you're not partisans or advocates for one
19 side or the other. You are judges of the facts.
20 And your sole interest in this case is to try to
21 determine the truth from the evidence that you have
22 presented to you here in this courtroom.

23 When you are to begin in your deliberations,
24 I'm going to ask and instruct you to listen to
25 everybody's views and their points of view, talk

1 through and walk through all the evidence and
2 discuss it thoroughly and courteously. And
3 remember, if you're doing something deliberately,
4 you should not be in a hurry and you should not be
5 in a hurry today. This is the State's only day in
6 court and this is the defendant's only day in court,
7 and this case is important to both sides.

8 In order for your verdict to stand, it will
9 necessarily have to be unanimous. But with that
10 being said, each of you must decide this case for
11 yourself, and you should only do so after you have
12 impartially considered all the evidence in this
13 case, you've discussed it fully with your fellow
14 jurors, you've listened to their views and their
15 points of view.

16 Don't be afraid to change your opinion if the
17 discussion persuades you that's the right thing to
18 do. On the other hand, do not come to a decision
19 simply because your other jurors think it's the
20 right thing to do.

21 Now, it is important that you try to reach a
22 unanimous verdict, but you can only do so after
23 you've made up your own mind. Do not change an
24 honest belief about the weight or the effect of the
25 evidence simply to reach a verdict, in other words,

1 simply to appease your fellow jurors.

2 With that being said, Madame Forelady, if,
3 during the course of your deliberations, there shall
4 ever be any questions, what I want you to do is
5 write the question down on a piece of paper, sign
6 your name, knock on the door, we will receive it
7 back here in the courtroom, and we'll act on it
8 accordingly. Okay?

9 Also, it will be your function to preside over
10 the deliberations. You're supposed to do that in a
11 democratic manner and not a dictatorial manner.
12 Okay?

13 Now, the verdict form in this case is as
14 follows, and it will be your job, Madame Forelady,
15 to fill it out at the end of the case if the jury
16 can reach a unanimous verdict. The order in which
17 the options appear is of no consequence. I have to
18 put them in some order, and so just pay no attention
19 to the order they appear in.

20 These are your options: As to indictment
21 number 2010-GS-35-52, assault and battery with
22 intent to kill, we, the jury, unanimously find the
23 defendant not guilty. The other option would be, as
24 to indictment 2010-GS-35-52, assault and battery
25 with intent to kill, we, the jury, unanimously find

1 the defendant guilty.

2 Once you have determined which of those the
3 jury unanimously agrees upon, initial it or check
4 it. Okay?

5 Now, if and only if you were to find the
6 defendant guilty of the charge of assault and
7 battery with intent to kill, then you would consider
8 whether or not he would be guilty of possession of a
9 weapon during the commission of a violent crime. If
10 you find that the defendant is not guilty of assault
11 and battery with intent to kill, then you may not
12 and shall not consider the possession of a weapon
13 during the commission of a violent crime charge.

14 But the options for that charge are as follows:
15 As to the indictment 2010-GS-35-49, possession of a
16 weapon during the commission of a violent crime, we,
17 the jury, unanimously find the defendant not guilty.
18 Or as to indictment 2010-GS-35-49, possession of a
19 weapon during the commission of a violent crime, we,
20 the jury, unanimously find the defendant guilty.

21 Once the jury has reached a decision on
22 everything, you are to sign your name and you are to
23 fold over this verdict form, knock on the door, and
24 we'll receive it here in the courtroom. Okay?

25 Now, I'm going to ask that you go back to your

1 jury room right now. I need to go over with the
2 State and the defense whether or not I have
3 misstated some issue of law or I have neglected to
4 tell you something I should have. Do not begin your
5 deliberations yet.

6 And then before we do, we'll send word back
7 that it's okay and we'll bring the alternates back
8 out with us. But I'm going to ask the alternates to
9 go in at this juncture, but do not begin your
10 deliberations. Okay?

11 (The jury retires to the jury room.)

12 **THE COURT:** All right. Mr. Myers, other than
13 the issue of the jurors' notes, any additions or
14 exceptions to the charges given?

15 **MR. MYERS:** No, sir.

16 **THE COURT:** Ms. Ballard, any additions or
17 exceptions to the charges given?

18 **MS. BALLARD:** Not as given, Your Honor. I just
19 want to renew my objections to -- and my request
20 that you charge the defendant's request to charge
21 number 5, number 8, and number 11, which we've
22 already discussed and they're part of the record.
23 And I would incorporate my previous arguments,
24 rather than add to the record more.

25 **THE COURT:** Very good. As well as your motion

1 for a mistrial.

2 **MS. BALLARD:** Yes, sir.

3 **THE COURT:** All right. Anything that we need
4 to do to clean up the record, make sure it's
5 protected?

6 **MR. MYERS:** Yes, sir. I'd like to put in as a
7 Court's Exhibit the defendant's list of witnesses
8 where, on Number 3, they listed Mary C. Worley, the
9 defendant's mother, as a potential State {sic}
10 witness.

11 **THE COURT.** Okay. That will be a Court's
12 Exhibit.

13 **MS. BALLARD:** That will not go back to the
14 jury.

15 **THE COURT:** No, absolutely not.

16 **MS. BALLARD:** Thank you, Your Honor.

17 **THE COURT:** All right. Now, guys, if y'all
18 will double check your exhibits. Here's the verdict
19 form.

20 Madame Clerk, once they get that checked, just
21 go ahead and tell them they can begin their
22 deliberations.

23 I'm going to go back and start doing more
24 research. And before, Mr. Henderson, we let the
25 verdict come in, I'm going to make a decision on the

1 mistrial.

2 **MS. BALLARD:** Thank you, Your Honor.

3 (Court's Exhibit Number 12, defendant's
4 witness list, marked for identification.)

5 (The jury commences its deliberations at
6 11:25 a.m.)

7 (The Judge excused the alternates.)

8 (A recess transpired.)

9 (Court's Exhibit Number 13, jury note,
10 marked for identification.)

11 **THE COURT:** All right, guys. The jury has
12 reached a verdict.

13 Would you bring the jury in, please -- hold on
14 for a second. Is there anything from the State
15 before we bring the jury in?

16 **MR. MAYE:** Nothing from the State, Your Honor.

17 **THE COURT:** From the defense?

18 **MS. BALLARD:** Nothing from the defense.

19 **THE COURT:** Would you bring the jury in?

20 **MS. BALLARD:** Oh, Your Honor --

21 **MS. MAYE:** Mistrial.

22 **THE COURT:** Oh, yeah. I just -- hold them up.

23 Thank you so much. I had told counsel I was
24 denying the motion. I want to put my grounds on the
25 record. And the basis for me denying it is the

1 Meggett case. I thought it was in line with what we
2 had here. But I can tell you what I do recall, and
3 I'll double check it, is, number one, the comment
4 was in response to information or issues that were
5 placed in the record by defense in this matter. So
6 it was commenting on the evidence or the lack of
7 evidence.

8 In no way was it burden-shifting commentary nor
9 did it suggest or infer that the defendant is guilty
10 because he failed to testify, and no comment on the
11 defendant's failing to testify whatsoever. It was
12 just simply commenting on the lack of evidence or --
13 that was raised by the defendant. And, as such, to
14 the extent I have to do this, I find that the
15 comment was harmless beyond a reasonable doubt, if
16 that is, in fact, required. It's supposed to be an
17 appellate court standard. If I need to make that
18 finding, I've made it based on the fact that it is
19 as I've stated.

20 Anything further?

21 **MS. BALLARD:** No, sir.

22 **MR. MAYE:** Your Honor, was the standard that
23 they were looking for clear and convincing evidence?

24 Or what was the standard that you announced
25 that you thought that the Judge needed to make his

1 finding?

2 **MS. BALLARD:** Beyond a reasonable doubt.

3 **MR. MAYE:** Beyond a -- that's fine. I just
4 wanted to make sure the defense was satisfied.

5 **THE COURT:** And I said it was harmless beyond a
6 reasonable doubt, which is, I think, the standard
7 they asked me to address.

8 **MR. MAYE:** I just wanted to make sure that that
9 was the standard they were satisfied with.

10 **THE COURT:** Thank you.

11 Okay. Would you bring the jury in, please?

12 (The jury returns to open court to report
13 its verdict at 3:07 p.m.)

14 **THE COURT:** Madame Forelady, I'm informed by
15 the Clerk that the jury has reached a verdict; is
16 that correct?

17 **MADAME FORELADY:** That's correct.

18 **THE COURT:** Is it unanimous amongst all 12?

19 **MADAME FORELADY:** Yes, it is.

20 VERDICT OF THE JURY

21 **THE COURT:** I've been handed the form. This is
22 the verdict, as to indictment number 2010-GS-35-52,
23 assault and battery with intent to kill, we, the
24 jury, unanimously find the defendant guilty.

25 As to indictment 2010-GS-35-49, possession of a

1 weapon during the commission of a violent crime, we,
2 the jury, unanimously find the defendant guilty.
3 Signed, the Forelady.

4 Ladies and gentlemen, if that was your verdict
5 in the jury room and if that is your verdict now,
6 would you raise your right hand?

7 Let the record reflect that all 12 jurors
8 raised their right hand.

9 All right. Ladies and gentlemen, the Court is
10 never, ever concerned about your verdict, but the
11 Court is concerned that you, as jurors, perform your
12 duties the way you promised that you would. And
13 I've watched you throughout this case, and it's been
14 a week-long trial, and you've stayed engaged and
15 you've paid attention and you did what you're
16 supposed to do.

17 And I tell this to all jurors that I go --
18 wherever I am, that regardless of what you may
19 believe or think about our judicial system, that
20 without citizens like yourselves who are willing to
21 take time away from their homes and their jobs and
22 their families and spend time up here doing the
23 unpleasant task of having to sit in judgment of your
24 fellow citizen here in McCormick County, then
25 there's no way to resolve our disputes in a

1 civilized manner. And if you don't have an outlet
2 to resolve your disputes in a civilized manner, then
3 the only way to do it is in an uncivilized manner,
4 and we see examples of that around the world.

5 So I'm not praising you one way or the other
6 about your verdict, but I thank you for your service
7 and thank you for performing your duties as you said
8 you would. The good thing is, you don't have to
9 come back for three years.

10 Does anybody need a statement from the Clerk
11 for their employer?

12 Do you normally mail those out or do you have
13 them here?

14 **THE CLERK:** I'll give them to the bailiff.

15 **THE COURT:** And there will be a check coming to
16 you in the mail, and it will be a whopper, so don't
17 spend it all in one place, please. But we do thank
18 you in all seriousness. I know this was a tough
19 case.

20 Anything from the State before I excuse this
21 jury?

22 **MR. MAYE:** Nothing. Thank you, Your Honor.

23 **THE COURT:** From the defense?

24 **MR. GARRETT:** No.

25 **THE COURT:** Okay. Ladies and gentlemen, I'm

1 going to ask that you go back to your jury room for
2 one second. I'm going to step back there and I'm
3 going to talk to you one second, then we'll come
4 back out here in the courtroom. Okay?

5 (The jury was excused.)

6 **THE COURT:** I'll be back in just one moment.

7 (Pause.)

8 **THE COURT:** Mr. Worley, Mr. Garrett, would you
9 come around, please, Ms. Ballard, Mr. Henderson?

10 **MS. BALLARD:** Your Honor, can you note for the
11 record my motions being made before sentencing, and
12 I'll put them on the record afterwards?

13 **THE COURT:** Yes, ma'am. Would you rather make
14 them now or would you rather wait till --

15 **MS. BALLARD:** No, I'll be happy -- as long as
16 you'll note for the record that they were made, I'll
17 put them on the record afterwards.

18 **THE COURT:** Absolutely.

19 Mr. Garrett, would you like to give me some
20 information that I haven't heard about Mr. Worley?

21 **MR. GARRETT:** Well, you know, Your Honor, he's
22 55 years of age. He went to high school in Aiken
23 through the 12th grade. He did a year and a half
24 over there at the Aiken Tech part where he studied
25 machining and welding.

1 Judge, he has hardly any criminal record.
2 Years ago, back in the 70s, appears he had a DUI, a
3 simple possession of marijuana, and a failure to
4 stop for a blue light. And other than that, Your
5 Honor, he's led an exemplary life with his family,
6 his brother, his mother. They're a good family.

7 This is a horrible tragedy. As you said, it's
8 a tough case. It's a horrible tragedy. And, you
9 know, the jury has spoken, we understand that, but I
10 ask you to have mercy.

11 You've seen the case as well. You saw the
12 facts and circumstances about how it came about.
13 And obviously, when you have a case like that, the
14 jury's spoken and I respect that, but by the same
15 token, this is so out of character for Joe, and I
16 just think that you should consider that in
17 sentencing him. And, hopefully, at his age,
18 depending on what you do, as to whether or not he'll
19 ever be out of jail.

20 **THE COURT:** How much time has he been in jail;
21 do y'all know?

22 **MR. GARRETT:** He's been in jail for four years
23 and a month.

24 **MR. HENDERSON:** Since November 15th of '09. He
25 has never had bond set, Your Honor.

1 **MR. GARRETT:** I'll say this, too, Judge. He's
2 never had the first disciplinary, as I understand
3 it, with the jail. He's not caused any problems.
4 He's sat over in jail waiting this trial all this
5 time. He's not been a problem.

6 He also developed some sickness during the time
7 he was there. He's got a serious hernia and he's
8 going to need a hernia operation, that's developed
9 during the period of time that he was in jail, but I
10 would say he's been exemplary.

11 **THE COURT:** Well, do you -- since I know this
12 case is going to be appealed, do you wish for your
13 client to give a statement or would you rather him
14 not?

15 **MR. GARRETT:** I would rather him not, Your
16 Honor, because of those issues that may still have
17 to be addressed, and Ms. Ballard will address those
18 after sentencing, Your Honor.

19 **THE COURT:** Is there anything other than the
20 motion? Do you have anything to add to what's been
21 said, Ms. Ballard?

22 **MS. BALLARD:** Your Honor, the only thing that,
23 other than I need to put my motions on the record is
24 I would request that the Judge consider delaying
25 sentencing and having a mental evaluation done of

1 Mr. Worley so that you could have -- his condition
2 has deteriorated while he's been incarcerated, and I
3 think it would be a tremendous benefit to the Court
4 to have the benefit of a current mental evaluation.

5 **THE COURT:** Has there been one performed before
6 today?

7 **MS. BALLARD:** No, sir.

8 **THE COURT:** No?

9 **MS. BALLARD:** No, sir.

10 **THE COURT:** Okay. I'll do that.

11 I'm going to have him held over until --

12 **MR. HENDERSON:** That's fine, Your Honor.

13 **MS. BALLARD:** Absolutely. We'd like to have
14 the evaluation --

15 **THE COURT:** Would there be a -- I can always
16 ride back down here or would you consider bringing
17 him to Anderson?

18 **MS. BALLARD:** Yes, sir.

19 **THE COURT:** We'll cross that bridge --

20 **MS. BALLARD:** Yes, sir. We'd like to get the
21 mental evaluation done so Your Honor has a complete
22 picture before you sentence him.

23 **MR. HENDERSON:** And, I guess, also the full
24 presentence report, Your Honor, because this is kind
25 of an unusual case. And I think the mental

1 health --

2 **THE COURT:** When you say a full, what are you
3 referring to?

4 **MR. HENDERSON:** The probation agent talking to,
5 you know, the family, talking to Mr. Rushton's
6 family. I mean, just getting -- I know there will
7 be a lot of stuff that the Court's already heard --

8 **THE COURT:** Just a presentence evaluation?

9 **MR. HENDERSON:** Right. But there's a lot of
10 stuff --

11 **THE COURT:** Including the psychological.

12 **MS. BALLARD:** Yes, sir.

13 **MR. HENDERSON:** But there's a lot of stuff the
14 Court didn't hear because Mr. Worley did not
15 testify.

16 **THE COURT:** Sure. Well, that's why I asked,
17 because I had some -- I can tell you that I had some
18 concerns, not about his capability of participating
19 in trial, when he stood up and I gave him his Fifth
20 Amendment rights, there just seemed to be something
21 there, couldn't put my finger on it. But, yeah,
22 I'll do that.

23 Mr. Rushton?

24 **MR. RUSHTON:** Yes, sir, Your Honor.

25 **THE COURT:** You have already testified. You

1 are the victim. You have a constitutional right to
2 be heard again if you would like to.

3 **MR. RUSHTON:** Your Honor, Mr. Maye has a
4 victim's impact statement I would just like to pass
5 to you and he's going to give you a brief summary.

6 **MR. MAYE:** Your Honor, if we're going to carry
7 out the full sentence at another point in time, I'm
8 not sure -- with all due respect, I'll do anything
9 you'd like for me to do, but I think that's more
10 appropriate to carry it out at the time that you
11 conduct your sentence.

12 **THE COURT:** And what is your position about
13 having a presentence evaluation at this point? I
14 think it would be appropriate to do, but, I mean, is
15 there any reason why I shouldn't do that?

16 **MR. MAYE:** Your Honor, we've never been
17 apprised that he had any mental difficulties now. I
18 mean, I'm sure that they want to do that for the
19 purpose of mitigation.

20 I don't think there's ever been any issue with
21 this gentleman's competency. And certainly, from
22 the State's standpoint, we see -- with all deference
23 to the Court, your call completely and totally, but
24 we know of absolutely no reason to put this off
25 other than for them to try to generate some sort of

1 mitigation evidence in this case for somebody who
2 has no -- we've never had any indication from the
3 defense that there's any issue with his mental
4 health or mental stability in this case, of course
5 -- because if we would have, we would have insisted,
6 with a case of this gravity and this magnitude and
7 this seriousness, that we'd have had him evaluated.
8 We just think that's an attempt to generate some
9 sort of mitigation at the last minute. We'll leave
10 that to your discretion.

11 **THE COURT:** Well, you know, under the
12 circumstances, when we have somebody who has
13 relatively no record, the DUI and marijuana is not
14 such that caused a whole lot of concern at all,
15 compared to what happened in this case, and in
16 somebody the age that Mr. Worley is, who has
17 otherwise seemed to have been a productive citizen,
18 I think it would be appropriate to go ahead and have
19 the presentence evaluation.

20 Once that is received, we'll schedule a time
21 and place for the sentencing at that point. Okay?

22 **MS. BALLARD:** Thank you, Your Honor.

23 **THE COURT:** Now, Mr. Rushton --

24 **MR. RUSHTON:** Yes, sir.

25 **THE COURT:** -- you will be notified through the

1 Solicitor's office of that date and time. And
2 you'll be granted an opportunity to speak or I
3 thought what I heard you say is you have an impact
4 report that you would --

5 **MR. MAYE:** I do. I'm going to hand up a victim
6 impact statement for the Court. You can certainly
7 have it in between now and then. We'll be happy to
8 make a full presentation whenever the Court
9 dictates.

10 And like I said, Your Honor, that's with all
11 due deference, I completely -- we'll be wherever you
12 say, whenever you say, in order to carry out the
13 sentencing.

14 **MS. BALLARD:** Can we have a copy of that as
15 well?

16 **MR. MAYE:** Sure. We'll get you a copy of it.

17 **THE COURT:** I'm going to leave this with the
18 Clerk's office. Having not ever requested a
19 presentence report, I assume they will come back to
20 the Clerk and I will be notified of that? Is that
21 how it normally goes?

22 **MR. HENDERSON:** Your Honor, the ones I've seen
23 done or have had done is probation will send it to
24 the trial judge and also copy the attorneys and I
25 think the original would go to the clerk.

1 **THE COURT:** Okay. Well, once it comes in then,
2 I will just convene a conference call?

3 **MS. BALLARD:** Yes, sir.

4 **THE COURT:** And we'll go forward from there.
5 Again, I appreciate everybody's professionalism
6 during the case, but we're in recess.

7 **MS. BALLARD:** Can I put my motions on the
8 record?

9 **THE COURT:** Yes, you can.

10 **MS. BALLARD:** Your Honor, we move for a new
11 trial on a number of grounds. The first ground is
12 based on the error by Judge Keesley in denying
13 Mr. Worley the immunity that is provided under the
14 Castle Doctrine. As Your Honor knows, we've
15 attempted to appeal that, and our appeal eventually
16 was dismissed, and that issue still remains.

17 We also move for a new trial on the basis of
18 the disappearance during the original Castle
19 Doctrine hearing of the entire transcript of
20 Mr. Worley's testimony. I don't know how much
21 detail Your Honor's aware of about that, but --

22 **THE COURT:** I have way little bit, but not --
23 go ahead.

24 **MS. BALLARD:** What occurred was when we
25 attempted to appeal Judge Keesley's order, the court

1 reporter had a break-in at her car -- in her car,
2 which was out on Garners Ferry Road in Columbia.
3 And the backup tapes, the electronic recording, and
4 the paper recording of Mr. Worley's testimony was
5 stolen. Nothing else was stolen.

6 And during the appeal, that became an issue
7 because, obviously, the appellant has to create a
8 record, and we attempted to do that. And we were in
9 the process of reconstructing that record before
10 Judge Keesley, upon order of the Court of Appeals,
11 when the Isaac opinion came out.

12 So, at this point, we were denied the
13 opportunity to complete the reconstruction of that
14 record, which we would have had available to us to
15 use during these trial court proceedings. So we
16 think a new trial is appropriate for that reason as
17 well.

18 Also, the grounds that we moved for a directed
19 verdict, the self-defense and the Castle Doctrine
20 issues that should have been ruled on as a matter of
21 law.

22 The issue that I raised, Your Honor, regarding
23 my request that you rule as a matter of law
24 Mr. Rushton was not qualified as a deputy sheriff at
25 the time he entered on Mr. Worley's premises;

1 failure to give the charges, number 5, 8, and number
2 11 that were in our request to charge; your failure
3 to grant a mistrial when the improper comments were
4 made by the Solicitor during the closing argument.
5 And just for the record, I wanted to state again
6 that there were two comments. We did not object
7 until the second comment.

8 And for all of those reasons, Your Honor, we
9 believe a new trial would be appropriate.

10 **THE COURT:** Thank you, ma'am. You noted them
11 on the record.

12 Let me tell you, once I pass sentence,
13 Mr. Worley, you will have ten days to appeal. Okay,
14 sir? That will be after the sentence is passed
15 down. Okay, sir? I just want to make sure that's
16 on the record.

17 Anything further from the defense?

18 **MR. GARRETT:** No, sir.

19 **MR. HENDERSON:** No, sir, Your Honor.

20 **MR. MYERS:** Your Honor, the only thing that I
21 have, just to make the record clear, I know the
22 statement from the defense in this case, that the
23 only things that were taken from the court reporter
24 in this case that she had stolen was purely just the
25 defendant's cross, there were other portions of

1 testimony from another witness that were taken as
2 well. So it was not entirely -- we didn't get a
3 complete transcript of some of the other testimony
4 from the Castle Doctrine hearing, so it was not like
5 that was the only thing that was missing. She had a
6 variety of items stolen from her. A police report
7 was filed, and I think all that's been fully
8 investigated.

9 **MS. BALLARD:** There was cross of one witness,
10 Your Honor. And we'd handed up as a Court's Exhibit
11 that portion of the reconstruction dealing with
12 exhibits that have occurred to date. But the court
13 reporter testified, Court Administration testified,
14 there was a full investigation into the loss of
15 Mr. Worley's testimony. And I just can't stress
16 enough how important it would have been to have the
17 benefit of that testimony at this proceeding.

18 **MR. MYERS:** And the State would have certainly
19 -- would have liked to have had the -- they had the
20 benefit of having sworn testimony from all of the
21 State's witnesses, and we did not have the benefit
22 of having any sworn record with which we would have
23 been able to cross-examine Mr. Worley in this case,
24 Your Honor. Thank you.

25 **THE COURT:** Okay. Does everybody feel like

1 they have what they need to on the record?

2 **MS. BALLARD:** Yes, sir. Thank you very much.

3 **MR. MYERS:** Yes, sir.

4 **THE COURT:** For the jurors who happen to be out
5 in the gallery, what I did, there was a request to
6 delay sentencing to have an evaluation done, there's
7 -- probation will do some reports, a psychological
8 evaluation will be performed. I usually would not
9 do that, but under the circumstances of this case, I
10 feel like it would be appropriate to have that done.
11 Once I get that back, I'll either come back here or
12 they'll come meet me where I am and we'll pass
13 sentence down. All right. Thank you.

14 All right. Ladies and gentlemen, sine die.

15

16 END OF PROCEEDINGS

17

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19

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25

1 C E R T I F I C A T E

2

3 STATE OF SOUTH CAROLINA

4 COUNTY OF MCCORMICK

5

6 I, the undersigned, Stacy L. Sheppard, Circuit
7 Court Reporter for the Eleventh Judicial Circuit of
8 the State of South Carolina, do hereby certify that
9 the foregoing is a true, accurate and complete
10 transcript of record of all the proceedings had and
11 the evidence introduced in the trial of the
12 captioned cause, relative to appeal in the Criminal
13 Court for McCormick County, South Carolina, on the
14 16th - 20th of December, 2013.

15 I do further certify that I am neither of kin,
16 counsel, nor interest to any party hereto.

17

18

October 4, 2015

19

20

s/Stacy L. Sheppard

21

22

Stacy L. Sheppard, RPR
Circuit Court Reporter

23

24

25

STATE OF SOUTH CAROLINA
COUNTY OF MCCORMICK

ELEVENTH JUDICIAL CIRCUIT
IN THE COURT OF GENERAL SESSIONS

STATE OF SOUTH CAROLINA,)
))
PLAINTIFF,)
))
-VS-)
JOE R. WORLEY)
))
DEFENDANT.)
_____)

2010-GS-35-49
SENTENCING HEARING
TRANSCRIPT OF RECORD

JUNE 30, 2014
MCCORMICK, SOUTH CAROLINA

B E F O R E:

THE HONORABLE R. LAWTON MCINTOSH, JUDGE

A P P E A R A N C E S:

ATTORNEY FOR PLAINTIFF:
ERVIN J. MAYE, SOLICITOR

ATTORNEYS FOR DEFENDANT:
BILLY GARRETT, ESQUIRE
BEATTIE ASHMORE, ESQUIRE

TARA T. SCOTT, CVR
CIRCUIT COURT REPORTER

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<u>NO</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EVIDENCE</u>
	Court's Exhibit 1:		Victim Impact Statement

1 THE COURT: This is the matter in the State of
2 South Carolina v. Joe R. Worley. Back in December of 2013
3 we had a trial where Mr. Worley was found guilty under
4 indictment 2010-GS-35-52 of assault and battery with intent
5 to kill, and under 2010-GS-35-49 possession of weapon during
6 the commission of a violent crime. Defense counsel
7 requested that there be a pre sentence investigation and
8 evaluation prior to my passing sentence. And that's the
9 purpose of why we're here today. Are you ready to proceed?

10 MR. GARRETT: Yes, sir.

11 THE COURT: Okay. Would you like to call -- put any
12 testimony on the record or call any witnesses or would you
13 like to present?

14 MR. GARRETT: No, Your Honor.

15 THE COURT: I'll be glad to hear from you first. And
16 I'm going to hear from the victim later.

17 MR. GARRETT: Thank you, Your Honor. If it please the
18 Court. Your Honor, as his Honor knows, this is a very
19 tragic and unfortunate set of circumstances that combined
20 unusually and unforeseen in this tragic situation that
21 happened over there that evening. Sometimes, you know, the
22 truth is stranger than the fiction. It's just unbelievable
23 the convergence of all the various things that happened --
24 that had to happen and the way they happened in order for
25 this to have occurred. You know, it starts out with, you

1 know, with Joe being an animal lover with his cat, Sweet
2 Pea, and, you know, his intent to shoot the fox that was
3 bothering his cat is not something that is bad. He
4 shouldn't have been shooting out there probably at that time
5 of night, but in the scheme of things, how bad is that? I
6 mean, it's completely lawful for him to do it. And the
7 statutes that your read they say that he had a right to do
8 that.

9 And unusually, Judge, I mean, did you see the work --
10 the lattice work where they had worked to build a place
11 special for this cat? You know, some people just really
12 have a love for their animals, you know. And so he's out
13 there trying to do that. Nobody had ever come to him, the
14 evidence will show. Nobody had ever come to Joe and said,
15 "Joe, don't be shooting out there at that time of night."
16 There was some suggestion that his mother was told that, but
17 there was no evidence that anybody ever told Joe don't shoot
18 out there at night. So that -- if somebody had said to Joe,
19 "Don't shoot out there at night", we might not even be here.

20 The other part is not -- if we had waited just a few
21 hours until the morning time, it's four o'clock in the
22 morning, if we had have waited until daylight where
23 everything wouldn't have been dark, the officers would have
24 been able to see, Mr. Rushton would have been able to see,
25 Mr. Worley would have been able to see. Again, an unusual

1 set of circumstances. How many possibilities are there,
2 Your Honor, that a police officer, if he is and was, was not
3 in uniform? I mean, how unusual could that be on the
4 darkest night. And that's another thing, the darkest night
5 in that month. So now we got a police officer, if he was or
6 not, not in uniform because they hadn't got it yet. Again,
7 a combination of unforeseen, unfortunate circumstances that
8 pulls us in, sucks us into this situation.

9 Now, no sirens. No blue lights. And I understand
10 these officers have their reasons for not doing that. But
11 this was not an undercover scene. There was no reason that
12 they didn't have some blue lights on or do something to
13 announce their presence, other than their testimony is, you
14 know, "We told him we were police officers. He said he
15 didn't care." But, you know, the Court, I hope, listening
16 to the testimony knows that these happen in split seconds.
17 They're not like -- I mean, it happened real quick. So
18 there's no question that but that when Joe was standing on
19 his balcony he had his gun in his port position. He never
20 aimed it at that officer until Mr. Rushton found it
21 necessary to aim his gun, and for all practical and intents
22 and purposes, probably going to shoot him.

23 And some of the testimony was -- in some of the prior
24 testimony that we were unable to get that he was going shoot
25 him if he didn't put his gun down. But there were very few

1 seconds in there where all this happened. Now, Judge, I
2 hate to say it, but if I were in that situation personally,
3 and I didn't know who that was out there that aimed a gun at
4 me, I don't know if I wouldn't have done the same thing. I
5 might be sitting in this same courtroom. I know the jury
6 disagreed with that, and I certainly respect their decision.
7 And I'm not trying to argue against their findings, Your
8 Honor. I'm just saying God help me to ever be in that
9 situation, standing on my own deck, under my own eave with a
10 gun and I see somebody out there who I don't know, who's not
11 in uniform and he takes his gun and he aims up and shoots
12 me.

13 The other part that I think is important, Judge, if he
14 really wanted to kill him, Your Honor, if he really wanted
15 to kill him when he hit him and knocked him down to the
16 ground when he hit his hand and knocked him to the ground,
17 this 30-06 weapon is a very, very powerful weapon. It could
18 have very easily killed him. He had him dead to rights. He
19 was on the ground.

20 Another unfortunate circumstance, we've got a house
21 that's weird. I mean, this house is insulated beyond
22 anything I've ever heard of, and it's only got one door for
23 entrance and exit. And so Officer Rushton, or Mr. Rushton,
24 not knowing where the entrance and exit was when he's
25 escaping, he's running towards the very place that my client

1 would either have to get in or get out of. Obviously,
2 again, a convergence of facts and circumstances that you
3 just can't make up.

4 You know, we made a big deal about this small
5 flashlight, but if you go back and look at the photographs
6 when they were doing their research one night, and it's in
7 the evidence, it's one of those big long flashlights. So
8 for Mr. -- for Joe here to see somebody out there with a
9 little old bitty flashlight, when he would expect a police
10 officer to have a longer flashlight, again goes to his state
11 of mind. Was he really wanting to hurt somebody or was he
12 trying to defend himself?

13 Now, Joe's got no history of violence. Does a man
14 become 50 years old in our lives without a history of
15 violence and all of a sudden become violent? Maybe so, but
16 it's unusual. There's no history of violence by Joe. He's
17 got some minor violations with the law, but nothing of any
18 real substance. Why would he all of a sudden want to pick
19 on a police officer? Why would he want to call a police
20 officer out and why would he want to shoot a police officer?
21 What kind of idiot or fool would want to shoot a police
22 officer? Who would plan -- you know, if he was a member of
23 some kind of, you know, gang or some kind of, you know,
24 right-wing conspiracy, whatever all that stuff is then it
25 might be a little different here.

1 This man stays home with his mother. He takes care of
2 his mother in his home between Aiken and McCormick. He had
3 been shooting his gun in McCormick all these years. Nobody
4 ever complained about it because it wasn't against the law.
5 It's in the county. In spite of the fact that he's been in
6 jail all this time, he's never caused anybody over at the
7 McCormick County Jail any problem. He's been a model
8 prisoner. If he was a bad sort, he would be out here doing
9 bad things, even in prison. But he's not doing anything bad
10 in prison. As far as I know, he's been a model prisoner.
11 So he's done good in there.

12 He comes from a good family. As I said, his brother
13 served in the service. His mother is 88 years old, and he
14 was home taking care of her. And these bullets that they
15 tried to make out as some kind of cop killer bullets, you
16 know. I'm certain that they would have prosecuted him under
17 the federal level if they could have. But, as we well know,
18 it's not against the law to have those bullets. It wasn't
19 by him either, it was his father who prepared those bullets,
20 not him.

21 Now, His Honor can bring him up and give him 25 years
22 if that's what His Honor decides to do. I mean, we're
23 standing before you for justice. It's a serious crime, I
24 understand that. But I ask you to look at the humanity of
25 this case. The other part of it is if he's convicted of it

1 and His Honor orders restitution to try to help Mr. Rushton
2 with his hand that's horribly deformed for the rest of his
3 life, I mean, there's no money there for him to pay.
4 Whereas, if you put him on probation, let -- you know,
5 convict him for the time that he's served. He's almost
6 served five years already. He's almost served five years.
7 And he's been a model citizen. Let him get out and go to
8 work and start paying Mr. Rushton back for your restitution
9 when you determine what the restitution amount is. Ringing
10 him up is not going to help Mr. Rushton, nor is it going to
11 help the state of South Carolina. He's not been a problem.
12 He wouldn't be here but for this congregation of the most --
13 I mean, it's just impossible for him to be here in this
14 circumstance. So I just ask the Court to consider all these
15 issues. You've heard the case.

16 One other thing, Judge, his testimony got stolen. Have
17 you -- in all -- I mean, to add insult to injury, he comes
18 to court, he testifies under oath, he's cross-examined by
19 Mr. Donny Myers, the greatest prosecutor there is in this
20 state and the longest serving, and he withstood. But all of
21 a sudden that testimony gets stolen. You know, he could
22 have had that. And now after sitting in jail a lot of
23 years, it's just kind of unfair to then try to force
24 somebody to testify against themselves after they've already
25 stood up in court, cross-examined and there was a record.

1 And then he was not allowed to use it. I just ask the court
2 to consider those things.

3 And one other thing, there was a comment made during
4 the closing about his not testifying. That is -- you know,
5 that just makes things just so unfair. So it is what it is.
6 The jury has made its decision, and I ask to put it in your
7 good hands and give us a sentence that we can work -- we can
8 live with, also one that will do good for society and
9 mitigation. He's already served a lot of time.

10 THE COURT: Do any of the other attorneys have anything
11 you want to add to that?

12 MR. ASHMORE: Your Honor, if I may very briefly?

13 THE COURT: Yes, sir.

14 MR. ASHMORE: Good afternoon, Your Honor. Beattie
15 Ashmore. First, let me apologize for the scheduling snafu.
16 I was in federal court this morning. Apologies to Solicitor
17 Myers and all these fine officers for being here today.
18 But, Your Honor, I know you've seen the pre sentence
19 investigation report. It reflects, Your Honor, two prior
20 convictions of DUI, simple possession of marijuana, so he
21 really doesn't have any prior convictions to speak of, Your
22 Honor. He's 56 years old. I have been involved in this
23 case for almost five years because of federal intervention
24 at the onset. And I'm here to tell you, Judge, I have seen
25 a decline in Mr. Worley over the last five years. This has

1 impacted him greatly, as it would most people being
2 incarcerated, but particularly with regard to Mr. Worley,
3 Your Honor. He is not the man he once was. Jail has had a
4 very negative impact on him physically, emotionally,
5 mentally, Your Honor. And I would ask you to take that into
6 consideration. And we're here, Your Honor, simply asking
7 for justice as Mr. Garrett has outlined. And you've got a
8 ton of discretion here today. We understand that. And would
9 ask you to impose what you feel to be the most reasonable
10 sentence.

11 THE COURT: All right. Mr. Myers?

12 MR. MAYE: May it please the Court, Your Honor. And
13 with all deference to the defense in this case, basically
14 what we've heard is a revisiting of arguments that were
15 rejected by both Judge Keesley during the Castle Doctrine
16 hearing, who resoundingly -- I mean, he absolutely rejected
17 their version of the facts of it, to the extent that he
18 recused himself and he said that he had so judged the facts
19 in this case that he was incapable of continuing acting as
20 the trial judge. The jury has rejected all those arguments
21 and has basically said that that is not an accurate version
22 of the facts in this case.

23 Ultimately, Your Honor, we've got a police officer in
24 this case that served in Iraq who came back here on his
25 first night back and gets shot by Mr. Worley. There's just

1 no way to sugarcoat it in this case, Your Honor. Mr. Worley
2 was a man that wanted to shoot a police officer that night.
3 He had rounds chambered in that weapon that were made for no
4 other purpose than to penetrate body armor. Now, they have
5 proffered what we would maintain, and we would maintain the
6 jury agreed with us, is an absolutely audacious and
7 preposterous version of the facts that somehow he was an
8 environmentalist, and he put that off on someone else that
9 these bullets were made to reduce the amount of lead as some
10 sort of environmental concern. The record was clear from
11 the officers that testified in this case, and the experts,
12 there's no other reason to possess rounds like this other
13 than to penetrate either a hardened target or body armor.
14 He was trained as a machinist. It would have certainly
15 taken someone with that level of training and sophistication
16 to manufacture those rounds.

17 This is an individual that was not even supposed to
18 possess any firearms under federal law. I mean, it was
19 clear he wasn't supposed to have any firearms at all in this
20 case.

21 THE COURT: Based on?

22 MR. MAYE: Based on his various record.

23 THE COURT: Why was he not supposed to have --

24 MR. MAYE: He had a previous conviction. We are told by
25 the ATF officer that reviewed this, he had a previous

1 conviction in this case for failure to stop for a blue light
2 that under federal law would have prohibited him from
3 possessing any weapons under federal law. We were told that
4 by Shawn Stilo, ATF.

5 THE COURT: That didn't show up in our pre sentence
6 paperwork.

7 MR. MAYE: I don't know that on the State's side it
8 would have, Your Honor. I don't think that they reviewed
9 that. I can go back and review Agent Stilo's notes, but
10 they did say that he was conclusively an individual that was
11 prohibited from possessing any firearm under federal law.
12 So he should not have had a firearm in any regard under
13 federal law.

14 THE COURT: Do you disagree with that, Mr. Garrett?

15 MR. GARRETT: I do, Your Honor. Under the -- as I
16 understood it, under the federal law. I understand that
17 there was a three year sentence imposed on him way back
18 yonder --

19 THE COURT: But he did have a failure to stop for a blue
20 light?

21 MR. GARRETT: He did. He did have a failure to stop for
22 a blue light that carried more than three -- I think carried
23 three years, at the time. But I also want to point out that
24 the bullets themselves were not unlawful under the federal
25 law. And you can always possess a weapon in self defense.

1 There's numerous federal cases on that point, especially out
2 of the California side where somebody can use a weapon to
3 hunt, fish or to defend yourself. And so...

4 THE COURT: Excuse me, Mr. Myers, for interrupting.

5 MR. MAYE: And, Your Honor, I'm going to go back and
6 refresh my recollection, but that was exactly what we were
7 advised by ATF. He was prohibited under federal law from
8 possession a firearm. Your Honor, in this case he's
9 certainly got a right to exercise his right to trial. He
10 has done so in this case. I worked many years, I guess, for
11 Judge Baggett. One of the things that he told me is
12 certainly there is no penalty for exercising your right to
13 trial. But certainly there are considerations for
14 individuals that accept responsibility. In this, Your
15 Honor, like I said, the version of facts that they posited
16 that he was somehow acting in self defense, that this
17 officer was not adequately addressed or dressed as a police
18 officer, that he didn't know it was a police officer, you've
19 got the testimony of all the officers out there, that they
20 beat on the door, they screamed, they yelled, they
21 identified themselves as law enforcement officers.

22 This is a case of just absolute and pure malice. The
23 officers in this case have testified that in response to
24 them identifying themselves as police officers in this case,
25 that he responded directly to that, "I don't give a fuck."

1 And that's the version of the facts that the jury found was
2 true, and that's the version of the facts that Judge Keesley
3 recognized was true in this case as well. At no time did he
4 ever call law enforcement. They try to posit this dream
5 scenario that he believed somehow he was under assault from
6 a burglar. At no time did they ever summon law enforcement
7 out.

8 After he shot Bobby Rushton, and while he was down, he
9 did fire again and try to strike him, but just missed him
10 again. He fired a second time while Bobby was down. He
11 then reloaded these same bullets with the armor piercing tip
12 loaded in them, reloaded that weapon, came outside. We've
13 got testimony from the officers in this case that once he
14 gets outside on the ground he is looking for them and
15 searching for them, "Where are you, you son of a bitch or
16 son of a bitches." That continues on even after the fact
17 that the -- it is clear that he has shot a police officer.
18 The Sheriff of this county goes back out afterwards, after
19 he is gone, and collected up evidence in this case, moved
20 fragments of his shattered gun into his police car,
21 collected his flashlight, put it into the police car there.
22 The Sheriff encounters him there and asks him, "Who shot my
23 deputy." He responds, "I did. He had no business ringing
24 my damn doorbell." He is not talking anything about at that
25 point in time that he believes he has mistakenly shot a

1 police officer because he thought he was a burglar. His
2 response was, "He had no business ringing my damn doorbell."
3 All of this talk about him believing it was a burglar, that
4 these rounds were done for some environmental purpose, we
5 just maintain are just generating what was an audacious
6 version of the facts in this case to try to mitigate the
7 truth that the jury has accepted in this case is that he
8 knew he was a police officer, he was adequately identified
9 as a police officer, and this individual intentionally shot
10 him with rounds that had no other legitimate purpose other
11 than to defeat body armor. I don't know what was in his
12 mind or what would possess someone to manufacture weapons
13 like that or rounds like that. They have no legitimate
14 sporting purpose. They have no other -- there's no other
15 explanation why anybody would make those. And we would
16 maintain certainly that's what the jury has accepted as fact
17 in this case. They say that he has been well suited for
18 jail. And we would certainly maintain that he's not well
19 suited to be out on the street. He's got a continuing
20 pattern of bad behavior. It is certainly a tragedy for
21 Bobby Rushton. His life has forever been changed. I know
22 that he has passed up previously a statement involving the
23 impact to his life in this case. He survives all of that to
24 come back here and be shot at the hands of Mr. Worley. It's
25 just the ultimate tragedy. Here's an individual that was

1 utterly devoted to being a police officer. He can't carry
2 that out. He's lost a finger off that hand. It's a miracle
3 that he wasn't killed out there that night. And we just
4 believe that it was ongoing pattern of animus that night
5 that manifested itself over and over again. We would
6 certainly ask that you hand down a sentence with your wisdom
7 and discretion that addresses the gravity of this case and
8 the version of the fact that the jury has stated as fact in
9 this case.

10 THE COURT: Mr. Rushton, do you wish to add anything,
11 say anything further on the matter, or do you want to refer
12 to your written statement?

13 MR. RUSHTON: I'll just let my written statement stand.

14 THE COURT: Okay. I will make that a court exhibit.

15 MR. MAYE: Your Honor, I did receive some information
16 from the Sheffields in this case, the complaining victims to
17 begin with.

18 THE COURT: Right.

19 MR. MAYE: They are also here today. They're very
20 concerned. They would ask that anything that you perhaps
21 would sentence. He's not a property owner out there. They
22 don't want to be around him in any regard. And if -- with
23 this being a violent crime, if he was to come out on
24 community supervision or something afterwards, they have
25 asked that he have absolutely no contact with them. They

1 are very much afraid of him. They have testified against
2 him in this case. We would certainly maintain that they are
3 the complaining victims in this case initially. As the
4 result of their complaints to law enforcement about him
5 being out there and being drunk and disorderly and
6 indiscriminately firing his weapon, Officer Rushton
7 responded to the case, and he ultimately became a victim at
8 that point in time. We would like for you to address that
9 as well.

10 THE COURT: I'll be glad to hear from the Sheffield's as
11 well if they want to add. I have your testimony. I've read
12 back through it and my notes.

13 MR. SHEFFIELD: The testimony has everything. I have
14 nothing else to say. I discussed what he just said to you.

15 THE COURT: I just wanted to give you an opportunity.

16 MR. SHEFFIELD: Thank you.

17 MR. MAYE: Thank you, Your Honor.

18 THE COURT: Anything further from either side?

19 MR. GARRETT: Your Honor, I'll just point out, you know,
20 for any sentence Mr. Worley will be happy to stay out of
21 McCormick County period. So he has no reason to ever, ever
22 have any contact with them period. I don't think you'll see
23 Mr. Worley back regardless of what happens in the end.

24 THE COURT: Let me tell you. I read back through my
25 notes. I read back through my law clerk's notes and the pre

1 sentence investigation. And there was something that struck
2 me as odd that somebody like Mr. Worley, who really
3 ostensibly didn't have much of any kind of a record that
4 gave me much pause or concern, would act in such the manner
5 that he did. But the testimony was clear that you did act
6 in that manner. And I know that you are saying that -- or
7 your attorneys would raise the issue that it was somebody
8 that he believed to be breaking into your home. But that
9 you had been out shooting a fox. I found that not plausible
10 at all. I found that those -- changing those bullets, and I
11 looked at them. I shoot and I hunt. And I just didn't
12 believe that they were anything other than for piercing
13 abilities. The thing that kind of stands out to me about
14 this case is that for you to have been so quick on the shot.
15 Seems to me that you had designed to carry out what you did.
16 And that for you to cut off -- cut on the light, cut off and
17 for you to be able to shoot that officer as quickly as you
18 had that your gun had to be aimed and ready and cocked, in
19 my opinion. Further, under any testimony in this case, that
20 I recall the fact that you were so quick to shoot, whether
21 it was an officer or not, can't be supported, in my
22 judgment. I think that you were probably a menace to the
23 neighborhood certainly had a huge impact on this gentlemen's
24 life. You have four fine attorneys. They can't do anything
25 other than what the facts are. But it's my job to sentence

1 you in this case. And I'm going to sentence you under the
2 2010-49 possession of a weapon during the commission of a
3 violent crime to five years. On the assault and battery with
4 intent to kill will be twenty years. They will be
5 concurrent. Good luck to you. There will be no contact
6 with the victims

7 MR. GARRETT: Your Honor, may we renew all of our prior
8 motions?

9 THE COURT: You absolutely should and you may. I think
10 you're probably protected on the record. But just if you
11 want to, I'll deny those motions. If you want to go ahead
12 and articulate them now that will be fine.

13 MR. GARRETT: I won't need to, Your Honor.

14 THE COURT: Okay.

15 MR. GARRETT: They are previously stated. What I also,
16 Your Honor, for time served, I'd --

17 THE COURT: I have written out it's November 15, 2009.

18 MR. GARRETT: Yes, sir.

19 THE COURT: According to my notes. Gentlemen,
20 attorneys, y'all did a fine presentation. I appreciate it.

21 (END OF REQUESTED TRANSCRIPT OF RECORD)

22

23

24

25

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM McCORMICK COUNTY

Honorable William P. Keesley, Circuit Judge, 11th Judicial Circuit
Case No. J-036561, J-036562, J-036563, J-036564, J-036565, J-036566

Joe Ross Worley,

Appellant

v.

State of South Carolina,

Respondent.

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STATEMENT OF ISSUES ON APPEAL

- I. BECAUSE AN AGENT OF THE STATE FAILED TO PRESERVE EVIDENCE OF CRITICAL TESTIMONY FROM THE HEARING REGARDING IMMUNITY, DOES APPELLATE COURT LACK SUFFICIENT RECORD TO CONDUCT MEANINGFUL APPELLATE REVIEW?

- II. DOES PROPER APPLICATION OF THE ACT DURING A PRE-TRIAL HEARING REQUIRE DEFENDANT TO PRESENT EVIDENCE OF THE APPLICABILITY OF IMMUNITY, AND THEN PLACE UPON THE STATE THE BURDEN OF SHOWING AN EXCEPTION TO IMMUNITY?

STATEMENT OF THE CASE

This matter is before the South Carolina Court of Appeals (Court) following Appellant Joe Ross Worley's arrest on or about November 9, 2009. Appellant was charged with three (3) counts of Assault and Battery with Intent to Kill and three (3) counts of Possession of Weapon during a Violent Crime arising from his firing of a rifle at an unknown person, later revealed to be a newly re-hired employee of the McCormick County Sheriff's Department. Appellant remains in jail, without trial, during these pre-trial proceedings of almost three (3) years.

Appellant raised as a defense to the charges the immunity from criminal prosecution afforded by the "Protection of Persons and Property Act" at S.C. Code Ann. § 16-11-401 *et seq.* (hereinafter "the Act"). On December 3, 2009, the Honorable William P. Keesley denied pre-trial bond. On February 23, 2010, Judge Keesley again denied bond. Defense counsel moved for an order setting the case for trial, which was denied by order dated August 11, 2010. In the same order, Judge Keesley warned the prosecution that the case must be expedited.

Judge Keesley thereafter held a hearing on the applicability of immunity provided by the Act on May 31, 2011 and June 1, 2011. On July 5, 2011, Judge Keesley issued an Amended¹ Order on Motion to Bar Prosecution, denying Appellant's assertion of immunity. In that order, Judge Keesley recused himself from further proceedings in the action, and again denied Appellant's request for bond.

¹ The initial order was issued on June 24, 2011, but later amended to correct scrivener's errors.



On July 6, 2011, Appellant filed a Motion to Reconsider the denial of immunity, and a separate Motion to Reconsider Denial of Bond. Judge Keesley requested briefs² from both Appellant and the State on the immunity issues. Appellant filed his memorandum in support of reconsideration on August 1, 2011 and the State submitted a return on August 12, 2011. Appellant then filed a reply brief on August 22, 2011. On August 22, 2011, Appellant also filed a Motion to Supplement the Record on Rehearing, seeking to have Judge Keesley supplement the record of the hearing on immunity of an attached exhibit that reflected the State's witness Mr. Rushton was not certified as a law enforcement officer at the time of the events in question leading to arrest of Appellant.

Judge Keesley denied the motion to supplement by order dated February 22, 2012. Upon receipt of that order, Appellant realized the exhibit that was submitted in conjunction with the motion to supplement was already part of the hearing record, having been introduced at the hearing, and the actual exhibit intended to be the subject of the motion to supplement had not been presented to Judge Keesley for consideration. Accordingly, Appellant filed a Motion *Nunc Pro Tunc* to Supplement the Record on February 23, 2012. At the time of this initial brief, that motion remains pending before Judge Keesley.

Judge Keesley issued an Amended Order on Reconsideration of the Defendant's Motion to Bar Prosecution that was signed December 6, 2011 and filed December 8, 2011. Appellant timely filed a notice of appeal on January 20, 2012. Appellant subsequently filed two motions for extension of time in which to file the initial Appellant's brief.

² On October 10, 2011, counsel for Appellant provided Judge Keesley with a partial transcript of the proceedings (see discussion in Statement of the Facts *infra*) held before him on May 31 and June 1, 2011, on the immunity issue.

STATEMENT OF FACTS

In the early hours of November 15, 2009, Appellant fired a rifle to shoot an adult male who was pointing a gun at him as he stood on his second floor porch. The shot injured Robert Rushton, who was pointing a gun at Appellant³. Rushton was there with two officers (Nick Moore and Sara McAllister⁴) of the McCormick County Sheriff's Department investigating a report of shots being fired earlier that night. (Tr. p. 33, lines 1 – 11). A hearing on the applicability of immunity provided by the "Protection of Persons and Property Act" at S.C. Code Ann. § 16-11-401 *et seq.* was held on May 31, 2011 and June 1, 2011. Unfortunately, only enough information to compile a partial transcript of this hearing survived a theft from the court reporter's records before a complete written transcript could be completed. (Tr. p. 159, lines 15-17; Tr. p. 231). Regrettably, Appellant's testimony is among the missing portions of the transcript.

At that immunity hearing, a neighbor testified that Appellant's family cat, Sweat Pea, was known to have been injured and that there were foxes in the area. (Tr. p. 152, l. 20 – p. 153, l. 11). Mr. Rushton testified he would not be surprised if Appellant had fired at a fox as Appellant contends. (Tr. p. 41, lines 21 – 23; Tr. p. 93, lines 2-3). Neighbors further testified that they often heard gunshots in the area, although some when Appellant was not at home, and had relayed their objections to the noise to Appellant's mother. (Tr. p. 148, lines 22 – 24; Tr. p. 149, lines 15 – 21). There is no evidence a prior noise report was ever communicated to Appellant by law enforcement. (Tr. p. 86, lines 6 – 9). On

³ The property was owned by Appellant's mother, with whom he resided.

⁴ Entered into evidence was a document detailing the termination of Deputy McAllister from her prior employment with the SC Dept. of Natural Resources. (Defense exhibit 6 from immunity hearing). She was fired because DNR discovered that she had participated in the destruction and concealment of critical evidence in a fatal accident investigation, only to then lie on three separate occasions about her actions during questioning by DNR officials. (Tr. p. 191, lines 8 – 14).

the night in question, the neighbors contacted police regarding shots fired in the area. (Defense Exhibit 4 from hearing).

The neighbors did not advise Appellant they had contacted police, so Appellant had no notice that anyone would be arriving at his home. Testimony conflicted regarding the exact time of the shots heard by the neighbors, with the latest time estimated by a neighbor to be 3:30 a.m. (Statement by Gayle Sheffield dated 11/15/09). Dispatch notified Mr. Rushton of the call sometime after 4:00 a.m. (Tr. p. 30, lines 9 – 11). Appellant shot Mr. Rushton sometime after approximately 4:30 a.m. (Tr. p. 64, line 5).

Appellant testified that by the time of their arrival, he was sound asleep in his bed. (Tr. p. 225, line 9). The neighbors who contacted police were expecting police presence and had their windows open. (Tr. p. 153, lines 20-21). Appellant was located upstairs, inside of a dwelling that he testified was well insulated. (Tr. p. 213, lines 8-9).

Rushton admitted that he believed a deer poacher was active in the area and was responsible for the prior shots. (Tr. p. 35, lines 6 – 8, Tr. p. 36, lines 2 – 5, Tr. p. 41, lines 14 - 15). Rushton did not have on a uniform; instead he was wearing merely khaki pants, a green shirt, and a small badge on his belt. (Tr. p. 21, line 13 – p. 22, line 14). He was not wearing McCormick County's standard deputy uniform, any reflective items such as a vest, or any hat identifying him as law enforcement, even though Rushton had a vest and hat he could have worn. (Tr. p. 22, lines 15 – 23; Tr. p. 25, lines 5 – 9; Tr. p. 24, lines 4 - 8).

Rushton, Moore, and McAllister did not telephone, or have dispatch call, the house in which Appellant was asleep to alert the residents of their impending arrival. (Tr. p. 87, lines 10-22). All arrived without sirens and blue lights in operation; in other

words, they arrived silently. Rushton and Moore approached the house, under a covered porch, knocked on the door, and rang the doorbell. The ground level door that was knocked upon, which was where the doorbell was located and is the only entrance to the house, had no peephole or other means to examine the identity or appearance of the person(s) on the other side. (Tr. p. 213, lines 10-18). There were no windows on the ground level, and no police cars could be seen from the upstairs windows. Id. Rushton's car, without blue lights or siren on, was parked on the other side of the house, out of Appellant's line of sight. (Tr. p. 92, lines 11-12; Tr. p. 213, lines 12-14). Moore's car and McAllister's car weren't parked on Appellant's property, and likewise did not have sirens or lights activated. (Tr. p. 197, lines 24 – p. 198, line 8).

Appellant testified that he had heard media reports of home invasions having occurred in the rural area, his mother's home had been burglarized at least once before successfully, and attempted burglaries had occurred on multiple occasions. (Tr. p. 212, line 23 – p. 213, line 3). Appellant also presented evidence that the night in question was the darkest night of the month. (Tr. p. 125, lines 5-7; Moon calendar submitted as portion of exhibit notebook by Defendant; Amended Order on Motion To Bar Prosecution, p. 3).

Appellant testified that he did not see anyone and only saw total darkness outside. (Tr. p. 213, lines 10-12). Moore and McAllister testified that they saw the light come on initially as they were at the rear of Appellant's house getting ready to leave. (Tr. p. 162, lines 10 – 18.). Every witness is consistent in acknowledging the light was not on continuously. Moore testified that he never had a clear look at Appellant, only seeing his silhouette. (Tr. p. 164, lines 18 – 24). McAllister said she never even saw Appellant. (Tr. p. 196, lines 18 – 21).

The shooting occurred immediately after Appellant stepped onto his balcony, with his weapon in the port position, not aimed at anyone. The State contends there was a verbal exchange prior to that shot wherein Appellant supposedly asked who was at his home, received a response that it was law enforcement, and replied with a statement of non-concern including profanity. (State's Exhibit 2 from immunity hearing).

Deputy Moore's claims a call of "Sherriff's office" and "gun!" were made, after which Appellant immediately fired at Rushton. (State's Exhibit 2 from immunity hearing). It is undisputed that the shooting happened almost immediately after Appellant's entrance onto the balcony, and not after a contemplative, observation of and conversation between those involved. (Tr. p. 45, lines 25 – p. 46, line 9). Rushton testified that "it just happened so fast right then." (Tr. p. 46, lines 22 – 23.)

Evidence of the angle of trajectory and damage to Rushton's weapon and hand confirm that his weapon was aimed at Appellant when Rushton was struck by Appellant's fired bullet. (Tr. p. 66, lines 6 – 10; Amended Order on Motion To Bar Prosecution). Rushton's testimony confirms that he aimed his weapon at Appellant, despite no menacing, threatening, or illegal action having been taken by Appellant, merely by being in possession of a weapon of self-defense. (Tr. p. 46, lines 18 – p. 47, line 1; Tr. p. 47, lines 22 – 23; Tr. p. 54, lines 10 – 14; Tr. p. 63, lines 1 – 7).

Ruston testified the shot knocked him to the ground. (Tr. p. 52, line 2). Although armed with a semi-automatic rifle at the time and therefore capable of doing so, there is no evidence that Appellant sought to hunt down or further injure the person he had just shot. The notion that Appellant would not have shot Rushton if he had known Rushton was there on behalf of the police is not controverted with any evidence as to motive,

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substantial prior criminal history, or evidence of ill will towards law enforcement generally. (Tr. p. 34, lines 4 – 8; Tr. p. 204, lines 6 – 8; Tr. p. 136, lines 25 – p. 137, line 8; Tr. p. 126, lines 15 – 19).

Appellant's expert, Dr. George Kirkham, examined the premises at night and reviewed the actions of Rushton, Moore, and McAllister before testifying that the trio failed to follow proper police procedures in many respects, so much so that "if you were making a training video for officers" the actions of these actors could be used to train for what not to do in such a situation. (Tr. p. 137, lines 24 – p. 138, line 3). Dr. Kirkham further stated "what seems to be clear that could have prevented this tragedy from happening[:] proper police procedure. That's all." (Tr. p. 142, lines 8 – 10).

At the hearing and subsequently upon reconsideration, the issue of whether Rushton was a duly authorized deputy was disputed. Rushton's own testimony was that he never took any oath of office, and that his appointment was never approved by any circuit court judge. (Tr. p. 9, lines 21 – p. 10, line 6). When the State produced an oath form signed by Rushton, Ruston testified only that his signature was on the document, not that he had taken the oath. (Tr. p. 109, lines 2 - 3).

STANDARD OF REVIEW

The Supreme Court, in its one opinion directly applying the “Protection of Persons and Property Act” at S.C. Code Ann. § 16-11-401 *et seq.* (hereinafter “the Act”) and the procedure to be implemented in the application thereof, both at the trial court and upon appeal, was silent as to the appropriate standard of review that should be applied by appellate courts considering initial trial court determinations of immunity. State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011).

The Circuit Court is a general trial court with original jurisdiction in civil and criminal cases. Article V, § 11. The immunity provided by the Act of course only arises in criminal proceedings. Nevertheless, it is civil in implementation, relying on the civil standard of “preponderance of evidence” and civil in the nature of its relief, as it acts not only to bar to conviction, but a complete bar to a wider range of acts constituting “prosecution” generally. See Duncan, at 409, 664 (“the legislature intended to create a true immunity, and not simply an affirmative defense”).

Because the issue of immunity was tried by a judge alone and is equitable in nature, Appellant contends any appellate court considering the judgment should use a standard of review appropriate for equitable actions tried in such a manner. Therefore, the underlying facts in this matter would be reviewed with the ability to find facts in accordance with this Court’s own view of the preponderance of the evidence. See Townes Associates, Ltd. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976).

ARGUMENT

- I. BECAUSE AN AGENT OF THE STATE FAILED TO PRESERVE EVIDENCE OF CRITICAL TESTIMONY FROM THE HEARING REGARDING IMMUNITY, DOES APPELLATE COURT LACK SUFFICIENT RECORD TO CONDUCT MEANINGFUL APPELLATE REVIEW?

Rule 607, SCACR details the requirements for a state-employed court reporter regarding transcripts and tapes of proceedings in circuit court. State-employed reporters are required to maintain both primary and backup tapes of a proceeding for a full five years after the proceeding. Id. The SC Court Reporter Manual, issued pursuant to order of the State Supreme Court, establishes the standards of conduct of all state-employed court reporters in the South Carolina judicial system. It states that a court reporter “is responsible for obtaining a clear, complete, and understandable record of the court proceedings” and that reporter materials “should be kept in a secure and safe manner.” Id., p. 14, 17.

Nevertheless, the state-employed court reporter that was tasked with creating a transcript of the immunity hearing proceedings held on May 31, 2011 and June 1, 2011 before Judge Keesley has not produced a complete transcript of those proceedings. (Court Reporter Certification, Tr. p. 231). Importantly, Appellant bears absolutely no responsibility for this failure. Fortunately, missing transcripts and incomplete records, and the need and nature of correction thereof, have been addressed previously by courts in South Carolina.

Where portions of stenographic notes are lost prior to transcription, it is appropriate for the judge to accept affidavits of counsel and the court reporter to determine what transpired. Adams v. H.R. Allen, Inc., 397 S.C. 652, 656-57, 726 S.E.2d 9, 12 (Ct. App. 2012) (citing China v. Parrott, 251 S.C. 329, 333-34, 162 S.E.2d 276, 278

(1968)). "A new trial is therefore appropriate if the appellant establishes that the incomplete nature of the transcript prevents the appellate court from conducting a meaningful appellate review." Id.

Unfortunately, the portions of the immunity hearing transcript that are missing are not limited to mere ancillary matters of record. Rather, the portions missing are of grave and critical importance, including the testimony of the accused himself. Appellant provided that testimony at great risk and jeopardy, requiring first a waiver of his Fifth Amendment right to remain silent, subjecting himself to intense cross-examination by the State well before ultimate trial on the pending charges themselves before a jury of his peers. The critical issues in this matter are determinations of the reasonableness of Appellant's actions on the night in question, and Appellant's proffered information regarding his subjective thoughts and impressions, as well as information regarding the premises at which the events unfolded, are critical to a full and fair consideration of the matters, which is why he willingly waived his right to remain silent and submit sworn testimony at the immunity hearing.

The appropriate remedy for the State's failure should be the augmentation of the record on appeal, which Appellant attempted to bring about through a Motion to Supplement the Record. That motion was denied by order of this Court on December 19, 2012. Absent acceptance of that proffered supplementation then, the matter should be remanded to the lower court with direction to evaluate Appellant's proffered reconstructive materials, as well as any others deemed appropriate through which a meaningful and more complete record for review can be created. Only then is this matter appropriate for appellate review. Recent case law, however, indicates partial



reconstructions may be disfavored. See Adams v. H.R. Allen, Inc., 397 S.C. 652, 726 S.E.2d 9 (Ct. App. 2012) (remanding for new trial in light of rejected attempt at partial record reconstruction).

If augmentation of the existing record is ordered instead of complete re-hearing, Appellant should receive an inference in his favor regarding all testimony and evidence that was not initially preserved for review. If a party fails to produce testimony of an available witness on a material issue, it may be inferred that such testimony would have been adverse to him. Nelson v. Coleman Co., 249 S.C. 652, 155 S.E.2d 917 (1967). Likewise, when a party loses or destroys evidence, an inference may be drawn that the destroyed or lost evidence would have been adverse to that party. Gathers By and Through Hutchinson v. South Carolina Elec. and Gas Co., 311 S.C. 81, 427 S.E.2d 687 (Ct. App. 1993). Although Respondent did not directly lose the portion of the transcript, the actor that did was a State actor, and thus the actions of the court reporter should be imputed to the State as Respondent.

II. PROPER APPLICATION OF THE ACT DURING A PRE-TRIAL HEARING REQUIRES APPELLANT TO PRESENT EVIDENCE OF THE APPLICABILITY OF IMMUNITY, AND THEN PLACES BURDEN UPON THE STATE TO PROVE AN EXCEPTION

As noted by the State Supreme Court, the Act “does not explicitly provide a procedure for determining immunity.” State v. Duncan, 392 S.C. 404, 409, 709 S.E.2d 662, 664 (2011). However, the Act does clearly articulate the legislative intent was to codify the common law Castle Doctrine, providing for the ability of law-abiding citizens to protect themselves via their constitutional right to bear arms, and thereby protect their right to “expect to remain unmolested and safe within their homes.” S.C. Code Ann. §

16-11-420. The Act provides definitions for certain terms before the critical portions applicable in this matter appear, beginning with the presumption, which provides:

- (A) 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 the person:
 - (1) ... has unlawfully and forcibly entered a dwelling ...; 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.

S.C. Code Ann. § 16-11-440.

The actual provision providing for immunity under the Act then reads as follows:

- (A) 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, unless the person against whom deadly force was used is a law enforcement officer acting in the performance of his official duties and he identifies himself in accordance with applicable law or the person using deadly force knows or reasonably should have known that the person is a law enforcement officer.

S.C. Code Ann. § 16-11-450(A).

The statute thus begins with the explanation of the legislative intent by citing the expectations of the state's citizens, and buttresses that starting point by granting an express presumption in their favor if certain criteria are met. Then the immunity provision comes, which has a clear organization of general grant of immunity, then listing of possible exceptions. The State argues the applicability of an exception to that presumption and immunity, but for purposes of the discussion of the statute and its application to Appellant, proper analysis by the lower court necessarily begins with Appellant seeking to establish applicability of the general presumption and immunity.



The burden of producing evidence shifts from side to side as the proceedings progress. Am. Jur. 2d, Evidence § 123. Generally accepted principles of burden of persuasion and burden of production place upon the party seeking relief, and who are in possession of the means by which an affirmative showing can be made, with the obligation to present evidence. Stanley Smith & Sons v. D.M.R. Inc., 307 S.C. 413, 415 S.E.2d 428 (Ct. App. 1992)(“the burden of evidence is imposed on the party best able to sustain it, that is, the party having peculiar knowledge of the facts or control of the evidence relating to an issue).. “Once the party to whose advantage the presumption operates has proven the basic facts giving rise to the presumption, the burden of persuasion shifts to the party against whom the presumption operates.” Alex Sanders & John S. Nichols, Trial Handbook for South Carolina Lawyers § 12:2 at 472 (4th ed. 2007). Appellant thus contends the burden of persuasion, or at minimum the burden of production, should shift to the State to accomplish application of an exception to immunity.

The lower court, however, goes beyond placing the burden on Appellant of entitlement to the immunity itself, and also places the additional obligation on Appellant of disproving any possible exception. Appellant contends placing that second, additional burden on Appellant beyond mere entitlement to immunity is an error of law necessitating a reversal and remand by the Court of Appeals.

A. Appellant established applicability of the presumption and immunity.

Appellant contends that he has presented evidence that demands application of the statutory presumption and immunity pursuant to the Act, and any factual findings to the contrary would be unsupported by the evidence, clearly wrong, or controlled by error of



law and thus justify reversal and remand. See State v. Williams, 326 S.C. 130, 135, 485 S.E.2d 99, 102 (1997)

The lower court erred as a matter of law by determining Appellant failed to prove entry or attempt at entry into Appellant's dwelling. S.C. Code Ann. § 16-11-420(A) is clear in its intent to absorb and continue the wealth of common law related to the Castle Doctrine. Section 16-11-430 thereafter defines "dwelling." It is undisputed that the home where Appellant was staying that night qualifies as his dwelling and his residence. Given that presence in his dwelling, deep-rooted case law extends the area for qualified defensive action to include Appellant's curtilage, an important aspect of South Carolina jurisprudence continued by express incorporation of the statute. See State v. Sampson, 12 S.C. 567 (1880)(an outhouse can be part of a dwelling if connected under the same roof); State v. Osborne, 21 S.E.2d 178, 182, 200 S.C. 504, (1942)("may repel trespassers in or upon the house...as if he were under his own roof or within his own doors.")..

Rushton had "entered" the dwelling, given his location under the roof and eaves of the house, the very type of place "where the property owner alone has the right to be; to the exclusion of the general public." State v. Dickey, 669 S.E.2d 917, 923, 380 S.C. 384, 396 (Ct. App. 2008)(*cert. granted*). In Duncan, the "victim" was only on the porch of the shooter's residence, which was determined to have been within the scope of the Act's definition of dwelling. 392 S.C. at 407, 709 S.E.2d at 663.

The entrance of Rushton was unlawful because he was not a law enforcement officer, as discussed in detail *infra*, and thus could not have been acting within the proper scope of his duties of employment as a "deputy" while on Appellant's premises that evening. As such, he had no right to be on the premises, and was a trespasser. Moreover,

it is clear that Rushton aimed his weapon at Appellant before Rushton was shot. (Tr. p. 66, lines 6 – 10; Amended Order on Motion To Bar Prosecution).

B. The State must respond to Appellant's showing of entitlement to the statutory presumption and immunity by meeting its burden of production to show an exception to immunity.

S.C. Code Ann. § 16-11-450(A) provides an exception to the statutory immunity. The criteria for the exception requires that the person against whom the deadly force was used was a law enforcement officer, that person was acting in the performance of his official duties, and either he identifies himself in accordance with applicable law, or the person using deadly force knows or should have known that the person was a law enforcement officer.

1. The State cannot even meet the first criteria for the exception, as Rushton was not a "law enforcement officer" at the time of the incident.

"Law enforcement officer" is not defined by the Act. Rushton was hired by the county sheriff to be a "deputy," which is defined apart from the Act in other statutory and constitutional provisions. No one becomes a qualified, recognized deputy sheriff without taking certain actions required by law. First, Article III, Section 26 of the State Constitution requires an oath be taken. Next, S.C. Code Ann. § 23-13-10 requires an appointment and approval process be completed, and S.C. Code Ann. § 23-13-20 contains an additional statutory oath that must be completed. The two (2) oaths have to be filed with the County Clerk of Court. No case law or statutory provision creates an "almost deputy" office that can be held. Therefore, as a matter of law, one is either a



deputy or not. Since Rushton is not, he has no other claim to assume the title of "law enforcement officer" within the meaning of the Act.⁵

The lower court's opinion as written and applied to Appellant, however, expressly invalidates both of the referenced statutory provisions. Appellant submits that all such portions of the Order compelling or evidencing that conclusion and result are errors of law. That error is exploited by the State to qualify Rushton as a deputy, and thereby avail itself of an exception under the Castle Doctrine that it otherwise would not qualify for given the absence of involvement of a "law enforcement officer."

- (a) Interpreted properly, statutorily mandated judicial approval of deputy appointments does not violate the separation of powers.

S.C. Code Ann § 23-13-10 sets out a requirement that the sheriff's appointed deputy "be approved" by a circuit court judge. He made this legal determination, apparently, so as to minimize the failure of the State to satisfy its burden of proving that Rushton was properly deputized. The lower court deems this a violation of the separation of powers, to the extent "it provides for judicial approval of executive branch appointments." (Amended Order on Motion To Bar Prosecution, p. 9). Prior review of the same statutory requirement by the Supreme Court, however, raised no such issues. See Willis v. Aiken County, 26 S.E.2d 313, 315, 203 S.C. 96 (1943) (rejecting argument that deputy was not a separate officer from the Sheriff, and referencing the manner in which deputies were appointed *and* approved). Mere interaction or participation by elements from multiple branches of government is not the equivalent of merger and loss

⁵ Although not made as an argument by the State, Rushton could cite mere employment with the sheriff's department as sufficient to qualify him as a "law enforcement officer" but such a claim would stretch the meaning of that phrase past its logical limits. Otherwise, any janitor employed by a department would carry the same "officer" title with all the rights, privileges and obligations that go along with it.

of separation as the presiding judge gratuitously determined in what appears to be a ruling to lessen the impact of the State's absence of proof on this issue.

As the order cites, statutes are to be construed first upon their plain meaning if unambiguous, as this statute in question is certainly. Carolina Power & Light Co. v. City of Bennettsville, 314 S.C. 137, 139, 442 S.E.2d 177, 179 (1994). However, when judging the constitutionality of a given statute, the courts should if possible

construe[] [the statute] so as to render it valid; every presumption will be made in favor of the constitutionality of a legislative enactment; and a statute will be declared unconstitutional only when its invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution.

City of Rock Hill v. Harris, 391 S.C. 149, 154, 705 S.E.2d 53 (2011)(citing Moseley v. Welch, 209 S.C. 19, 26-27, 39 S.E.2d 133, 137 (1946)).

Instead, the lower court makes a narrow and most extreme interpretation of the term "approved" and imbues the circuit court judge with the power of veto and rejection of the sheriff's employment decisions.

With an eye toward meeting the obligation to construe it in any way so as to render it effective, however, the "approved" language in S.C. Code Ann § 23-13-10 could, and therefore should, be read to merely require the involvement of the circuit court judge to verify the appointment and completion of the necessary oaths/other actions. In essence, such a reading would merely create judicial certification of compliance with a mandatory process, something judges do every day and in many different ways. This very case involves judicial determination of an executive's compliance with statutory law, and no more implicates the separation of powers than when a notary, and executive branch officer, participates by necessity of law in the completion of any number of judicial activities (completion of affidavits, etc.).

Having thus shown that the statutory provision is capable of interpretation so as to render it valid, the statute remains valid, and the consequences for failure to comply must be addressed by the Court in its opinion. Rushton's own testimony was that he never took any oath, and that his appointment was never approved by any circuit court judge. No evidence to the contrary was presented, and thus the only rational conclusion based on the evidence presented was that Rushton had not been approved as required by statute.

As a matter of law, therefore, the State failed to establish that Rushton met the prerequisites to be a "deputy." By extension, the State failed to prove that Rushton was a "law enforcement officer" for purposes of the immunity exception contained within the Act. Even when the State produced an oath form signed by Rushton, Rushton testified only that his signature was on the document. (Tr. p. 109, lines 2 - 3). Rushton did not testify⁶ he took the oath. (Tr. p. 12, lines 2 - 8, Tr. p. 9, lines 21 - p. 10, line 6).

(b) Statutory oath requirement is a distinct and mandatory prerequisite that Rushton failed to satisfy.

The "right, authority, and duty of a deputy sheriff are thus created by statute." Willis v. Aiken County, 26 S.E.2d 313, 316, 203 S.C. 96 (1943). The Supreme Court in that matter was addressing specifically the same requirements now codified in S.C. Code Ann § 23-13-10, which establishes a separate requirement of the taking of an oath by a deputy "before entering upon the discharge of his duty." The statute expressly mentions the Constitutional Oath of Article III, and sets forth an additional oath that must be completed as set forth verbatim. Clearly the legislature's intent was to add a distinct,

⁶ The order references the Constitutional oath, and states that Appellant produced no evidence it was not forwarded to the Secretary of State, as the form indicated it would be. This is an example of the improper placement of burden of production discussed in section III supra, as it was the State's responsibility to prove compliance with all necessary aspects of Rushton's deputization, not Appellant's burden to produce evidence of non-compliance.

mandatory oath *above and beyond* the constitutionally mandated oath, which the Supreme Court in Willis accepted as a given without discussion or rejection. Again, the evidence presented was that Rushton did not recall taking any oaths upon his employment with the County, and Rushton never testified that he took the oath that he signed, which does not comply with the language required by § 23-13-10.

The Court characterizes Appellant's interpretation of the statute as "strict, technical evaluations." (Amended Order on Motion to Bar Prosecution, P. 13). The statute does not require any complex or "technical" actions. It merely, and in plain language, puts recitation of a particular oath as a barrier to qualification as a deputy, a barrier Rushton and the State cannot surmount. Appellant has only made simple demands for compliance with a simple statute. Surely mere compliance with controlling plain language of a statute cannot be devalued and dismissed as a "strict" interpretation.

Treatment of this statutory oath requirement as just "supplemental" to the Constitutional requirement is at its essence a mere a refusal to enforce the clear, mandatory intent of the legislature. It can be fairly characterized as "additional" or "supplemental" to the Constitutional oath, but neither characterization diminishes or excuses failure to comply with its mandatory nature. That result could not have been intended by the legislature, who went through the trouble of crafting the statute to place the requirement, despite acknowledging the existence of a similar oath requirement already.

The legislature's requirement is a minimal barrier to deputization, but any barriers that the legislature deems fit to impose expressly are intended because of the significant

meaning and consequence created once that process is completed. That significance is destroyed by the lower court's nullification of the mandatory nature of the statute.

In the process of nullifying that provision of the State Code, the lower court's conclusion operates to delete the word "officer" from § 16-11-440 and 450. Once the barrier to becoming an officer is removed, the castle doctrine statute would then provide an exception for any member of "law enforcement," not just officers thereof. Under that standard, mere labeling of any county employee as a "deputy," regardless of demonstrated noncompliance with the requirements set forth in § 23-13-10 or 20, is enough to grant that employee the full protections expressly reserved for "law enforcement officers." Surely that result would be the sort of "plainly absurd" result that courts are to avoid when interpreting statutes. City of Rock Hill v. Harris, 391 S.C. 149, 154, 705 S.E.2d 53, 55 (2011) (citing Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)).

- (c) Rushton's certification as a Class I law enforcement officer had lapsed, and necessary training to recertify was not completed prior to the events in question.

Rushton left his employment with the McCormick County Sheriff's Department and spent four years working abroad between 2005 and 2009. (Tr. p. 7, lines 21 – p. 8, line 4). He testified upon cross examination that he "had to catch up all the training hours I had missed for the previous four years." (Tr. p. 9, lines 11 – 12). He claimed to have taken a criminal domestic violence update and legal update. (Tr. p. 13, lines 16 – 20). No such training, however, is listed on his training record submitted at the hearing.

(Court's Exhibit 1 from hearing). That same document shows he was certified⁷ as a Class I law enforcement officer on June 26, 2010, nearly seven months *after* the night in question. *Id.* The only evidence of training is thus contradicted by a certified document from the Criminal Justice Academy that was entered into the hearing record as an exhibit.

(d) Failure to qualify as a "law enforcement officer" does not bar prosecution, but merely precludes certain exception to immunity.

The Court justifies its determination that failure to comply with the oath requirement of S.C. Code Ann. § 23-13-20 "does not deprive the State of the ability to prosecute here for shooting a deputy." That first assumes qualification as a deputy, which as shown has not been met as a matter of law. Second, that is an oversimplification of the collateral consequences of Rushton's (and the County's) failures. Failure of an exception is not the equivalent of proof that the underlying immunity applies. The failure here does preclude the State from availing itself of the "law enforcement officer" exception under § 16-11-450, but does not by itself bar prosecution. The bar to prosecution, if any, comes as the result of Appellant's separate preliminary showing of entitlement to the necessary presumption and immunity, as set forth hereinabove in Section III.A.

2. The State cannot support a finding that Appellant knew or should have known Rushton was a law enforcement officer at the time of the incident.

Assuming for the purposes of argument that Rushton is determined to be a "law enforcement officer" as a matter of law or factual finding by the presiding judge, the

⁷ The date referenced is a recertification date. Since Rushton had spent more than three years away from the McCormick County Sheriff's Department, his certification had lapsed. See S.C. Code § 23-23-60. The June 26, 2007 date listed is, upon information and belief, the date of that lapse, and is not indicative of continuous certification that was not renewed until 2010.

State would still need to show that Rushton “identifie[d] himself in accordance with applicable law.” S.C. Code Ann. § 16-11-450(A). The State may also make the requisite showing by producing evidence that Appellant knew or should have known Rushton was a law enforcement officer. *Id.* The evidence, however, compels the conclusion that Appellant acted reasonably in ignorance of the fact that Rushton was (purportedly) a law enforcement officer, in part because of Rushton’s failure to follow proper procedures for responding to a “shots fired” dispatch. Any factual finding to the contrary is “clearly wrong” such that the findings may be set aside on appeal. *See State v. Williams*, 326 S.C. 130, 485 S.E.2d 99 (1997)

- (a) The facts, when viewed properly from the perspective of Appellant as compelled by the common law and codification thereof, compel a finding that Appellant was reasonable in his belief that he was not firing upon a law enforcement officer.⁸

Appellant testified that he was aware of home invasions occurring, and that his mother’s home had been burglarized at least once before successfully, and attempted burglaries had occurred on multiple occasions. (Tr. p. 212, line 23 – p. 213, line 3). The Order mentions that Appellant had discharged his firearm in the area that evening, as he was allowed to do lawfully since his mother’s house was in an unincorporated area, not a “neighborhood” as the order claims, and he was protecting his pet from a fox pursuant to S.C. Code § 50-11-2570(B) (right to shoot at furbearing animal damaging property). The Order mentions neighbor complaints to Appellant’s mother about Appellant’s shooting, but absolutely no firm testimony or evidence indicates that Appellant was ever advised of

⁸ Again, as set forth in detail *supra*, Appellant contends that Rushton was not a “law enforcement officer” within the meaning of the Act,

hml

that conversation. (Tr. p. 149, lines 15 – 18). There is no evidence a prior noise report was ever communicated to Appellant by law enforcement. (Tr. p. 86, lines 6 – 9).

Rushton, Moore, and McAllister did not telephone, or have dispatch call, the house in which Appellant was located, and they were not responding to any contact initiated by Appellant. ((Tr. p. 87, lines 10-22). The neighbors that called the police had not contacted Appellant or notified him of police involvement on the night of the shooting or any previous occasion. (Tr. p. 149, lines 15 – 18). As he testified, Appellant was sound asleep in his bed when the disturbance on the property began.⁹ (Tr. p. 225, line 9). He was upstairs, inside of a dwelling that was well insulated. (Tr. p. 213, lines 8 – 9, Amended Order on Motion To Bar Prosecution, p. 3).

The Court's reference to the ability of neighbors to observe and hear various events is irrelevant and misguided. Those neighbors were expecting police presence, as they had in fact initiated police presence, and they had their windows open. (Tr. p. 153, lines 20-21).

The ground level door that was knocked upon, which was where the doorbell was located and is the only entrance to the house, had no peephole or other means to examine the identity or appearance of the person(s) on the other side, which is submitted as a more than appropriate reason for Appellant to not open this door. (Tr. p. 213, lines 10-18). There were no windows on the ground level, and no police cars could be seen from the upstairs windows. Id. Rushton's police car, without blue lights on, was parked on the other side of the house. (Tr. p. 92, lines 11-12; Tr. p. 213, lines 12-14). It was also

⁹ Testimony conflicted regarding the exact time of the shots, although witnesses seemed to agree that there were only two shots fired. Even using a time later than Appellant's own recollection, the 3:30 a.m. time testified to by the neighbor, still puts an hour between the final shot and when Rushton arrived on scene, which was more than ample time for Appellant to reach a deep sleep prior to awakening suddenly.

parked behind an SUV. (Tr. p. 39, lines 16 – 18). Moore's car and McAllister's car weren't parked on Appellant's property, and likewise did not have sirens or lights activated. (Tr. p. 197, lines 24 – p. 198, line 8). Appellant had no obligation to remove and open the only barrier to entry into his home, just to determine the identity of an uninvited, demanding visitor of unknown purpose or identity in the middle of the night. It is unreasonable to require otherwise.

Appellant presented evidence that the night in question was the darkest night of the month, and the Court stated it had no reason to disbelieve that evidence (Amended Order on Motion To Bar Prosecution, p. 3). That raises the issue regarding the use/non-use of a balcony light. Moore and McAllister testified that they saw the light come on initially as they were at the rear of Appellant's house getting ready to leave. (Tr. p. 162, lines 10 – 18.). This clearly explains why Appellant did not see any person in his yard when he first turned on the light and looked out over the yard from within his house.

Every witness is consistent in acknowledging the light was not on continuously. The Court finds that there was a verbal exchange wherein Appellant supposedly asked who was at his home, received a response that it was law enforcement, and replied with a confrontational statement. (Amended Order on Motion To Bar Prosecution, p. 6).

Appellant maintains no such verbal exchange occurred, and there is no evidence to indicate that Appellant was disposed to, or had any reason on the night in question, have reacted in such a cavalier manner to the supposed announced presence of law enforcement, regardless of the time of night. (Tr. p. 46, lines 18 – p. 47, line 1; Tr. p. 47, lines 22 – 23; Tr. p. 54, lines 10 – 14; Tr. p. 63, lines 1 – 7). Thus Appellant's testimony that he would not have shot Rushton if he had known Rushton was there on behalf of the

police, (Amended Order on Motion To Bar Prosecution, p. 3), is uncontroverted and should be accepted by the Court.

Appellant had no death wish, and had no grudge against law enforcement, and thus the only reasonable explanation for why he would turn on the light and step onto his balcony, which also is the actual explanation, is that Appellant had not yet understood or acknowledged the presence of purported law enforcement. The Court acknowledges that Appellant testified about a failure to see any blue lights, or hear sirens, or see that the area was cordoned off, but "his testimony in that regard is not credible." (Amended Order on Motion To Bar Prosecution, p. 4). However, the reason Appellant did not see any blue lights, hear any sirens, or see a cordoned off area is that those actions were *never taken* by anyone, and thus the testimony is not contested in that regard and cannot be found to be no credible.

It is undisputed that the shooting happened almost immediately after Appellant's entrance onto the balcony, and not after a contemplative, observation of and conversation between those involved. (Tr. p. 45, lines 25 – p. 46, line 9). Rushton testified that "it just happened so fast right then." (Tr. p. 46, lines 22 – 23.) Deputy Moore's statement to the ATF was that this action was supposedly met with a call of "Sherriff's office" and "gun!" after which Appellant immediately fired at Rushton. (R. ____). Even without agreement with Moore's statement, it is undisputed that the shooting happened within a very brief after Appellant's entrance onto the balcony, and not after a contemplative, observation of and conversation with or dialogue with any particular person. Accordingly, there is no evidence to support the contention that even had those statements been made, that there was sufficient time to process the information prior to Appellant's shot.

- (b) Appellant provided expert testimony regarding the procedural and technical failures of Rushton, Moore, and McAllister that further justify a necessary finding of reasonableness on the part of Appellant.

The lower court ignores the significant and relevant testimony of Appellant's expert, Dr. George Kirkham. Dr. Kirkham, a member of law enforcement himself, examined the premises at night and reviewed the actions of Rushton, Moore, and McAllister on site that morning. (Tr. p. 114, lines 23 – 24). He testified that the trio failed to follow proper police procedures in many respects, so much so that “if you were making a training video for officers” the actions of these actors could be used to train for what not to do in such a situation. (Tr. p. 137, lines 24 – p. 138, line 3). Dr. Kirkham further stated “what seems to be clear that could have prevented this tragedy from happening[:] proper police procedure. That’s all.” (Tr. p. 142, lines 8 – 10).

- (c) Rushton was not in uniform or appearance a law enforcement officer.

The Order states that Rushton did not have on a military style uniform, “but had his badge displayed.” (Amended Order on Motion To Bar Prosecution, p. 6). There is neither evidence nor any indication how the clothing worn by Rushton differed from the stereotypical outfit a burglar might employ, aside from the small badge on a belt. Rushton did not have on a uniform; instead he was wearing merely khaki pants, a green shirt, and a small badge on his belt. (Tr. p. 21, line 13 – p. 22, line 14). He was not wearing McCormick County’s standard deputy uniform, any reflective items such as a vest, or any hat identifying him as law enforcement, even though Rushton had a vest and hat he could have worn. (Tr. p. 22, lines 15 – 23; Tr. p. 25, lines 5 – 9; Tr. p. 24, lines 4 – 8). Appellant testified that he did not see the badge anyway, which is highly likely and

understandable given Rushton's first appearance to Appellant involved a gun aimed at Appellant on a dark night.¹⁰

Appellant's actions after shooting Rushton support this belief, and actions in conformity therewith up until that point, that he was protecting himself within his castle and not mistakenly shooting a purported member of law enforcement. There is absolutely no evidence that Appellant maliciously sought to hunt down or further injure the person he had just shot. Ruston testified the shot knocked him to the ground. (Tr. p. 52, line 2). Appellant was armed with a semi-automatic rifle that contained additional unspent ammunition, including a round in the chamber. (State's Exhibit 2 at immunity hearing, p. 3 (Statement of Moore)). Appellant could have easily fired multiple shots at Rushton if he had intended to be as evil as portrayed by the State.

Instead, Appellant fired a warning shot into the air over Ruston's head. Then, consistent with someone protecting himself and not intent upon attacking known law enforcement, Appellant remained within the protection of the home for a short time, then searched the premises and even helpfully placed Mr. Rushton's damaged pistol inside the patrol car before meeting with the Sheriff who arrived on scene later. (State's Exhibit 2, p. 11 (Sheriff Reid's statement)).

The Order repeats Appellant's statement as "Where are you, you son of a b____?" (Amended Order on Motion To Bar Prosecution, p. 7). Although not clear from the order, it is important that the statement be clarified as definitively referring to a single person, as Appellant contends he was only aware of a single, un-uniformed person on his premises that evening, and not the trio that the State wants to focus on. Moore

¹⁰ As the Court notes in its order, evidence of the angle of trajectory and damage to Rushton's weapon confirms that it was aimed at Appellant when struck by Appellant's fired bullet.

testified that he never had a clear look at Appellant, only seeing his silhouette. (Tr. p. 164, lines 18 – 24). McAllister said she never even saw Appellant. (Tr. p. 196, lines 18 – 21). These statements, even without reliance upon anything Appellant testified regarding, compel but one factual finding supported by evidence, that Appellant was reasonably ignorant of the presence of more than one person, let alone multiple persons with law enforcement, that dark morning.

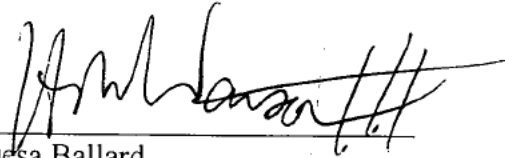
Retrospectively, of course, it is obvious that Rushton, Moore and McAllister were trying to serve the community and do their jobs. But when examined from the perspective of Appellant, or any other reasonable person placed in his shoes, at the relevant time when Appellant was making decisions about what to do, the only evidence available compels a finding in favor of Appellant as to this personal or imputed knowledge, and thus the inapplicability of the State's attempt at proving an exclusion to immunity. The root source of such a perspective is longstanding precedent that says a man may defend his castle "if necessary or apparently so." State v. Bradley, 120 S.E. 240, 242, 126 S.C. 528 (1923). Appellant's actions exist squarely, and necessarily, within the boundaries of "apparently so" without any evidence that may be relied upon to justify a contrary factual finding.

CONCLUSION

Appellant respectfully submits that an insufficient records exists by which this Court can engage in a meaningful review of the relevant facts presented at the hearing, necessitating at minimum a remand for augmentation of the record with an inference in favor of information submitted by Appellant, or in the alternative a complete re-hearing.

However, even on the limited record preserved, appropriate application and enforcement of all relevant provisions of statutory law and common law principles discussed in this memorandum compels extension of immunity to Appellant and rejection of the State's attempted application of an exception thereto. As such, Appellant respectfully requests the denial of immunity from prosecution be reversed, with remand for issuance of a proper order dismissing these matters against Appellant, and for such other and further relief as this Court may deem necessary and proper.

Respectfully submitted,



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January 8, 2013

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM McCORMICK COUNTY

Honorable William P. Keesley, Circuit Judge, 11th Judicial Circuit
Case No. J-036561, J-036562, J-036563, J-036564, J-036565, J-036566

Joe Ross Worley,

Appellant

v.

State of South Carolina,

Respondent.

APPELLANTS' AMENDED INITIAL DESIGNATIONS OF MATTER

Pursuant to Rule 209(a) and (b), SCACR, Appellants hereby designate the following matter, which was before the lower court (as defined in Rule 202(b)(1)) to be included in the Record on Appeal in this matter. Appellants reserve the right to supplement these designations in conjunction with the submission of their initial reply brief.

All designated matter does not include proof of service or exhibits unless otherwise specified:

1. Amended Order on Motion to Bar Prosecution executed by Judge Keesley filed July 12, 2011.
2. Amended Order on Reconsideration of the Defendant's Motion to Bar Prosecution executed by Judge Keesley filed December 8, 2011.

RECEIVED

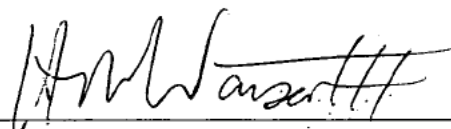
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SC Court of Appeals

3. Order on Defense Motion to Bar Prosecution executed by Judge Keesley filed June 24, 2011.
4. Defendant's Motion to Reconsider filed July 6, 2011.
5. Defendant's Brief in Support of Motion to Reconsider dated July 29, 2011.
6. State's Reply to Motion and Brief for Reconsideration dated August 12, 2011.
7. Defendant's Reply to State's Brief in Opposition to Motion to Reconsider filed August 23, 2011.
8. Defendant's Motion to Supplement the Record filed August 22, 2011.
9. Defendant's Second Motion to Reconsider filed on December 15, 2011.
10. Arrest Warrants J-036561, J-036562, J-036563, J-036564, J-036565, J-036566 dated November 15, 2009.
11. Bureau of Alcohol, Tobacco, Firearms and Explosives Field Report dated April 28, 2011.
12. Partial Transcript of Record from Immunity Hearing before Judge Keesley on May 31, 2011 and June 1, 2011.
13. Defendant's Motion *Nunc Pro Tunc* to Supplement the Record on Rehearing or Take Judicial Notice filed February 23, 2012.
14. Defendant's Exhibits 1-7 from Immunity Hearing held before Judge Keesley.
15. Court's Exhibit 1 from Immunity Hearing held before Judge Keesley.
16. State's Exhibits 1 and 2 from Immunity Hearing held before Judge Keesley.

The undersigned is informed and believes, and therefore certifies, that the matter designated is relevant to the appeal in this matter.

Respectfully submitted,



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January 8, 2013

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM McCORMICK COUNTY

Honorable William P. Keesley, Circuit Judge, 11th Judicial Circuit
Case No. J-036561, J-036562, J-036563, J-036564, J-036565, J-036566

Joe Ross Worley,

Appellant

v.

State of South Carolina,

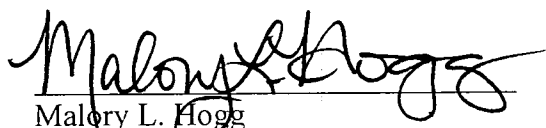
Respondent.

CERTIFICATE OF SERVICE

I, Malory L. Hogg, an employee with the Law Offices of Ballard Watson Weissenstein, do hereby certify that on January 8, 2013, I served a copy of the **Appellant's Amended Initial Brief and Appellant's Amended Designation of Matter** in the above-captioned case on the following individuals by United States Mail, with sufficient first-class postage affixed, addressed as follows:

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Assistant Attorney General
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January 8, 2013
West Columbia, South Carolina


Malory L. Hogg
Paralegal

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JAN 09 2013

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

FEB 07 2013

SC Court of Appeals

Appeal from McCormick County
Honorable William P. Keesley, Circuit Court Judge
Appellate Case No. 2012-210646

THE STATE,

Respondent,

vs.

JOE ROSS WORLEY,

Appellant.

**MOTION TO REMAND FOR
RECONSTRUCTION OF THE RECORD
AND
MOTION TO STRIKE
IMPROPERLY-DESIGNATED MATTER
FROM AMENDED DESIGNATION OF MATTER**

Respondent ("the State"), through its undersigned counsel, would respectfully show unto the Court as follows:

Procedural History

In November of 2009, Appellant Joe Ross Worley was arrested and charged with three counts of assault and battery with intent to kill and three counts of possession of a firearm during the commission of a violent crime. In February of 2010, the McCormick County grand jury indicted Appellant for three counts of assault and battery with intent to kill and one count of possession of a firearm during the commission of a violent crime. Subsequently, Appellant sought immunity from criminal prosecution pursuant to S.C. Code Ann. § 16-11-450, and a

hearing on the immunity issue was commenced in the McCormick County court of general sessions on May 31, 2011, with the Honorable William P. Keesley, circuit court judge, presiding. Following the hearing, Judge Keesley issued an order on July 5, 2011, denying Appellant's request for immunity from prosecution and recusing himself from further participation in the case. Appellant then promptly moved for reconsideration of Judge Keesley's ruling. On December 8, 2011, Judge Keesley issued an order affirming his earlier ruling and denying Appellant's motion for reconsideration. On January 18, 2012, Appellant filed a notice of appeal appealing Judge Keesley's ruling on the immunity issue. Thereafter, on April 18, 2012, Appellant filed his Initial Brief of Appellant and Designation of Matter in this case.

Following the filing of the Initial Brief of Appellant and Designation of Matter, the State filed a Motion to Strike and Require Filing of Amended Initial Brief of Appellant on August 20, 2012. In response, Appellant filed a return opposing the State's motion, and the State filed a reply to Appellant's return. Subsequently, on September 7, 2012, Appellant filed a Motion to Supplement Record on Appeal and Expedite Briefing. In response, the State filed a return opposing Appellant's motion, and Appellant filed a reply to the State's return.

Thereafter, on December 19, 2012, this Court issued an order granting the State's motion to strike and denying Appellant's motion to supplement the record and expedite briefing. Additionally, this Court ordered Appellant to serve and file an amended initial brief within twenty days of the ruling. Following the issuance of the order, Appellant filed his Amended Initial Brief of Appellant and Amended Designation of Matter on January 8, 2012.

**Motion to Remand to the Trial Court for Reconstruction of Missing Portions of the
Hearing Transcript**

In the case sub judice, portions of the testimony presented during the pre-trial hearing on the immunity issue could not be transcribed due to the fact that part of the record was stolen from

the court reporter in a criminal act. (Exhibit “A” – Court Reporter Certification, Pre-Trial Hearing Transcript, p. 231). In his amended initial brief, Appellant notes the missing portions of the transcript include his own testimony while contending those missing portions “are critical to a full and fair consideration of the matters” on appeal. (Exhibit “B” – Amended Initial Brief of Appellant, p. 11). Appellant further maintains “an insufficient record exists by which this Court can engage in a meaningful review of the relevant facts presented at the hearing” and asks this Court to either remand the matter to the trial court for “augmentation of the record” or for a complete rehearing. (Exhibit “B” – Amended Initial Brief of Appellant, p. 12; pp. 29-30).

In light of Appellant’s representations and the fact that portions of the pre-trial immunity hearing transcript were lost and unable to be transcribed, the State believes it is necessary for the matter to be remanded to the trial court to allow the trial judge to attempt to reconstruct the missing portions of the transcript. See Koon v. State, 358 S.C. 359, 367, 595 S.E.2d 456, 460 (2004) (“Where a transcript has been lost or destroyed, a court may remand to have the record reconstructed.”), overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005); see also Whitehead v. State, 352 S.C. 215, 221, 574 S.E.2d 200, 2003 (2002) (remanding a case to the circuit court for reconstruction of the trial record). Such a remand would ensure this Court can be provided the most complete and accurate record on appeal that can be obtained prior to undertaking appellate review of the issues raised in this case and would enable to the trial judge to attempt to reconstruct the trial court record in the most expedient fashion possible under the circumstances, which would help to maximize the probability that the trial judge will be able to successfully reconstruct the missing portions of the transcript. Accordingly, the State asks that this Court remand the matter to the trial court for reconstruction of the missing portions of the trial court record.

Motion to Strike Improperly-Designated Matter

In the case at bar, Appellant has designated in his amended designation of matter a Motion Nunc Pro Tunc to Supplement the Record on Rehearing or Take Judicial Notice along with an attached exhibit. However, as previously noted, that motion was filed on February 23, 2012, which was thirty-six days **after** the notice of appeal was filed in this case. Because Appellant filed the motion and exhibit **after** the notice of appeal was filed in this case, the trial judge no longer had jurisdiction in Appellant's case and had no jurisdiction to consider the motion or attached exhibit in relation to the ruling being appealed. See Rule 205, SCACR ("Upon the service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal[.]"). For that reason, the motion and exhibit were not properly before the trial judge in connection with the ruling on appeal and were not and could not have been considered by the trial judge in issuing that ruling, rendering that matter irrelevant to the current appeal. See Rule 210(c), SCACR ("The Record shall not, however, include matter which was not presented to the lower court or tribunal."); see also Rule 209(b), SCACR ("A party shall not include any matter in his Designation of Matter which is not relevant to the appeal."); see, e.g., Hofer v. St. Clair, 298 S.C. 503, 513, 381 S.E.2d 736, 742 (1989) ("It would be utterly inappropriate for an appellate court to reverse a trial court's decision in reliance on evidence never submitted to the trial court for its consideration."). Therefore, since the motion and attached exhibit were not before the trial court prior to the initiation of the appeal in this case, those documents cannot properly be considered on appeal or included in the Record on Appeal in Appellant's case. Accordingly, the State asks this Court to strike that matter from Appellant's Amended Designation of Matter and preclude its improper inclusion in the Record on Appeal.

WHEREFORE, Respondent prays that this Court will remand the matter to the trial court to allow the trial judge to reconstruct the missing portions of the trial court record; strike the improperly-designated material not properly presented to the trial judge from Appellant's amended designation of matter; hold this appeal in abeyance pending a ruling on Respondent's motion; and grant such other and further relief as the Court may deem just and proper.

Respectfully submitted,

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Attorney General

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By: 

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February 7, 2013

EXHIBIT "A"

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

COURT REPORTER'S CERTIFICATION

I, REMA K. GANTT, OFFICIAL COURT REPORTER, AND
NOTARY PUBLIC IN AND FOR THE STATE OF SOUTH
CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A
TRUE, ACCURATE BUT PARTIAL TRANSCRIPT OF RECORD OF
THE PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE
ABOVE-CAPTIONED CASE ON MAY 31, 2011, IN MCCORMICK,
SOUTH CAROLINA.

THIS RECORD IS INCOMPLETE DUE TO AN ILLEGAL
BREAK-IN TO MY PERSONAL VEHICLE ON 6/23/2011,
WHEREIN ITEMS WERE STOLEN FROM THE VEHICLE,
INCLUDING PART OF THIS RECORD; COLUMBIA POLICE
REPORT #110018381.

I FURTHER CERTIFY THAT I AM NEITHER OF COUNSEL
NOR KIN TO ANY OF THE PARTIES TO THIS CAUSE OF
ACTION, NOR AM I INTERESTED IN ANY MANNER IN ITS
OUTCOME.

IN WITNESS WHEREOF, I HAVE HEREUNTO SET MY HAND
AND SEAL AT LEXINGTON, SOUTH CAROLINA, THIS THE
TWENTY-EIGHTH DAY OF AUGUST 2011.


REMA K. GANTT THOMAS
OFFICIAL COURT REPORTER
NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES 11/21/2013

EXHIBIT "B"

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM McCORMICK COUNTY

Honorable William P. Keesley, Circuit Judge, 11th Judicial Circuit
Case No. J-036561, J-036562, J-036563, J-036564, J-036565, J-036566

Joe Ross Worley,

Appellant

v.

State of South Carolina,

Respondent.

AMENDED INTIAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

- I. BECAUSE AN AGENT OF THE STATE FAILED TO PRESERVE EVIDENCE OF CRITICAL TESTIMONY FROM THE HEARING REGARDING IMMUNITY, DOES APPELLATE COURT LACK SUFFICIENT RECORD TO CONDUCT MEANINGFUL APPELLATE REVIEW?

- II. DOES PROPER APPLICATION OF THE ACT DURING A PRE-TRIAL HEARING REQUIRE DEFENDANT TO PRESENT EVIDENCE OF THE APPLICABILITY OF IMMUNITY, AND THEN PLACE UPON THE STATE THE BURDEN OF SHOWING AN EXCEPTION TO IMMUNITY?

STATEMENT OF THE CASE

This matter is before the South Carolina Court of Appeals (Court) following Appellant Joe Ross Worley's arrest on or about November 9, 2009. Appellant was charged with three (3) counts of Assault and Battery with Intent to Kill and three (3) counts of Possession of Weapon during a Violent Crime arising from his firing of a rifle at an unknown person, later revealed to be a newly re-hired employee of the McCormick County Sheriff's Department. Appellant remains in jail, without trial, during these pre-trial proceedings of almost three (3) years.

Appellant raised as a defense to the charges the immunity from criminal prosecution afforded by the "Protection of Persons and Property Act" at S.C. Code Ann. § 16-11-401 *et seq.* (hereinafter "the Act"). On December 3, 2009, the Honorable William P. Keesley denied pre-trial bond. On February 23, 2010, Judge Keesley again denied bond. Defense counsel moved for an order setting the case for trial, which was denied by order dated August 11, 2010. In the same order, Judge Keesley warned the prosecution that the case must be expedited.

Judge Keesley thereafter held a hearing on the applicability of immunity provided by the Act on May 31, 2011 and June 1, 2011. On July 5, 2011, Judge Keesley issued an Amended¹ Order on Motion to Bar Prosecution, denying Appellant's assertion of immunity. In that order, Judge Keesley recused himself from further proceedings in the action, and again denied Appellant's request for bond.

¹ The initial order was issued on June 24, 2011, but later amended to correct scrivener's errors.



On July 6, 2011, Appellant filed a Motion to Reconsider the denial of immunity, and a separate Motion to Reconsider Denial of Bond. Judge Keesley requested briefs² from both Appellant and the State on the immunity issues. Appellant filed his memorandum in support of reconsideration on August 1, 2011 and the State submitted a return on August 12, 2011. Appellant then filed a reply brief on August 22, 2011. On August 22, 2011, Appellant also filed a Motion to Supplement the Record on Rehearing, seeking to have Judge Keesley supplement the record of the hearing on immunity of an attached exhibit that reflected the State's witness Mr. Rushton was not certified as a law enforcement officer at the time of the events in question leading to arrest of Appellant.

Judge Keesley denied the motion to supplement by order dated February 22, 2012. Upon receipt of that order, Appellant realized the exhibit that was submitted in conjunction with the motion to supplement was already part of the hearing record, having been introduced at the hearing, and the actual exhibit intended to be the subject of the motion to supplement had not been presented to Judge Keesley for consideration. Accordingly, Appellant filed a Motion *Nunc Pro Tunc* to Supplement the Record on February 23, 2012. At the time of this initial brief, that motion remains pending before Judge Keesley.

Judge Keesley issued an Amended Order on Reconsideration of the Defendant's Motion to Bar Prosecution that was signed December 6, 2011 and filed December 8, 2011. Appellant timely filed a notice of appeal on January 20, 2012. Appellant subsequently filed two motions for extension of time in which to file the initial Appellant's brief.

² On October 10, 2011, counsel for Appellant provided Judge Keesley with a partial transcript of the proceedings (see discussion in Statement of the Facts *infra*) held before him on May 31 and June 1, 2011, on the immunity issue.

STATEMENT OF FACTS

In the early hours of November 15, 2009, Appellant fired a rifle to shoot an adult male who was pointing a gun at him as he stood on his second floor porch. The shot injured Robert Rushton, who was pointing a gun at Appellant³. Rushton was there with two officers (Nick Moore and Sara McAllister⁴) of the McCormick County Sheriff's Department investigating a report of shots being fired earlier that night. (Tr. p. 33, lines 1 – 11). A hearing on the applicability of immunity provided by the "Protection of Persons and Property Act" at S.C. Code Ann. § 16-11-401 *et seq.* was held on May 31, 2011 and June 1, 2011. Unfortunately, only enough information to compile a partial transcript of this hearing survived a theft from the court reporter's records before a complete written transcript could be completed. (Tr. p. 159, lines 15-17; Tr. p. 231). Regrettably, Appellant's testimony is among the missing portions of the transcript.

At that immunity hearing, a neighbor testified that Appellant's family cat, Sweat Pea, was known to have been injured and that there were foxes in the area. (Tr. p. 152, l. 20 – p. 153, l. 11). Mr. Rushton testified he would not be surprised if Appellant had fired at a fox as Appellant contends. (Tr. p. 41, lines 21 – 23; Tr. p. 93, lines 2-3). Neighbors further testified that they often heard gunshots in the area, although some when Appellant was not at home, and had relayed their objections to the noise to Appellant's mother. (Tr. p. 148, lines 22 – 24; Tr. p. 149, lines 15 – 21). There is no evidence a prior noise report was ever communicated to Appellant by law enforcement. (Tr. p. 86, lines 6 – 9). On

³ The property was owned by Appellant's mother, with whom he resided.

⁴ Entered into evidence was a document detailing the termination of Deputy McAllister from her prior employment with the SC Dept. of Natural Resources. (Defense exhibit 6 from immunity hearing). She was fired because DNR discovered that she had participated in the destruction and concealment of critical evidence in a fatal accident investigation, only to then lie on three separate occasions about her actions during questioning by DNR officials. (Tr. p. 191, lines 8 – 14).

the night in question, the neighbors contacted police regarding shots fired in the area. (Defense Exhibit 4 from hearing).

The neighbors did not advise Appellant they had contacted police, so Appellant had no notice that anyone would be arriving at his home. Testimony conflicted regarding the exact time of the shots heard by the neighbors, with the latest time estimated by a neighbor to be 3:30 a.m. (Statement by Gayle Sheffield dated 11/15/09). Dispatch notified Mr. Rushton of the call sometime after 4:00 a.m. (Tr. p. 30, lines 9 – 11). Appellant shot Mr. Rushton sometime after approximately 4:30 a.m. (Tr. p. 64, line 5).

Appellant testified that by the time of their arrival, he was sound asleep in his bed. (Tr. p. 225, line 9). The neighbors who contacted police were expecting police presence and had their windows open. (Tr. p. 153, lines 20-21). Appellant was located upstairs, inside of a dwelling that he testified was well insulated. (Tr. p. 213, lines 8-9).

Rushton admitted that he believed a deer poacher was active in the area and was responsible for the prior shots. (Tr. p. 35, lines 6 – 8, Tr. p. 36, lines 2 – 5, Tr. p. 41, lines 14 - 15). Rushton did not have on a uniform; instead he was wearing merely khaki pants, a green shirt, and a small badge on his belt. (Tr. p. 21, line 13 – p. 22, line 14). He was not wearing McCormick County's standard deputy uniform, any reflective items such as a vest, or any hat identifying him as law enforcement, even though Rushton had a vest and hat he could have worn. (Tr. p. 22, lines 15 – 23; Tr. p. 25, lines 5 – 9; Tr. p. 24, lines 4 - 8).

Rushton, Moore, and McAllister did not telephone, or have dispatch call, the house in which Appellant was asleep to alert the residents of their impending arrival. (Tr. p. 87, lines 10-22). All arrived without sirens and blue lights in operation; in other

words, they arrived silently. Rushton and Moore approached the house, under a covered porch, knocked on the door, and rang the doorbell. The ground level door that was knocked upon, which was where the doorbell was located and is the only entrance to the house, had no peephole or other means to examine the identity or appearance of the person(s) on the other side. (Tr. p. 213, lines 10-18). There were no windows on the ground level, and no police cars could be seen from the upstairs windows. Id. Rushton's car, without blue lights or siren on, was parked on the other side of the house, out of Appellant's line of sight. (Tr. p. 92, lines 11-12; Tr. p. 213, lines 12-14). Moore's car and McAllister's car weren't parked on Appellant's property, and likewise did not have sirens or lights activated. (Tr. p. 197, lines 24 – p. 198, line 8).

Appellant testified that he had heard media reports of home invasions having occurred in the rural area, his mother's home had been burglarized at least once before successfully, and attempted burglaries had occurred on multiple occasions. (Tr. p. 212, line 23 – p. 213, line 3). Appellant also presented evidence that the night in question was the darkest night of the month. (Tr. p. 125, lines 5-7; Moon calendar submitted as portion of exhibit notebook by Defendant; Amended Order on Motion To Bar Prosecution, p. 3).

Appellant testified that he did not see anyone and only saw total darkness outside. (Tr. p. 213, lines 10-12). Moore and McAllister testified that they saw the light come on initially as they were at the rear of Appellant's house getting ready to leave. (Tr. p. 162, lines 10 – 18.). Every witness is consistent in acknowledging the light was not on continuously. Moore testified that he never had a clear look at Appellant, only seeing his silhouette. (Tr. p. 164, lines 18 – 24). McAllister said she never even saw Appellant. (Tr. p. 196, lines 18 – 21).

The shooting occurred immediately after Appellant stepped onto his balcony, with his weapon in the port position, not aimed at anyone. The State contends there was a verbal exchange prior to that shot wherein Appellant supposedly asked who was at his home, received a response that it was law enforcement, and replied with a statement of non-concern including profanity. (State's Exhibit 2 from immunity hearing).

Deputy Moore's claims a call of "Sherriff's office" and "gun!" were made, after which Appellant immediately fired at Rushton. (State's Exhibit 2 from immunity hearing). It is undisputed that the shooting happened almost immediately after Appellant's entrance onto the balcony, and not after a contemplative, observation of and conversation between those involved. (Tr. p. 45, lines 25 - p. 46, line 9). Rushton testified that "it just happened so fast right then." (Tr. p. 46, lines 22 - 23.)

Evidence of the angle of trajectory and damage to Rushton's weapon and hand confirm that his weapon was aimed at Appellant when Rushton was struck by Appellant's fired bullet. (Tr. p. 66, lines 6 - 10; Amended Order on Motion To Bar Prosecution). Rushton's testimony confirms that he aimed his weapon at Appellant, despite no menacing, threatening, or illegal action having been taken by Appellant, merely by being in possession of a weapon of self-defense. (Tr. p. 46, lines 18 - p. 47, line 1; Tr. p. 47, lines 22 - 23; Tr. p. 54, lines 10 - 14; Tr. p. 63, lines 1 - 7).

Ruston testified the shot knocked him to the ground. (Tr. p. 52, line 2). Although armed with a semi-automatic rifle at the time and therefore capable of doing so, there is no evidence that Appellant sought to hunt down or further injure the person he had just shot. The notion that Appellant would not have shot Rushton if he had known Rushton was there on behalf of the police is not controverted with any evidence as to motive,

substantial prior criminal history, or evidence of ill will towards law enforcement generally. (Tr. p. 34, lines 4 – 8; Tr. p. 204, lines 6 – 8; Tr. p. 136, lines 25 – p. 137, line 8; Tr. p. 126, lines 15 – 19).

Appellant's expert, Dr. George Kirkham, examined the premises at night and reviewed the actions of Rushton, Moore, and McAllister before testifying that the trio failed to follow proper police procedures in many respects, so much so that "if you were making a training video for officers" the actions of these actors could be used to train for what not to do in such a situation. (Tr. p. 137, lines 24 – p. 138, line 3). Dr. Kirkham further stated "what seems to be clear that could have prevented this tragedy from happening[:] proper police procedure. That's all." (Tr. p. 142, lines 8 – 10).

At the hearing and subsequently upon reconsideration, the issue of whether Rushton was a duly authorized deputy was disputed. Rushton's own testimony was that he never took any oath of office, and that his appointment was never approved by any circuit court judge. (Tr. p. 9, lines 21 – p. 10, line 6). When the State produced an oath form signed by Rushton, Ruston testified only that his signature was on the document, not that he had taken the oath. (Tr. p. 109, lines 2 - 3).

STANDARD OF REVIEW

The Supreme Court, in its one opinion directly applying the "Protection of Persons and Property Act" at S.C. Code Ann. § 16-11-401 *et seq.* (hereinafter "the Act") and the procedure to be implemented in the application thereof, both at the trial court and upon appeal, was silent as to the appropriate standard of review that should be applied by appellate courts considering initial trial court determinations of immunity. State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011).

The Circuit Court is a general trial court with original jurisdiction in civil and criminal cases. Article V, § 11. The immunity provided by the Act of course only arises in criminal proceedings. Nevertheless, it is civil in implementation, relying on the civil standard of "preponderance of evidence" and civil in the nature of its relief, as it acts not only to bar to conviction, but a complete bar to a wider range of acts constituting "prosecution" generally. See Duncan, at 409, 664 ("the legislature intended to create a true immunity, and not simply an affirmative defense").

Because the issue of immunity was tried by a judge alone and is equitable in nature, Appellant contends any appellate court considering the judgment should use a standard of review appropriate for equitable actions tried in such a manner. Therefore, the underlying facts in this matter would be reviewed with the ability to find facts in accordance with this Court's own view of the preponderance of the evidence. See Townes Associates, Ltd. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976).

ARGUMENT

- I. BECAUSE AN AGENT OF THE STATE FAILED TO PRESERVE EVIDENCE OF CRITICAL TESTIMONY FROM THE HEARING REGARDING IMMUNITY, DOES APPELLATE COURT LACK SUFFICIENT RECORD TO CONDUCT MEANINGFUL APPELLATE REVIEW?

Rule 607, SCACR details the requirements for a state-employed court reporter regarding transcripts and tapes of proceedings in circuit court. State-employed reporters are required to maintain both primary and backup tapes of a proceeding for a full five years after the proceeding. Id. The SC Court Reporter Manual, issued pursuant to order of the State Supreme Court, establishes the standards of conduct of all state-employed court reporters in the South Carolina judicial system. It states that a court reporter “is responsible for obtaining a clear, complete, and understandable record of the court proceedings” and that reporter materials “should be kept in a secure and safe manner.” Id., p. 14, 17.

Nevertheless, the state-employed court reporter that was tasked with creating a transcript of the immunity hearing proceedings held on May 31, 2011 and June 1, 2011 before Judge Keesley has not produced a complete transcript of those proceedings. (Court Reporter Certification, Tr. p. 231). Importantly, Appellant bears absolutely no responsibility for this failure. Fortunately, missing transcripts and incomplete records, and the need and nature of correction thereof, have been addressed previously by courts in South Carolina.

Where portions of stenographic notes are lost prior to transcription, it is appropriate for the judge to accept affidavits of counsel and the court reporter to determine what transpired. Adams v. H.R. Allen, Inc., 397 S.C. 652, 656-57, 726 S.E.2d 9, 12 (Ct. App. 2012) (citing China v. Parrott, 251 S.C. 329, 333-34, 162 S.E.2d 276, 278



(1968)). "A new trial is therefore appropriate if the appellant establishes that the incomplete nature of the transcript prevents the appellate court from conducting a meaningful appellate review." Id.

Unfortunately, the portions of the immunity hearing transcript that are missing are not limited to mere ancillary matters of record. Rather, the portions missing are of grave and critical importance, including the testimony of the accused himself. Appellant provided that testimony at great risk and jeopardy, requiring first a waiver of his Fifth Amendment right to remain silent, subjecting himself to intense cross-examination by the State well before ultimate trial on the pending charges themselves before a jury of his peers. The critical issues in this matter are determinations of the reasonableness of Appellant's actions on the night in question, and Appellant's proffered information regarding his subjective thoughts and impressions, as well as information regarding the premises at which the events unfolded, are critical to a full and fair consideration of the matters, which is why he willingly waived his right to remain silent and submit sworn testimony at the immunity hearing.

The appropriate remedy for the State's failure should be the augmentation of the record on appeal, which Appellant attempted to bring about through a Motion to Supplement the Record. That motion was denied by order of this Court on December 19, 2012. Absent acceptance of that proffered supplementation then, the matter should be remanded to the lower court with direction to evaluate Appellant's proffered reconstructive materials, as well as any others deemed appropriate through which a meaningful and more complete record for review can be created. Only then is this matter appropriate for appellate review. Recent case law, however, indicates partial



reconstructions may be disfavored. See Adams v. H.R. Allen, Inc., 397 S.C. 652, 726 S.E.2d 9 (Ct. App. 2012) (remanding for new trial in light of rejected attempt at partial record reconstruction).

If augmentation of the existing record is ordered instead of complete re-hearing, Appellant should receive an inference in his favor regarding all testimony and evidence that was not initially preserved for review. If a party fails to produce testimony of an available witness on a material issue, it may be inferred that such testimony would have been adverse to him. Nelson v. Coleman Co., 249 S.C. 652, 155 S.E.2d 917 (1967). Likewise, when a party loses or destroys evidence, an inference may be drawn that the destroyed or lost evidence would have been adverse to that party. Gathers By and Through Hutchinson v. South Carolina Elec. and Gas Co., 311 S.C. 81, 427 S.E.2d 687 (Ct. App. 1993). Although Respondent did not directly lose the portion of the transcript, the actor that did was a State actor, and thus the actions of the court reporter should be imputed to the State as Respondent.

II. PROPER APPLICATION OF THE ACT DURING A PRE-TRIAL HEARING REQUIRES APPELLANT TO PRESENT EVIDENCE OF THE APPLICABILITY OF IMMUNITY, AND THEN PLACES BURDEN UPON THE STATE TO PROVE AN EXCEPTION

As noted by the State Supreme Court, the Act “does not explicitly provide a procedure for determining immunity.” State v. Duncan, 392 S.C. 404, 409, 709 S.E.2d 662, 664 (2011). However, the Act does clearly articulate the legislative intent was to codify the common law Castle Doctrine, providing for the ability of law-abiding citizens to protect themselves via their constitutional right to bear arms, and thereby protect their right to “expect to remain unmolested and safe within their homes.” S.C. Code Ann. §

16-11-420. The Act provides definitions for certain terms before the critical portions applicable in this matter appear, beginning with the presumption, which provides:

(A) 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 the person:

- (1) ... has unlawfully and forcibly entered a dwelling ...; 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.

S.C. Code Ann. § 16-11-440.

The actual provision providing for immunity under the Act then reads as follows:

(A) 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, unless the person against whom deadly force was used is a law enforcement officer acting in the performance of his official duties and he identifies himself in accordance with applicable law or the person using deadly force knows or reasonably should have known that the person is a law enforcement officer.

S.C. Code Ann. § 16-11-450(A).

The statute thus begins with the explanation of the legislative intent by citing the expectations of the state's citizens, and buttresses that starting point by granting an express presumption in their favor if certain criteria are met. Then the immunity provision comes, which has a clear organization of general grant of immunity, then listing of possible exceptions. The State argues the applicability of an exception to that presumption and immunity, but for purposes of the discussion of the statute and its application to Appellant, proper analysis by the lower court necessarily begins with Appellant seeking to establish applicability of the general presumption and immunity.

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The burden of producing evidence shifts from side to side as the proceedings progress. Am. Jur. 2d, Evidence § 123. Generally accepted principles of burden of persuasion and burden of production place upon the party seeking relief, and who are in possession of the means by which an affirmative showing can be made, with the obligation to present evidence. Stanley Smith & Sons v. D.M.R. Inc., 307 S.C. 413, 415 S.E.2d 428 (Ct. App. 1992) (“the burden of evidence is imposed on the party best able to sustain it, that is, the party having peculiar knowledge of the facts or control of the evidence relating to an issue). “Once the party to whose advantage the presumption operates has proven the basic facts giving rise to the presumption, the burden of persuasion shifts to the party against whom the presumption operates.” Alex Sanders & John S. Nichols, Trial Handbook for South Carolina Lawyers § 12:2 at 472 (4th ed. 2007). Appellant thus contends the burden of persuasion, or at minimum the burden of production, should shift to the State to accomplish application of an exception to immunity.

The lower court, however, goes beyond placing the burden on Appellant of entitlement to the immunity itself, and also places the additional obligation on Appellant of disproving any possible exception. Appellant contends placing that second, additional burden on Appellant beyond mere entitlement to immunity is an error of law necessitating a reversal and remand by the Court of Appeals.

A. Appellant established applicability of the presumption and immunity.

Appellant contends that he has presented evidence that demands application of the statutory presumption and immunity pursuant to the Act, and any factual findings to the contrary would be unsupported by the evidence, clearly wrong, or controlled by error of



law and thus justify reversal and remand. See State v. Williams, 326 S.C. 130, 135, 485 S.E.2d 99, 102 (1997)

The lower court erred as a matter of law by determining Appellant failed to prove entry or attempt at entry into Appellant's dwelling. S.C. Code Ann. § 16-11-420(A) is clear in its intent to absorb and continue the wealth of common law related to the Castle Doctrine. Section 16-11-430 thereafter defines "dwelling." It is undisputed that the home where Appellant was staying that night qualifies as his dwelling and his residence. Given that presence in his dwelling, deep-rooted case law extends the area for qualified defensive action to include Appellant's curtilage, an important aspect of South Carolina jurisprudence continued by express incorporation of the statute. See State v. Sampson, 12 S.C. 567 (1880)(an outhouse can be part of a dwelling if connected under the same roof); State v. Osborne, 21 S.E.2d 178, 182, 200 S.C. 504, (1942)("may repel trespassers in or upon the house...as if he were under his own roof or within his own doors.").

Rushton had "entered" the dwelling, given his location under the roof and eaves of the house, the very type of place "where the property owner alone has the right to be, to the exclusion of the general public." State v. Dickey, 669 S.E.2d 917, 923, 380 S.C. 384, 396 (Ct. App. 2008)(*cert. granted*). In Duncan, the "victim" was only on the porch of the shooter's residence, which was determined to have been within the scope of the Act's definition of dwelling. 392 S.C. at 407, 709 S.E.2d at 663.

The entrance of Rushton was unlawful because he was not a law enforcement officer, as discussed in detail *infra*, and thus could not have been acting within the proper scope of his duties of employment as a "deputy" while on Appellant's premises that evening. As such, he had no right to be on the premises, and was a trespasser. Moreover,



it is clear that Rushton aimed his weapon at Appellant before Rushton was shot. (Tr. p. 66, lines 6 – 10; Amended Order on Motion To Bar Prosecution).

B. The State must respond to Appellant's showing of entitlement to the statutory presumption and immunity by meeting its burden of production to show an exception to immunity.

S.C. Code Ann. § 16-11-450(A) provides an exception to the statutory immunity. The criteria for the exception requires that the person against whom the deadly force was used was a law enforcement officer, that person was acting in the performance of his official duties, and either he identifies himself in accordance with applicable law, or the person using deadly force knows or should have known that the person was a law enforcement officer.

1. The State cannot even meet the first criteria for the exception, as Rushton was not a "law enforcement officer" at the time of the incident.

"Law enforcement officer" is not defined by the Act. Rushton was hired by the county sheriff to be a "deputy," which is defined apart from the Act in other statutory and constitutional provisions. No one becomes a qualified, recognized deputy sheriff without taking certain actions required by law. First, Article III, Section 26 of the State Constitution requires an oath be taken. Next, S.C. Code Ann. § 23-13-10 requires an appointment and approval process be completed, and S.C. Code Ann. § 23-13-20 contains an additional statutory oath that must be completed. The two (2) oaths have to be filed with the County Clerk of Court. No case law or statutory provision creates an "almost deputy" office that can be held. Therefore, as a matter of law, one is either a

deputy or not. Since Rushton is not, he has no other claim to assume the title of "law enforcement officer" within the meaning of the Act.⁵

The lower court's opinion as written and applied to Appellant, however, expressly invalidates both of the referenced statutory provisions. Appellant submits that all such portions of the Order compelling or evidencing that conclusion and result are errors of law. That error is exploited by the State to qualify Rushton as a deputy, and thereby avail itself of an exception under the Castle Doctrine that it otherwise would not qualify for given the absence of involvement of a "law enforcement officer."

- (a) Interpreted properly, statutorily mandated judicial approval of deputy appointments does not violate the separation of powers.

S.C. Code Ann § 23-13-10 sets out a requirement that the sheriff's appointed deputy "be approved" by a circuit court judge. He made this legal determination, apparently, so as to minimize the failure of the State to satisfy its burden of proving that Rushton was properly deputized. The lower court deems this a violation of the separation of powers, to the extent "it provides for judicial approval of executive branch appointments." (Amended Order on Motion To Bar Prosecution, p. 9). Prior review of the same statutory requirement by the Supreme Court, however, raised no such issues. See Willis v. Aiken County, 26 S.E.2d 313, 315, 203 S.C. 96 (1943) (rejecting argument that deputy was not a separate officer from the Sheriff, and referencing the manner in which deputies were appointed *and* approved). Mere interaction or participation by elements from multiple branches of government is not the equivalent of merger and loss

⁵ Although not made as an argument by the State, Rushton could cite mere employment with the sheriff's department as sufficient to qualify him as a "law enforcement officer" but such a claim would stretch the meaning of that phrase past its logical limits. Otherwise, any janitor employed by a department would carry the same "officer" title with all the rights, privileges and obligations that go along with it.

of separation as the presiding judge gratuitously determined in what appears to be a ruling to lessen the impact of the State's absence of proof on this issue.

As the order cites, statutes are to be construed first upon their plain meaning if unambiguous, as this statute in question is certainly. Carolina Power & Light Co. v. City of Bennettsville, 314 S.C. 137, 139, 442 S.E.2d 177, 179 (1994). However, when judging the constitutionality of a given statute, the courts should if possible

construe[] [the statute] so as to render it valid; every presumption will be made in favor of the constitutionality of a legislative enactment; and a statute will be declared unconstitutional only when its invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution.

City of Rock Hill v. Harris, 391 S.C. 149, 154, 705 S.E.2d 53 (2011)(citing Moseley v. Welch, 209 S.C. 19, 26-27; 39 S.E.2d 133, 137 (1946)).

Instead, the lower court makes a narrow and most extreme interpretation of the term "approved" and imbues the circuit court judge with the power of veto and rejection of the sheriff's employment decisions.

With an eye toward meeting the obligation to construe it in any way so as to render it effective, however, the "approved" language in S.C. Code Ann § 23-13-10 could, and therefore should, be read to merely require the involvement of the circuit court judge to verify the appointment and completion of the necessary oaths/other actions. In essence, such a reading would merely create judicial certification of compliance with a mandatory process, something judges do every day and in many different ways. This very case involves judicial determination of an executive's compliance with statutory law, and no more implicates the separation of powers than when a notary, and executive branch officer, participates by necessity of law in the completion of any number of judicial activities (completion of affidavits, etc.).

Having thus shown that the statutory provision is capable of interpretation so as to render it valid, the statute remains valid, and the consequences for failure to comply must be addressed by the Court in its opinion. Rushton's own testimony was that he never took any oath, and that his appointment was never approved by any circuit court judge. No evidence to the contrary was presented, and thus the only rational conclusion based on the evidence presented was that Rushton had not been approved as required by statute.

As a matter of law, therefore, the State failed to establish that Rushton met the prerequisites to be a "deputy." By extension, the State failed to prove that Rushton was a "law enforcement officer" for purposes of the immunity exception contained within the Act. Even when the State produced an oath form signed by Rushton, Rushton testified only that his signature was on the document. (Tr. p. 109, lines 2 - 3). Rushton did not testify⁶ he took the oath. (Tr. p. 12, lines 2 - 8, Tr. p. 9, lines 21 - p. 10, line 6).

(b) Statutory oath requirement is a distinct and mandatory prerequisite that Rushton failed to satisfy.

The "right, authority, and duty of a deputy sheriff are thus created by statute." Willis v. Aiken County, 26 S.E.2d 313, 316, 203 S.C. 96 (1943). The Supreme Court in that matter was addressing specifically the same requirements now codified in S.C. Code Ann § 23-13-10, which establishes a separate requirement of the taking of an oath by a deputy "before entering upon the discharge of his duty." The statute expressly mentions the Constitutional Oath of Article III, and sets forth an additional oath that must be completed as set forth verbatim. Clearly the legislature's intent was to add a distinct,

⁶ The order references the Constitutional oath, and states that Appellant produced no evidence it was not forwarded to the Secretary of State, as the form indicated it would be. This is an example of the improper placement of burden of production discussed in section III supra, as it was the State's responsibility to prove compliance with all necessary aspects of Rushton's deputization, not Appellant's burden to produce evidence of non-compliance.

mandatory oath *above and beyond* the constitutionally mandated oath, which the Supreme Court in Willis accepted as a given without discussion or rejection. Again, the evidence presented was that Rushton did not recall taking any oaths upon his employment with the County, and Rushton never testified that he took the oath that he signed, which does not comply with the language required by § 23-13-10.

The Court characterizes Appellant's interpretation of the statute as "strict, technical evaluations." (Amended Order on Motion to Bar Prosecution, P. 13). The statute does not require any complex or "technical" actions. It merely, and in plain language, puts recitation of a particular oath as a barrier to qualification as a deputy, a barrier Rushton and the State cannot surmount. Appellant has only made simple demands for compliance with a simple statute. Surely mere compliance with controlling plain language of a statute cannot be devalued and dismissed as a "strict" interpretation.

Treatment of this statutory oath requirement as just "supplemental" to the Constitutional requirement is at its essence a mere a refusal to enforce the clear, mandatory intent of the legislature. It can be fairly characterized as "additional" or "supplemental" to the Constitutional oath, but neither characterization diminishes or excuses failure to comply with its mandatory nature. That result could not have been intended by the legislature, who went through the trouble of crafting the statute to place the requirement, despite acknowledging the existence of a similar oath requirement already.

The legislature's requirement is a minimal barrier to deputization, but any barriers that the legislature deems fit to impose expressly are intended because of the significant

meaning and consequence created once that process is completed. That significance is destroyed by the lower court's nullification of the mandatory nature of the statute.

In the process of nullifying that provision of the State Code, the lower court's conclusion operates to delete the word "officer" from § 16-11-440 and 450. Once the barrier to becoming an officer is removed, the castle doctrine statute would then provide an exception for any member of "law enforcement," not just officers thereof. Under that standard, mere labeling of any county employee as a "deputy," regardless of demonstrated noncompliance with the requirements set forth in § 23-13-10 or 20, is enough to grant that employee the full protections expressly reserved for "law enforcement officers." Surely that result would be the sort of "plainly absurd" result that courts are to avoid when interpreting statutes. City of Rock Hill v. Harris, 391 S.C. 149, 154, 705 S.E.2d 53, 55 (2011) (citing Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)).

- (c) Rushton's certification as a Class I law enforcement officer had lapsed, and necessary training to recertify was not completed prior to the events in question.

Rushton left his employment with the McCormick County Sheriff's Department and spent four years working abroad between 2005 and 2009. (Tr. p. 7, lines 21 – p. 8, line 4). He testified upon cross examination that he "had to catch up all the training hours I had missed for the previous four years." (Tr. p. 9, lines 11 – 12). He claimed to have taken a criminal domestic violence update and legal update. (Tr. p. 13, lines 16 – 20). No such training, however, is listed on his training record submitted at the hearing.

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(Court's Exhibit 1 from hearing). That same document shows he was certified⁷ as a Class I law enforcement officer on June 26, 2010, nearly seven months *after* the night in question. *Id.* The only evidence of training is thus contradicted by a certified document from the Criminal Justice Academy that was entered into the hearing record as an exhibit.

(d) Failure to qualify as a "law enforcement officer" does not bar prosecution, but merely precludes certain exception to immunity.

The Court justifies its determination that failure to comply with the oath requirement of S.C. Code Ann. § 23-13-20 "does not deprive the State of the ability to prosecute here for shooting a deputy." That first assumes qualification as a deputy, which as shown has not been met as a matter of law. Second, that is an oversimplification of the collateral consequences of Rushton's (and the County's) failures. Failure of an exception is not the equivalent of proof that the underlying immunity applies. The failure here does preclude the State from availing itself of the "law enforcement officer" exception under § 16-11-450, but does not by itself bar prosecution. The bar to prosecution, if any, comes as the result of Appellant's separate preliminary showing of entitlement to the necessary presumption and immunity, as set forth hereinabove in Section III.A.

2. The State cannot support a finding that Appellant knew or should have known Rushton was a law enforcement officer at the time of the incident.

Assuming for the purposes of argument that Rushton is determined to be a "law enforcement officer" as a matter of law or factual finding by the presiding judge, the

⁷ The date referenced is a recertification date. Since Rushton had spent more than three years away from the McCormick County Sheriff's Department, his certification had lapsed. See S.C. Code § 23-23-60. The June 26, 2007 date listed is, upon information and belief, the date of that lapse, and is not indicative of continuous certification that was not renewed until 2010.

State would still need to show that Rushton “identifie[d] himself in accordance with applicable law.” S.C. Code Ann. § 16-11-450(A). The State may also make the requisite showing by producing evidence that Appellant knew or should have known Rushton was a law enforcement officer. *Id.* The evidence, however, compels the conclusion that Appellant acted reasonably in ignorance of the fact that Rushton was (purportedly) a law enforcement officer, in part because of Rushton’s failure to follow proper procedures for responding to a “shots fired” dispatch. Any factual finding to the contrary is “clearly wrong” such that the findings may be set aside on appeal. See State v. Williams, 326 S.C. 130, 485 S.E.2d 99 (1997)

- (a) The facts, when viewed properly from the perspective of Appellant as compelled by the common law and codification thereof, compel a finding that Appellant was reasonable in his belief that he was not firing upon a law enforcement officer.⁸

Appellant testified that he was aware of home invasions occurring, and that his mother’s home had been burglarized at least once before successfully, and attempted burglaries had occurred on multiple occasions. (Tr. p. 212, line 23 – p. 213, line 3). The Order mentions that Appellant had discharged his firearm in the area that evening, as he was allowed to do lawfully since his mother’s house was in an unincorporated area, not a “neighborhood” as the order claims, and he was protecting his pet from a fox pursuant to S.C. Code § 50-11-2570(B) (right to shoot at furbearing animal damaging property). The Order mentions neighbor complaints to Appellant’s mother about Appellant’s shooting, but absolutely no firm testimony or evidence indicates that Appellant was ever advised of

⁸ Again, as set forth in detail *supra*, Appellant contends that Rushton was not a “law enforcement officer” within the meaning of the Act,

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that conversation. (Tr. p. 149, lines 15 – 18). There is no evidence a prior noise report was ever communicated to Appellant by law enforcement. (Tr. p. 86, lines 6 – 9).

Rushton, Moore, and McAllister did not telephone, or have dispatch call, the house in which Appellant was located, and they were not responding to any contact initiated by Appellant. ((Tr. p. 87, lines 10-22). The neighbors that called the police had not contacted Appellant or notified him of police involvement on the night of the shooting or any previous occasion. (Tr. p. 149, lines 15 – 18). As he testified, Appellant was sound asleep in his bed when the disturbance on the property began.⁹ (Tr. p. 225, line 9). He was upstairs, inside of a dwelling that was well insulated. (Tr. p. 213, lines 8 – 9, Amended Order on Motion To Bar Prosecution, p. 3).

The Court's reference to the ability of neighbors to observe and hear various events is irrelevant and misguided. Those neighbors were expecting police presence, as they had in fact initiated police presence, and they had their windows open. (Tr. p. 153, lines 20-21).

The ground level door that was knocked upon, which was where the doorbell was located and is the only entrance to the house, had no peephole or other means to examine the identity or appearance of the person(s) on the other side, which is submitted as a more than appropriate reason for Appellant to not open this door. (Tr. p. 213, lines 10-18). There were no windows on the ground level, and no police cars could be seen from the upstairs windows. Id. Rushton's police car, without blue lights on, was parked on the other side of the house. (Tr. p. 92, lines 11-12; Tr. p. 213, lines 12-14). It was also

⁹ Testimony conflicted regarding the exact time of the shots, although witnesses seemed to agree that there were only two shots fired. Even using a time later than Appellant's own recollection, the 3:30 a.m. time testified to by the neighbor, still puts an hour between the final shot and when Rushton arrived on scene, which was more than ample time for Appellant to reach a deep sleep prior to awakening suddenly.

parked behind an SUV. (Tr. p. 39, lines 16 – 18). Moore's car and McAllister's car weren't parked on Appellant's property, and likewise did not have sirens or lights activated. (Tr. p. 197, lines 24 – p. 198, line 8). Appellant had no obligation to remove and open the only barrier to entry into his home, just to determine the identity of an uninvited, demanding visitor of unknown purpose or identity in the middle of the night. It is unreasonable to require otherwise.

Appellant presented evidence that the night in question was the darkest night of the month, and the Court stated it had no reason to disbelieve that evidence (Amended Order on Motion To Bar Prosecution, p. 3). That raises the issue regarding the use/non-use of a balcony light. Moore and McAllister testified that they saw the light come on initially as they were at the rear of Appellant's house getting ready to leave. (Tr. p. 162, lines 10 – 18.). This clearly explains why Appellant did not see any person in his yard when he first turned on the light and looked out over the yard from within his house.

Every witness is consistent in acknowledging the light was not on continuously. The Court finds that there was a verbal exchange wherein Appellant supposedly asked who was at his home, received a response that it was law enforcement, and replied with a confrontational statement. (Amended Order on Motion To Bar Prosecution, p. 6).

Appellant maintains no such verbal exchange occurred, and there is no evidence to indicate that Appellant was disposed to, or had any reason on the night in question, have reacted in such a cavalier manner to the supposed announced presence of law enforcement, regardless of the time of night. (Tr. p. 46, lines 18 – p. 47, line 1; Tr. p. 47, lines 22 – 23; Tr. p. 54, lines 10 – 14; Tr. p. 63, lines 1 – 7). Thus Appellant's testimony that he would not have shot Rushton if he had known Rushton was there on behalf of the

police, (Amended Order on Motion To Bar Prosecution, p. 3), is uncontroverted and should be accepted by the Court.

Appellant had no death wish, and had no grudge against law enforcement, and thus the only reasonable explanation for why he would turn on the light and step onto his balcony, which also is the actual explanation, is that Appellant had not yet understood or acknowledged the presence of purported law enforcement. The Court acknowledges that Appellant testified about a failure to see any blue lights, or hear sirens, or see that the area was cordoned off, but "his testimony in that regard is not credible." (Amended Order on Motion To Bar Prosecution, p. 4). However, the reason Appellant did not see any blue lights, hear any sirens, or see a cordoned off area is that those actions were *never taken* by anyone, and thus the testimony is not contested in that regard and cannot be found to be no credible.

It is undisputed that the shooting happened almost immediately after Appellant's entrance onto the balcony, and not after a contemplative, observation of and conversation between those involved. (Tr. p. 45, lines 25 – p. 46, line 9). Rushton testified that "it just happened so fast right then." (Tr. p. 46, lines 22 – 23.) Deputy Moore's statement to the ATF was that this action was supposedly met with a call of "Sherriff's office" and "gun!" after which Appellant immediately fired at Rushton. (R. ____). Even without agreement with Moore's statement, it is undisputed that the shooting happened within a very brief after Appellant's entrance onto the balcony, and not after a contemplative, observation of and conversation with or dialogue with any particular person. Accordingly, there is no evidence to support the contention that even had those statements been made, that there was sufficient time to process the information prior to Appellant's shot.

- (b) Appellant provided expert testimony regarding the procedural and technical failures of Rushton, Moore, and McAllister that further justify a necessary finding of reasonableness on the part of Appellant.

The lower court ignores the significant and relevant testimony of Appellant's expert, Dr. George Kirkham. Dr. Kirkham, a member of law enforcement himself, examined the premises at night and reviewed the actions of Rushton, Moore, and McAllister on site that morning. (Tr. p. 114, lines 23 – 24). He testified that the trio failed to follow proper police procedures in many respects, so much so that "if you were making a training video for officers" the actions of these actors could be used to train for what not to do in such a situation. (Tr. p. 137, lines 24 – p. 138, line 3). Dr. Kirkham further stated "what seems to be clear that could have prevented this tragedy from happening[:] proper police procedure. That's all." (Tr. p. 142, lines 8 – 10).

- (c) Rushton was not in uniform or appearance a law enforcement officer.

The Order states that Rushton did not have on a military style uniform, "but had his badge displayed." (Amended Order on Motion To Bar Prosecution, p. 6). There is neither evidence nor any indication how the clothing worn by Rushton differed from the stereotypical outfit a burglar might employ, aside from the small badge on a belt. Rushton did not have on a uniform; instead he was wearing merely khaki pants, a green shirt, and a small badge on his belt. (Tr. p. 21, line 13 – p. 22, line 14). He was not wearing McCormick County's standard deputy uniform, any reflective items such as a vest, or any hat identifying him as law enforcement, even though Rushton had a vest and hat he could have worn. (Tr. p. 22, lines 15 – 23; Tr. p. 25, lines 5 – 9; Tr. p. 24, lines 4 – 8). Appellant testified that he did not see the badge anyway, which is highly likely and

understandable given Rushton's first appearance to Appellant involved a gun aimed at Appellant on a dark night.¹⁰

Appellant's actions after shooting Rushton support this belief, and actions in conformity therewith up until that point, that he was protecting himself within his castle and not mistakenly shooting a purported member of law enforcement. There is absolutely no evidence that Appellant maliciously sought to hunt down or further injure the person he had just shot. Ruston testified the shot knocked him to the ground. (Tr. p. 52, line 2). Appellant was armed with a semi-automatic rifle that contained additional unspent ammunition, including a round in the chamber. (State's Exhibit 2 at immunity hearing, p. 3 (Statement of Moore)). Appellant could have easily fired multiple shots at Rushton if he had intended to be as evil as portrayed by the State.

Instead, Appellant fired a warning shot into the air over Ruston's head. Then, consistent with someone protecting himself and not intent upon attacking known law enforcement, Appellant remained within the protection of the home for a short time, then searched the premises and even helpfully placed Mr. Rushton's damaged pistol inside the patrol car before meeting with the Sheriff who arrived on scene later. (State's Exhibit 2, p. 11 (Sheriff Reid's statement)).

The Order repeats Appellant's statement as "Where are you, you son of a b____?" (Amended Order on Motion To Bar Prosecution, p. 7). Although not clear from the order, it is important that the statement be clarified as definitively referring to a single person, as Appellant contends he was only aware of a single, un-uniformed person on his premises that evening, and not the trio that the State wants to focus on. Moore

¹⁰ As the Court notes in its order, evidence of the angle of trajectory and damage to Rushton's weapon confirms that it was aimed at Appellant when struck by Appellant's fired bullet.

testified that he never had a clear look at Appellant, only seeing his silhouette. (Tr. p. 164, lines 18 – 24). McAllister said she never even saw Appellant. (Tr. p. 196, lines 18 – 21). These statements, even without reliance upon anything Appellant testified regarding, compel but one factual finding supported by evidence, that Appellant was reasonably ignorant of the presence of more than one person, let alone multiple persons with law enforcement, that dark morning.

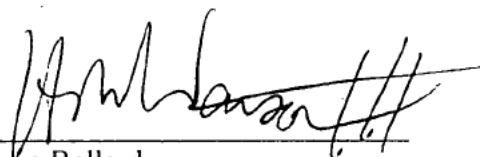
Retrospectively, of course, it is obvious that Rushton, Moore and McAllister were trying to serve the community and do their jobs. But when examined from the perspective of Appellant, or any other reasonable person placed in his shoes, at the relevant time when Appellant was making decisions about what to do, the only evidence available compels a finding in favor of Appellant as to this personal or imputed knowledge, and thus the inapplicability of the State's attempt at proving an exclusion to immunity. The root source of such a perspective is longstanding precedent that says a man may defend his castle "if necessary or apparently so." State v. Bradley, 120 S.E. 240, 242, 126 S.C. 528 (1923). Appellant's actions exist squarely, and necessarily, within the boundaries of "apparently so" without any evidence that may be relied upon to justify a contrary factual finding.

CONCLUSION

Appellant respectfully submits that an insufficient records exists by which this Court can engage in a meaningful review of the relevant facts presented at the hearing, necessitating at minimum a remand for augmentation of the record with an inference in favor of information submitted by Appellant, or in the alternative a complete re-hearing.

However, even on the limited record preserved, appropriate application and enforcement of all relevant provisions of statutory law and common law principles discussed in this memorandum compels extension of immunity to Appellant and rejection of the State's attempted application of an exception thereto. As such, Appellant respectfully requests the denial of immunity from prosecution be reversed, with remand for issuance of a proper order dismissing these matters against Appellant, and for such other and further relief as this Court may deem necessary and proper.

Respectfully submitted,



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ATTORNEYS FOR APPELLANT

January 8, 2013

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM McCORMICK COUNTY

Honorable William P. Keesley, Circuit Judge, 11th Judicial Circuit
Case No. J-036561, J-036562, J-036563, J-036564, J-036565, J-036566

Joe Ross Worley,

Appellant

v.

State of South Carolina,

Respondent.

APPELLANTS' AMENDED INITIAL DESIGNATIONS OF MATTER

Pursuant to Rule 209(a) and (b), SCACR, Appellants hereby designate the following matter, which was before the lower court (as defined in Rule 202(b)(1)) to be included in the Record on Appeal in this matter. Appellants reserve the right to supplement these designations in conjunction with the submission of their initial reply brief.

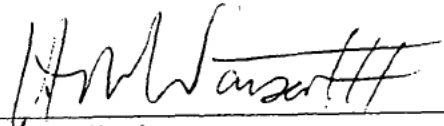
All designated matter does not include proof of service or exhibits unless otherwise specified:

1. Amended Order on Motion to Bar Prosecution executed by Judge Keesley filed July 12, 2011.
2. Amended Order on Reconsideration of the Defendant's Motion to Bar Prosecution executed by Judge Keesley filed December 8, 2011.

3. Order on Defense Motion to Bar Prosecution executed by Judge Keesley filed June 24, 2011.
4. Defendant's Motion to Reconsider filed July 6, 2011.
5. Defendant's Brief in Support of Motion to Reconsider dated July 29, 2011.
6. State's Reply to Motion and Brief for Reconsideration dated August 12, 2011.
7. Defendant's Reply to State's Brief in Opposition to Motion to Reconsider filed August 23, 2011.
8. Defendant's Motion to Supplement the Record filed August 22, 2011.
9. Defendant's Second Motion to Reconsider filed on December 15, 2011.
10. Arrest Warrants J-036561, J-036562, J-036563, J-036564, J-036565, J-036566 dated November 15, 2009.
11. Bureau of Alcohol, Tobacco, Firearms and Explosives Field Report dated April 28, 2011.
12. Partial Transcript of Record from Immunity Hearing before Judge Keesley on May 31, 2011 and June 1, 2011.
13. Defendant's Motion *Nunc Pro Tunc* to Supplement the Record on Rehearing or Take Judicial Notice filed February 23, 2012.
14. Defendant's Exhibits 1-7 from Immunity Hearing held before Judge Keesley.
15. Court's Exhibit 1 from Immunity Hearing held before Judge Keesley.
16. State's Exhibits 1 and 2 from Immunity Hearing held before Judge Keesley.

The undersigned is informed and believes, and therefore certifies, that the matter designated is relevant to the appeal in this matter.

Respectfully submitted,



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ATTORNEYS FOR APPELLANTS

January 8, 2013

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM McCORMICK COUNTY

Honorable William P. Keesley, Circuit Judge, 11th Judicial Circuit
Case No. J-036561, J-036562, J-036563, J-036564, J-036565, J-036566

Joe Ross Worley,

Appellant

v.

State of South Carolina,

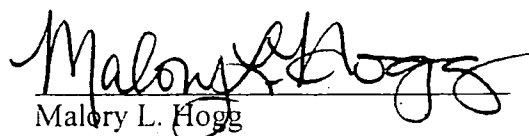
Respondent.

CERTIFICATE OF SERVICE

I, Malory L. Hogg, an employee with the Law Offices of Ballard Watson Weissenstein, do hereby certify that on January 8, 2013, I served a copy of the **Appellant's Amended Initial Brief and Appellant's Amended Designation of Matter** in the above-captioned case on the following individuals by United States Mail, with sufficient first-class postage affixed, addressed as follows:

**Mark R. Farthing, Esquire
Assistant Attorney General
Attorney General's Office
Post Office Box 11549
Columbia, SC 29211**

January 8, 2013
West Columbia, South Carolina


Malory L. Hogg
Paralegal

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from McCormick County
Honorable William P. Keesley, Circuit Court Judge
Appellate Case No. 2012-210646

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FEB 07 2013
SC Court of Appeals

THE STATE,

Respondent,

vs.

JOE ROSS WORLEY,

Appellant.

PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Motion to Remand for Reconstruction of the Record and Motion to Strike Improperly-Designated Matter from Amended Designation of Matter on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Desa Ballard and Harvey M. Watson, III, Esquires
Ballard Watson Weissenstein
Post Office Box 6338
West Columbia, South Carolina 29171

Carson Henderson, Esquire
The Henderson Law Firm, PC
109-B Oak Avenue
Greenwood, South Carolina 29646

Billy J. Garrett, Jr., Esquire
The Garrett Law Firm, PC
109 Oak Avenue
Greenwood, South Carolina 29646

I further certify that all parties required by Rule to be served have been served.
This 7th day of February, 2013.

Ellen R. DuBois

ELLEN R. DuBOIS

Legal Assistant

Office of the Attorney General

Post Office Box 11549

Columbia, SC 29211

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM McCORMICK COUNTY

Honorable William P. Keesley, Circuit Judge, 11th Judicial Circuit
Case No. J-036561, J-036562, J-036563, J-036564, J-036565, J-036566

Joe Ross Worley,

v.

State of South Carolina,

Appellant

Respondent.

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SC Court of Appeals

**APPELLANTS' RETURN TO RESPONDENT'S MOTION TO REMAND
AND
MOTION TO STRIKE**

Return to Motion to Remand

Respondent filed a Motion to Remand the matter back to the circuit court, apparently in response to arguments Appellant raised again, but most recently in his Amended Initial Brief. Appellant contends that there would error in proceeding with this appeal given the failure of the State to preserve an adequate record that would allow for a meaningful review by this Court.

As outlined in Appellant's Initial Brief, Appellant is informed and believes the appropriate remedy for the State's failure should be the augmentation of the record on appeal. Appellant attempted to bring that about through an earlier Motion to Supplement the Record that was denied by order of this Court on December 19, 2012. Given that order, Appellant contends that matter should be remanded to the lower court as requested by Respondent in his motion.

However, Respondent does not address the manner in which that augmentation of the record is to occur following remand to the circuit court level. If augmentation of the existing record is ordered instead of complete re-hearing, Appellant should receive an inference in his favor regarding all testimony and evidence that was not initially preserved for review. If a party fails to produce testimony of an available witness on a material issue, it may be inferred that such testimony would have been adverse to him. Nelson v. Coleman Co., 249 S.C. 652, 155 S.E.2d 917 (1967). Likewise, when a party loses or destroys evidence, an inference may be drawn that the destroyed or lost evidence would have been adverse to that party. Gathers By and Through Hutchinson v. South Carolina Elec. and Gas Co., 311 S.C. 81, 427 S.E.2d 687 (Ct. App. 1993). Although Respondent did not directly lose the portion of the transcript, the actor that did was a State actor, and thus the actions of the court reporter should be imputed to the State as Respondent.

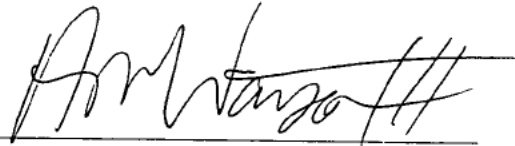
Appellant believes that relevant in this consideration for the nature of any remand is recent case law that appears to indicate partial reconstructions may be disfavored. See Adams v. H.R. Allen, Inc., 397 S.C. 652, 726 S.E.2d 9 (Ct. App. 2012). That matter was remanded for a new trial in light of a failed and unfair attempt at partial record reconstruction that violated procedural due process rights in a worker's compensation matter. Id. at 659, 13. Certainly Appellant warrants greater due process protection than a mere claimant seeking compensation for alleged work injuries.

Return to Motion to Strike Designated Matters

Given the apparent agreement between Appellant and Respondent that this case needs to be remanded back to the circuit court for some manner of record reconstruction, any motion to

strike certain matters designated by Appellant for inclusion in the Record on Appeal is, paradoxically, both premature and moot.

Respectfully submitted,



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February 15, 2013

ATTORNEYS FOR APPELLANTS

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM McCORMICK COUNTY

Honorable William P. Keesley, Circuit Judge, 11th Judicial Circuit
Appellate Case No. 2012-210646

Joe Ross Worley,

Appellant

v.

State of South Carolina,

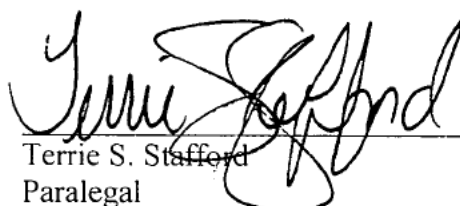
Respondent.

CERTIFICATE OF SERVICE

I, Terrie S. Stafford, an employee with the Law Offices of Ballard Watson Weissenstein, do hereby certify that on February 15, 2013, I served a copy of the **Appellant's Return to Motion to Remand for Reconstruction of the Record and Motion to Strike Improperly-Designated Matter from Amended Designation of Matter** in the above-captioned case on the following individuals by United States Mail, with sufficient first-class postage affixed, addressed as follows:

Mark R. Farthing, Esquire
Assistant Attorney General
Attorney General's Office
Post Office Box 11549
Columbia, SC 29211

February 15, 2013
West Columbia, South Carolina


Terrie S. Stafford
Paralegal

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FEB 19 2013

SC Court of Appeals



ALAN WILSON
ATTORNEY GENERAL

RECEIVED

February 20, 2013

FEB 20 2013

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, S.C. 29211

S.C. Supreme Court

RE: State v. Joe Ross Worley – Appellate Case No. 2012-210646

Dear Ms. Kitchings:

On February 15, 2013, Appellant Joe Ross Worley filed a return to the State's Motion to Remand for Reconstruction of the Record and Motion to Strike Improperly-Designated Matter from Amended Designation of Matter in the above-referenced criminal appeal. Please accept this letter as the State's reply to Appellant's return.

Regarding Appellant's contention that the actions of the court reporter are imputable to the State as Respondent due to the fact she is an employee of the State of South Carolina, the court reporter was not and is not a party to Appellant's case. Instead, just like the judge who presided over the immunity hearing and the members of this Court, the court reporter is an employee of the judicial department, is not a party to the cases on which she works as employee of the judicial department, and is not involved in the prosecution of Appellant or any other criminal defendant. In fact, the court reporter expressly certified "that [she was] neither of counsel nor kin to any of the parties to this cause of action, nor [was she] interested in any manner in its outcome." (Reply Exhibit "A" – Immunity Hearing Transcript, p. 231). Therefore, as the court reporter was not a party to Appellant's case, the court's reporter's actions are not imputable to the State in any way and do not entitle Appellant to "an inference in his favor regarding all testimony and evidence that was not initially preserved for review."

Regarding Appellant's contentions in regards to the manner in which reconstruction of the record should occur, such a decision lies in the discretion of the trial judge. See Adams v. H.R. Allen, Inc., 397 S.C. 652, 658, 726 S.E.2d 9, 13 (Ct. App. 2012) ("[W]e agree the trial court has discretion in determining how to reconstruct missing portions of a transcript[.]"); China v. Parrott, 251 S.C. 329, 334, 162 S.E.2d 276, 278 (1968) (instructing "the duty and responsibility" of settling the question of what the appellate record should contain rests upon the trial judge in a case where portions of the

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SC Court of Appeals

notes of the trial proceedings were lost before the court reporter was able to transcribe them). Therefore, as the trial judge is in the best position to determine what steps are necessary to reconstruct missing portions of the trial court proceedings that he previously presided over, the determination of what method is necessary to reconstruct the record in Appellant's case should be left to the trial judge's discretion.

Regarding Appellant's contentions in regards to the alleged prematurity and mootness of the State's motion to strike the improperly-designated motion and exhibit, Appellant's contentions are entirely without merit. Through its motion to strike, the State moved to strike a motion and exhibit filed with the trial judge after the trial judge issued his ruling and after Appellant appealed that ruling. Significantly, the challenged motion and exhibit were not a part of the missing portion of the immunity hearing transcript requiring reconstruction. Therefore, a remand for reconstruction of the missing portions of the transcript would have no bearing on whether the challenged motion and exhibit can or cannot properly be included in the Record on Appeal. Accordingly, the State's motion to strike that matter is neither premature nor moot, and this Court should address the State's motion.

If a more formal reply is desired by this Court, the State will promptly provide one upon request. Thanks, and if you should have any questions or concerns, please contact me at (803) 734-3727.

Sincerely,



Mark R. Farthing
Assistant Attorney General
Bar No. 76901

MRF/
Enclosures

cc: Desa Ballard, Esquire
Harvey Watson, III, Esquire
Carson Henderson, Esquire
Billy J. Garrett, Jr., Esquire
Victim Services

REPLY EXHIBIT "A"

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

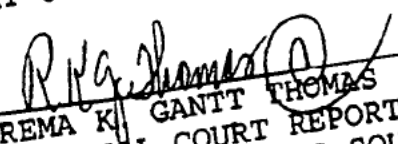
COURT REPORTER'S CERTIFICATION

I, REMA K. GANTT, OFFICIAL COURT REPORTER, AND NOTARY PUBLIC IN AND FOR THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE BUT PARTIAL TRANSCRIPT OF RECORD OF THE PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE ABOVE-CAPTIONED CASE ON MAY 31, 2011, IN MCCORMICK, SOUTH CAROLINA.

THIS RECORD IS INCOMPLETE DUE TO AN ILLEGAL BREAK-IN TO MY PERSONAL VEHICLE ON 6/23/2011, WHEREIN ITEMS WERE STOLEN FROM THE VEHICLE, INCLUDING PART OF THIS RECORD; COLUMBIA POLICE REPORT #110018381.

I FURTHER CERTIFY THAT I AM NEITHER OF COUNSEL NOR KIN TO ANY OF THE PARTIES TO THIS CAUSE OF ACTION, NOR AM I INTERESTED IN ANY MANNER IN ITS OUTCOME.

IN WITNESS WHEREOF, I HAVE HEREUNTO SET MY HAND AND SEAL AT LEXINGTON, SOUTH CAROLINA, THIS THE TWENTY-ETH DAY OF AUGUST 2011.


REMA K. GANTT THOMAS
OFFICIAL COURT REPORTER
NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES 11/21/2013

67524

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from McCormick County
Appellate Case No. 2012-210646

Joe Ross Worley,

Appellant

v.

State of South Carolina,

Respondent.

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SC Court of Appeals

APPELLANT'S MOTION TO REMAND

Appellant Joe Ross Worley (hereinafter "Worley") moves this Honorable Court for an order to remand this matter to the circuit court for a *de novo* hearing on the issues which are currently on appeal. In support of his motion, Worley will show:

1. Worley was arrested following events at his mother's home in the early morning hours of November 15, 2009. He has been incarcerated since that time in the McCormick County jail as a pretrial detainee¹. He has not been tried for the alleged crimes for which he has been incarcerated for more than three years.
2. The exact events of those early morning hours are heavily disputed between the parties to this appeal, but from Appellant's perspective, a full and complete record of the underling proceedings would demonstrate the following:

¹ On three (3) occasions (December 3, 2009, February 23, 2010, and August 11, 2010), the circuit court, via Judge Keesley, denied pretrial bond, finding Worley is a "danger to the community." On the fourth (4th) occasion on which Judge Keesley considered the issue, he recused himself. Judge Frank Addy then heard the pretrial bond motion, and denied it, essentially concluding he could not overrule Judge Keesley. (Order dated September 28, 2011)

On the darkest night of the month, and in the wee hours of the morning, two McCormick County Sheriff's Office deputies (Moore and McAllister) and another employee of the Sheriff, Rushton², approached Worley's mother's house to investigate a gunshot complaint made by Worley's next door neighbors. Worley was sound asleep in his bed but awoke when the police arrived and began ringing the doorbell.³ His mother remained asleep. Worley's bedroom and his mother's bedroom were upstairs, inside of a dwelling that was well insulated. Worley's windows were closed, and the HVAC unit was on and heating the house.

Worley's neighbors had called 911 to complain that Worley had fired a weapon earlier in the evening. The neighbors didn't contact Worley directly to complain and didn't tell Worley they had called the police. Rushton, Moore, and McAllister didn't telephone, or have police dispatch call, the Worley residence, even though Mrs. Worley's telephone number was listed in the local telephone book.

Rushton, Moore, and/or McAllister repeatedly rang the doorbell located at the ground level door. This door is the only entrance to the house. This door has no peephole or other means to examine the identity of the person(s) on the other side, which is why Worley didn't go downstairs and open this door. Also, there were no windows on the ground level of the house.

² Rushton's status as a law enforcement officer on the night of the shooting is disputed. Rushton was a former McCormick County deputy who was newly re-hired by the McCormick County Sheriff's Office after several years of other overseas employment. However, Rushton had not been recertified as a law enforcement officer, and had not been duly qualified to serve as a deputy sheriff, at the time he approached Worley's mother's house and aimed his gun at Worley.

³ Testimony conflicted regarding the exact time of the shots, although witnesses seemed to agree that there were only two (2) shots fired. Rushton admitted that he believed a deer poacher was active in the area and was responsible for the prior shots complained of by the neighbors. Regardless, Worley asserts he went to sleep afterward until roused from his bed by the ringing of the doorbell, and there is no evidence in the record to the contrary. Even using a time later than Worley's own recollection, the 3:30 a.m. time testified to by the neighbor still puts an hour between the final shot and when Rushton arrived on scene, which was more than ample time for Worley to reach a deep sleep prior to being awakened by the ringing doorbell

Worley couldn't see any police cars from the upstairs windows. Rushton's police car, without flashing blue lights on, was parked on the other side of the house and out of Worley's line of sight anyway. Moore's car and McAllister's car weren't parked on Worley's property. No one used sirens, a loud speaker, a bullhorn, or any other device in order to let Worley know that law enforcement was in his mother's yard.

Worley presented evidence that the night in question was the darkest night of the month. Worley testified that he did turn on the light while still inside the house, but did not see anyone and only saw total darkness. Moore and McAllister testified that they saw the light come on initially as they were at the rear of Worley's house getting to ready to leave. Rushton saw the light come on while walking from the neighbors' house to Worley's mother's house. This clearly explains why Worley did not see any person in his yard when he first turned on the light and looked out over the yard from within his house.

Worley testified that he then turned off the light. Every witness is consistent in acknowledging the light was not on continuously. Worley stated he turned off the light to ensure his rifle's safety was off before turning the light on again and exiting onto the balcony. Worley had the rifle in the port position (pointed upward and not at anyone) when he exited onto the balcony. Rushton agreed that Worley had the rifle in the port position when Worley exited onto the balcony. Worley testified that he saw Rushton, yelled "freeze," and then Rushton aimed his weapon at Worley. Rushton's testimony confirms that he aimed his weapon at Worley, despite no menacing, threatening, or illegal action having been taken by Worley, even according to Rushton himself. Worley testified that he would not have shot Rushton if he had known Rushton

was with the McCormick County Sheriff's Office.

Worley was armed with a semi-automatic rifle, and said he could have shot Rushton again when Rushton fell to the ground after being shot. Rushton testified the shot knocked him to the ground. Instead, Worley fired a warning shot into the air over Rushton's head when Rushton started running toward Worley's ground level door, in an effort to motivate the suspected burglar to vacate the premises.

3. Both parties agree that law enforcement officers arrested Worley at his mother's house that morning. Worley was charged with three (3) counts of assault and battery with intent to kill (S.C. Code Ann. § 16-3-0620) and three (3) counts of use of a weapon during a violent crime (§ 16-23-0490).
4. At a pretrial hearing, Worley raised the Castle Doctrine by way of defense. S.C. Code Ann. § 16-11-420 (hereinafter the "Act") codifies the common law Castle Doctrine, and provides for the ability of law-abiding citizens to protect themselves via their constitutional right to bear arms, and thereby protects their right to "expect to remain unmolested and safe within their homes." Id.
5. The Act provides for true immunity from prosecution, and the applicability of the statute is to be determined pretrial. State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011). Judge William P. Keesley held a hearing on May 31, 2011 (continued over onto June 1, 2011) to determine whether Worley was entitled to immunity under the Act, and concluded that Worley was not protected from prosecution. (Orders dated June 24, 2011 and July 5, 2011). Appropriate motions for reconsideration were filed and denied.
6. In his ruling on immunity, Judge Keesley recused himself from further proceedings in this case. Id. This presented such a complex procedural hurdle that Judge Keesley sought

expert advice from retired law professor John Freeman about his ability to decide the motions for reconsideration after having already recused himself. After receiving advice from Freeman, Judge Keesley addressed the motions for reconsideration.⁴

7. The Act does not explicitly provide a procedure for determining immunity. Duncan, 409, 664. In Duncan, the Supreme Court held that the immunity determination under the Act “must be decided prior to trial” upon motion of either party. Id. at 410, 665. The particular facts at issue in Duncan involved a grant of immunity, so the State’s appeal was, in fact, an appeal from a final order. Id. at 407, 663. However, the Supreme Court said a denial determination under the Act “is immediately appealable, as it is in the nature of an injunction.” Id. (footnote 2).
8. Unanswered, however, is whether a defendant who is denied the immunity in a pretrial order must appeal that order pretrial, or simply may do so and preserve the ability to raise the immunity at trial, especially since determination of immunity is not automatic or required but is triggered by pretrial motion of either party.
9. In this case, after the denial of pretrial bond, Worley has thus been given a Hobson’s choice: (1) not appeal Judge Keesley’s order, then go to trial with the risk he will be denied the ability to raise protections afforded by the Act as a defense at trial, or (2) remain in jail while he appeals the pretrial order denying applicability of the Act. In order to protect his rights, Worley has remained in jail while pursuing this appeal. Worley’s effort to seek extraordinary relief from the Supreme Court on the bond issue was denied. Order dated January 25, 2012.

⁴ Eleventh Judicial Circuit Judge R. Knox McMahon has also recused himself from hearing this matter.

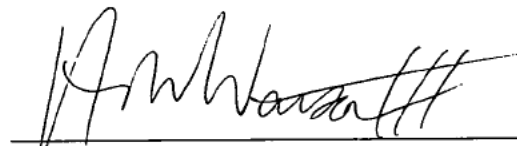
10. This appeal from Judge Keesley's Orders addresses the substantive issue of whether Worley is entitled to the immunity provided by the Act. In preparing the appeal, it was discovered that the court reporter who had recorded the hearing before Judge Keesley could not produce the entire transcript of the proceeding⁵. Oddly enough, all of Worley's testimony was missing, while all of the testimony from law enforcement was intact.
11. To avoid the delays which would accompany a remand, Worley attempted to supplement the appellate record with notes from the hearing taken by Worley's trial counsel. This effort was opposed by the State, and by order dated December 19, 2012, this Court ordered Worley's appellate counsel to amend the initial brief (and designations) to strike the proposed supplements to the record.
12. Following filing of Worley's amended initial brief, the State moved to remand the matter to the circuit court to reconstruct some portion of the record. Worley agreed in a return dated February 15, 2013, and asked that this Court construe the missing evidence adversely to the State.
13. The State has lobbied this Court, by letter dated February 20, 2013, to place some restrictions on the scope of the remand that will be made pursuant to its motion. However, in light of Judge Keesley's recusal, it is apparent that any remand must be a hearing *de novo* so that a complete record can be created for the review of this issue.
14. Cases cited by the State which suggest the trial judge should use his discretion to determine what to reconstruct on remand are not applicable here because Judge Keesley has recused himself. The judge to whom the matter is assigned for remand must start from

⁵ The court reporter produced a police report which indicated her car had been broken into and some tapes stolen. However, most tapes from the hearing before Judge Keesley remained. The only missing tapes included a portion of the neighbor's testimony and all of Worley's testimony.

scratch.

15. During the remand proceedings, the trial judge can address issues regarding any inferences that must be drawn from the failure of the State to produce the entire proceeding before Judge Keesley.
16. Worley moves for remand in total, with direction to the trial court to expedite the proceeding. In essence, this matter has to start again. A new judge will have to hear new evidence, and could well make a different ruling which would moot this appeal.
17. Because Worley remains incarcerated, without availability of bond, due to the State's (or its agents) failure to produce the entire transcript of the proceedings before Judge Keesley. Worley has been in jail since his arrest more than three years ago, all because the State (or its agents) cannot produce a complete record for appeal. For that reason, Worley respectfully requests that this Court's order of remand require expedited proceedings.

Respectfully submitted,



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March 6, 2013

ATTORNEYS FOR APPELLANT

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM McCORMICK COUNTY

Honorable William P. Keesley, Circuit Judge, 11th Judicial Circuit
Appellate Case No. 2012-210646

Joe Ross Worley,

Appellant

v.

State of South Carolina,

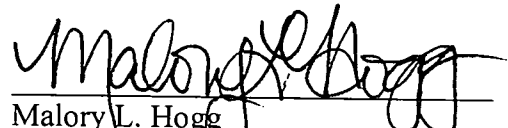
Respondent.

CERTIFICATE OF SERVICE

I, Malory L. Hogg, an employee with the Law Offices of Ballard Watson Weissenstein, do hereby certify that on March 6, 2013, I served a copy of the **APPELLANT'S MOTION TO REMAND** in the above-captioned case on the following individuals by United States Mail, with sufficient first-class postage affixed, addressed as follows:

Mark R. Farthing, Esquire
Assistant Attorney General
Attorney General's Office
Post Office Box 11549
Columbia, SC 29211

March 6, 2013
West Columbia, South Carolina


Malory L. Hogg
Paralegal

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from McCormick County
Honorable William P. Keesley, Circuit Court Judge
Appellate Case No. 2012-210646

RECEIVED

MAR 18 2013

THE STATE,

SC Court of Appeals

Respondent,

vs.

JOE ROSS WORLEY,

Appellant.

**RETURN TO APPELLANT'S MOTION
TO REMAND**

Respondent ("the State"), through its undersigned counsel, would respectfully show unto the Court as follows:

Procedural History

In November of 2009, Appellant Joe Ross Worley was arrested and charged with three counts of assault and battery with intent to kill and three counts of possession of a firearm during the commission of a violent crime. In February of 2010, the McCormick County grand jury indicted Appellant for three counts of assault and battery with intent to kill and one count of possession of a firearm during the commission of a violent crime. Subsequently, Appellant sought immunity from criminal prosecution pursuant to S.C. Code Ann. § 16-11-450, and a hearing on the immunity issue was commenced in the McCormick County court of general sessions on May 31, 2011, with the Honorable William P. Keesley, circuit court judge, presiding.

Following the hearing, Judge Keesley issued an order on July 5, 2011, denying Appellant's request for immunity from prosecution and recusing himself from further participation in the case. Appellant then promptly moved for reconsideration of Judge Keesley's ruling. On December 8, 2011, Judge Keesley issued an order affirming his earlier ruling and denying Appellant's motion for reconsideration. On January 18, 2012, Appellant filed a notice of appeal appealing Judge Keesley's ruling on the immunity issue. Thereafter, on April 18, 2012, Appellant filed his Initial Brief of Appellant and Designation of Matter in this case.

Following the filing of the Initial Brief of Appellant and Designation of Matter, the State filed a Motion to Strike and Require Filing of Amended Initial Brief of Appellant on August 20, 2012. In response, Appellant filed a return opposing the State's motion, and the State filed a reply to Appellant's return. Subsequently, on September 7, 2012, Appellant filed a Motion to Supplement Record on Appeal and Expedite Briefing. In response, the State filed a return opposing Appellant's motion, and Appellant filed a reply to the State's return.

Thereafter, on December 19, 2012, this Court issued an order granting the State's motion to strike and denying Appellant's motion to supplement the record and expedite briefing. Additionally, this Court ordered Appellant to serve and file an amended initial brief within twenty days of the ruling. Following the issuance of the order, Appellant filed his Amended Initial Brief of Appellant and Amended Designation of Matter on January 8, 2013.

In light of issues raised in Appellant's amended initial brief, the State filed a Motion to Remand for Reconstruction of the Record and Motion to Strike Improperly-Designated Matter from Amended Designation of Matter on February 7, 2013. As part of the motion, the State asked this Court to remand the matter to the trial court to allow the trial judge to attempt to reconstruct missing portions of the immunity hearing transcript that were lost after the court

reporter from the immunity hearing was victimized in a theft. In response, Appellant filed a return to the State's motion, and the State filed a reply to Appellant's return. The State's motion is currently pending before this Court. Thereafter, on March 6, 2013, Appellant filed a Motion to Remand.¹

Return to Appellant's Request for the Matter to be Remanded for an Entirely New Immunity Hearing

In Appellant's Motion to Remand, Appellant appears to ask this Court to remand the matter to the trial court for an entirely new immunity hearing in light of the fact a portion of the record of the immunity hearing was lost in a theft. In support of that request, Appellant contends it is not possible for just the missing portions of the record to be reconstructed because the trial judge who presided over the immunity hearing recused himself from further participation in Appellant's case. Appellant's motion should be denied, and the matter should be remanded to the trial court to allow for an attempt to be made to reconstruct the missing portions of the record

¹ Additionally, prior to Judge Keesley's ruling on the immunity issue, Appellant repeatedly petitioned Judge Keesley for pre-trial bail. On December 3, 2009, February 23, 2010, and August 11, 2010, Judge Keesley denied Appellant's requests for bail and determined Appellant was a danger to the community. Judge Keesley then recused himself from further involvement in Appellant's case on July 5, 2011, through his ruling on the immunity issue. Subsequently, Appellant moved for reconsideration of Judge Keesley's decision to deny bail. On September 23, 2011, a hearing on Appellant's motion was held in the McCormick County court of general sessions with the Honorable Frank R. Addy, Jr., circuit court judge, presiding. On October 3, 2011, Judge Addy issued an order denying Appellant's bond request. Subsequently, Appellant filed a notice of appeal dated October 12, 2011, and an amended notice of appeal dated October 27, 2011, appealing Judge Addy's ruling on the pre-trial bond issue. Thereafter, on December 2, 2011, Appellant filed a "Petition for Certification Pursuant to S.C. Code § 14-8-210(B) or in the alternative Petition for Writ of Habeas Corpus" in the Supreme Court. In the petition, Appellant sought "an order from [the Supreme Court], certifying the instant appeal from the South Carolina Court of Appeals, expediting the matter, and establishing a procedure for consideration of pre-trial bond in cases involving application of the Castle doctrine, codified as the 'Protection of Persons and Property Act' at S.C. Code Ann. §16-11-401 *et seq.* and granting such other relief as may be warranted under the facts." On December 16, 2011, the State filed a return to Appellant's petition, and Appellant filed a reply to the State's return on January 3, 2012. On January 25, 2012, the Supreme Court issued an order transferring Appellant's appeal from the denial of bond to the Supreme Court, dismissing the appeal, and dismissing the petition for a writ of habeas corpus. The next day, Appellant filed an Initial Brief of Appellant and Designation of Matter in this Court related to the appeal of Judge Addy's ruling on the bond issue. Then, on February 2, 2012, Appellant filed a Motion for Reconsideration in the Supreme Court. Thereafter, on April 18, 2012, Appellant filed another Initial Brief of Appellant and Designation of Matter in this Court raising the denial of bond issue along with the denial of immunity issue. Subsequently, on May 29, 2012, the Supreme Court issued an order denying Appellant's motion for reconsideration and, on September 7, 2012, issued remittitur in Appellant's appeal of the denial of pre-trial bond. Following the issuance of remittitur, this Court issued an order requiring Appellant to strike any argument regarding the denial of bond issue from his initial brief, and Appellant subsequently filed an Amended Initial Brief of Appellant striking any reference to that issue.

as requested in the State's pending Motion to Remand for Reconstruction of the Record and Motion to Strike Improperly-Designated Matter from Amended Designation of Matter.

“ [T]he inability to prepare a complete verbatim transcript, in and of itself, does not necessarily present sufficient ground for reversal.’ ” State v. Ladson, 373 S.C. 320, 324, 644 S.E.2d 271, 273 (Ct. App. 2007) (quoting State v. Smith, 291 Md. 125, 136, 433 A.2d 1143, 1148 (Md. 1981)). When a portion of a transcript from a trial court proceeding is lost or destroyed, it is proper for the appellate court to remand the matter to the trial court to allow the trial judge to attempt to reconstruct the missing portions of the record. See Koon v. State, 358 S.C. 359, 367, 595 S.E.2d 456, 460 (2004) (“Where a transcript has been lost or destroyed, a court may remand to have the record reconstructed.”), overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005); Whitehead v. State, 352 S.C. 215, 221, 574 S.E.2d 200, 203 (2002) (remanding a case to the circuit court for reconstruction of the trial record); see also China v. Parrott, 251 S.C. 329, 334, 162 S.E.2d 276, 278 (1968) (“The issues on appeal must therefore be determined on the basis of the record as settled by the trial court.”). Such a remand permits a neutral and impartial trial judge to determine the contents of the record and confirm the completeness and correctness of that record, which is solely the trial judge's duty and responsibility, while also allowing all of the interested parties to the case to mutually offer their assistance and input in reconstructing the record. See China, 251 S.C. at 334, 162 S.E.2d at 278 (instructing “the duty and responsibility” of settling the question of what the appellate record should contain rests upon the trial judge in a case where portions of the notes of the trial proceedings were lost before the court reporter was able to transcribe them).

In the case sub judice, Appellant asks this Court **not** to remand for any attempt or effort to be made to reconstruct the missing portions of the record of the immunity hearing but, instead,

to remand for an entirely new immunity hearing and ruling on the immunity issue. Thus, Appellant is asking this Court to declare void a presumptively-valid ruling adverse to his position and grant him a new opportunity to have the immunity issue argued and considered. See Martin v. Carolina Water Servs., Inc., 273 S.C. 43, 46, 254 S.E.2d 52, 53 (1979) (“The order of the lower court is presumed to be correct.”); Ehlke v. Nemec Constr. Co., Inc., 298 S.C. 477, 481, 381 S.E.2d 508, 510 (Ct. App. 1989) (“[T]here is a presumption in favor of correctness of an appealed order and the burden of showing error by the trial judge is on the appellant.”). However, remand for an entirely new hearing based on the loss or destruction of the record of a trial court proceeding is not an appropriate remedy until it can first be determined that the missing portions of the record cannot sufficiently be reconstructed to permit meaningful appellate review. See State v. Ladson, 373 S.C. 320, 327, 644 S.E.2d 271, 275 (Ct. App. 2007) (reversing and remanding for a new trial based on an incomplete record that was insufficient to permit meaningful appellate review where a good faith effort was made to reconstruct the missing transcript of the trial court proceedings but the effort ultimately proved to be unsuccessful); see also Whitehead, 352 S.C. at 221, 574 S.E.2d at 203 (remanding for reconstruction and notifying the circuit court judge to alert the appellate court if reconstruction was not possible). Accordingly, as requested in the State’s pending Motion to Remand for Reconstruction of the Record and Motion to Strike Improperly-Designated Matter from Amended Designation of Matter, the matter should be remanded to the trial judge to allow the trial judge to attempt to reconstruct the missing portions of the immunity hearing transcript. Notably, supporting the possibility that the missing portions of the record can be successfully reconstructed, Appellant has indicated he has his trial counsel’s notes from the immunity hearing, and the trial judge who presided over the hearing included a highly-detailed summary of

the testimony presented during the hearing in his order denying Appellant's request for immunity from prosecution. (Exhibit "A" – Amended Order on Motion to Bar Prosecution, pp. 1-7).

Therefore, it appears that the missing portions of the immunity hearing record, which included Appellant's testimony, can be reconstructed to a sufficient extent to permit meaningful appellate review, rendering a remand for an entirely new hearing unnecessary.²

In support of his request for the matter to be remanded for an entirely new immunity hearing and an entirely new ruling on the immunity issue, Appellant contends the matter cannot be remanded for reconstruction because the trial judge who presided over the immunity hearing recused himself from further participation in the case. However, just as the trial judge's decision to recuse himself did not prevent the trial judge from ruling on Appellant's motion for reconsideration of the ruling on the immunity issue, it would not prevent the trial judge from participating in the reconstruction of the missing portions of the immunity hearing record.³ However, even if the trial judge were to decline to participate in the reconstruction process, the missing portions of the transcript could still potentially be reconstructed by another trial judge

² Notably, in his order denying Appellant's request for immunity from prosecution, the trial judge expressly found Appellant's testimony during the hearing not to be credible. (Exhibit "A" – Amended Order on Motion to Bar Prosecution, pp. 2-5; p. 7). Thus, the absence of that testimony from the appellate record would be minimally prejudicial to Appellant if prejudicial at all and would not prevent meaningful appellate review in light of the appellate standard of review in criminal cases. See Ladson, 373 S.C. at 325, 644 S.E.2d at 273 ("We believe our supreme court would follow a rule requiring the party challenging a reconstructed record on appeal to demonstrate prejudice flowing from an inadequate record."); see also State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001) ("In criminal cases, the appellate court sits to review errors of law only. We are bound by the trial court's factual findings unless they are clearly erroneous. . . . This Court does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial judge's ruling is supported by any evidence." (citations omitted)).

³ In his order denying Appellant's request for immunity from prosecution, the trial judge recused himself from the case "[b]ecause of the extensive degree of factual determination that are required to decide this motion[.]" (Exhibit "A" – Amended Order on Motion to Bar Prosecution, p. 1). Critically, the trial judge did not recuse himself due to any conflicts with the parties or counsel or any issues regarding his partiality, and nothing suggested the trial judge was not impartial in the case, including his ruling denying Appellant immunity. See State v. Langford, 400 S.C. 421, 439, 735 S.E.2d 471, 480 (2012) ("The contention that a judge was biased *solely* because he ruled against a defendant is untenable and insulting towards the court, and it would set a dangerous precedent were we to sanction it." (italics in original)). Thus, there is nothing disqualifying the trial judge from participating in the reconstruction hearing.

with the input of the solicitor and Appellant's trial counsel. See China, 251 S.C. at 334, 162 S.E.2d at 278 ("In order to settle the record on appeal, it became necessary for the trial judge to determine what transpired In doing so he properly considered the affidavits of counsel and the court reporter as to what happened. The fact that the notes of the court reporter were lost **and the trial judge had no independent recollection of the incident under inquiry** did not preclude him from determining the question upon the basis of the affidavits submitted." (emphasis added)); see also Adams v. H.R. Allen, Inc., 397 S.C. 652, 656, 726 S.E.2d 9, 12 (Ct. App. 2012) ("Where portions of stenographic notes are lost prior to transcription, it is appropriate for the judge to accept affidavits of counsel and the court reporter to determine what transpired.")). In fact, such a method of reconstruction is routinely required when a trial judge that presided over a hearing requiring reconstruction retires, dies, or is otherwise unavailable to reconstruct the missing portions of the trial record. Accordingly, the fact the trial judge in Appellant's case recused himself from further participation in the matter does not mean reconstruction of the missing portions of the immunity hearing record cannot occur regardless of whether the original trial judge participates or not.

Furthermore, although Appellant now contends he discovered that a complete transcript of the immunity hearing proceedings was unavailable "while preparing the appeal[,]," Appellant acknowledged in his Initial Brief of Appellant and Amended Initial Brief of Appellant that he provided the trial judge with the incomplete partial transcript of the pre-trial hearing in October of 2011 while the matter was still pending before the trial judge and before the appeal was filed. (App. Br. p. 3, n. 2; Amended App. Br. p. 3, n. 2). Despite the fact that Appellant was aware the record from the immunity hearing was incomplete before initiating the appeal, it does not appear Appellant asked the trial judge to attempt to reconstruct the missing portions of the transcript or

to supplement the record with Appellant's missing testimony at that time. See State v. Williams, 321 S.C. 455, 464, n. 4, 469 S.E.2d 49, 55 (1996) ("The burden is on appellant to provide a sufficient record for review."). Instead, Appellant elected to go forward with the appeal with an incomplete trial court record while attempting to use the incompleteness of the record to his advantage by first asserting the incompleteness of the immunity hearing transcript entitled him to receive favorable evidentiary inferences on appeal and by now claiming the incompleteness of the transcript should entitle him to a complete rehearing on the immunity issue and the voiding of an adverse ruling. However, our courts do not permit a party to preserve an error until the error can no longer be corrected and then use such an uncorrected error to the party's advantage. See State v. Penland, 275 S.C. 537, 538, 273 S.E.2d 765, 766 (1981) ("One may not preserve a vice until he learns what the result will be and then, take advantage of the error on appeal."); State v. Ballew, 83 S.C. 82, 87, 63 S.E. 688, 690 (1909) ("The general principle that a party cannot take his chances of a successful issue, reserving vices in the trial, of which he has notice, for use in case of disappointment, is universally recognized and obviously just."). Thus, assuming the missing portion of the transcript from the immunity hearing cannot be successfully reconstructed, Appellant is not entitled to benefit or profit from such an issue by receiving a reversal of the trial judge's ruling and a grant of an entirely new immunity hearing because Appellant specifically declined to address the incompleteness of the record when he had the opportunity to do so after it came to his attention while the matter was still before the trial judge. See State v. Serrette, 375 S.C. 650, 654 S.E.2d 554 (Ct. App. 2007) (declining Serrette's request to remand for reconstruction of the trial transcript and dismissing Serrette's appeal where "Serrette's own actions [were] the reason a transcript of the proceedings below [was] not available"); see also People v. Paris, 4 N.Y.3d 41, 48, 823 N.E.2d 827, 832-833 (N.Y. 2004) ("A

defendant who wants a reconstruction hearing, however, should be diligent in maximizing the possibility that such a hearing can accomplish its purpose. That means, as a minimum, that defendant should move for a reconstruction hearing promptly after learning that the minutes have been lost. A defendant should also pursue promptly whatever other means are available to increase the likelihood that proceedings can effectively be reconstructed. This might well include, in a typical case, contacting defendant's trial counsel, the prosecutor and the judge, to jog their recollections and to ask that they preserve whatever notes or other records of the proceedings might exist; and also to ask that defendant's trial counsel furnish appellate counsel, without a formal hearing, the benefit of his or her notes or recollection. A defendant who does not proceed diligently is open to the suspicion that he thinks the likelihood of really finding significant appellate issues remote – and would prefer failure in reconstructing the proceedings to success, hoping to claim prejudice when reconstruction proves impossible.”). Accordingly, for the foregoing reasons, Appellant’s motion seeking a “remand in total” should be denied.

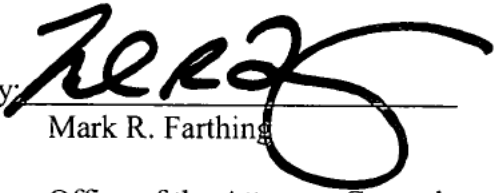
WHEREFORE, Respondent prays that this Court will deny Appellant’s Motion to Remand for an entirely new hearing and ruling on the immunity issue; remand the matter to the trial court for reconstruction of the missing portions of the immunity hearing record as requested in the State’s pending Motion to Remand for Reconstruction of the Record and Motion to Strike Improperly-Designated Matter from Amended Designation of Matter; and grant such other and further relief as the Court may deem just and proper.

Respectfully submitted,

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By:


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March 18, 2013

EXHIBIT "A"

FILED

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF GENERAL SESSIONS 11: 57
COUNTY OF McCORMICK	)	
	)	
STATE OF SOUTH CAROLINA,	)	KATHRYNE P. BUTLER
	)	CLERK OF COURT
	)	McCORMICK COUNTY, S.C.
-vs-	)	
	)	AMENDED ORDER ON MOTION TO
	)	BAR PROSECUTION ¹
JOE ROSS WORLEY,	)	Case Numbers J-036561, J-036562,
	)	J-036563, J-036564, J-036565, J-036566
Defendant.	)	

WRC
#1

The defendant moved prior to trial to bar the prosecution of these cases under the immunity provided in S.C. Code Ann. §16-11-410, et seq., the Protection of Persons and Property Act (the Act), which is South Carolina's codification of the common law Castle Doctrine. Pursuant to the holding in *State v. Duncan*, 2011 WL 1744209 (S.C.), the court conducted a full-day pretrial hearing and received testimony from various witnesses, including expert testimony for the defense. The motion is denied. Because of the extensive degree of factual determinations that are required to decide this motion, the court recuses itself from this case and any related civil lawsuit (2010-CP-35-00030). The motion to reconsider bond should be directed to The Honorable R. Knox McMahon for scheduling as Chief Judge for Administrative Purposes for General Sessions Court.

Synopsis of Factual Background

In November 2009, deputies with the McCormick County Sheriff's Department responded to a call of "shots fired" in a residential neighborhood on Lake Thurmond. One of the people who responded to the call, Robert E. Rushton, was injured by a shot

¹ The order of June 23, 2011, which was filed on June 24, 2011, is amended to correct minor typographical and grammatical errors. The attorneys were notified of the court's intent to amend by memo dated July 5, 2011. No substantive changes were made, and the court sees no need to modify the Motion to Reconsider.

fired by Mr. Worley using a high-powered rifle. The bullet from the rifle struck the pistol that Rushton was holding in his hand, blowing off part of his hand.

The defendant lives with his mother, who spends time at the lake house and at another home in another county. The court agrees that the home where Mr. Worley was staying that night qualifies as his dwelling and his residence under the definitions of the Act, specifically §16-11-430(1) and (3).

Mr. Worley admitted firing a weapon earlier in the evening. He testified that he had been trying to scare away a fox that he suspected had injured a pet, and that he had fired the weapon in that fashion on previous occasions. The neighbors are the Sheffields. Because of the previous incidents, Mrs. Gayle Sheffield had made a report to law enforcement months before, but did not want any charges to be brought at that time. Her husband, Mr. Alan Sheffield, testified credibly that he tried to handle the situation in a neighborly fashion. He communicated with Mr. Worley's mother, but the incidents continued to happen and Mr. Worley continued to create loud disturbances in the neighborhood, including firing a weapon at different times, late at night.

Finally, the situation got to the point that the November 2009 call to law enforcement was made. Mr. Worley testified that he had fired the shots to scare the fox on the evening of November 14, 2009, and that he had gone to bed sometime roughly around midnight. Regardless of why Mr. Worley was firing a weapon in a residential neighborhood, the more credible evidence from several prosecution witnesses is that this occurred much later and probably more than once, between 2:00 and 4:00 a.m. on November 15, 2009. Three people responded to the scene: Rushton, McAllister, and Moore, apparently in separate cars.

Worley
#2

The defendant raises a claim that Mr. Rushton was a not a law enforcement officer under the Act. There does not appear to be any dispute as to whether McAllister and Moore were law enforcement officers, and the court finds that they were. The court also finds that the greater weight of the evidence supports the determination that Mr. Rushton was a law enforcement officer within the meaning of the Act at the time he was injured. The analysis of that issue is discussed below.

Mr. Worley presented evidence that the night in question was extremely dark, and the court has no reason to disbelieve that evidence. However, the court does not believe that the exterior lights were not turned on at some point prior to the shooting of Deputy Rushton. The court finds no reasonable explanation why a person in his home, perceiving this alleged threat from people who were in his yard, would not cut on exterior lights to see what was happening. Other witnesses testified far more credibly that the lights were turned on.

Worley
#3

Mr. Worley's testimony is that he was awakened by a doorbell repeatedly ringing. He makes no assertion that anyone attempted to open a door or window, nor that he heard anyone inside his residence or attempting entry. The court finds no evidence that any of the deputies attempted to enter Mr. Worley's home.

Mr. Worley claims that the house has extensive insulation which prevents noise from being heard. Yet neighbors far away heard and saw a great deal. He denies ever hearing anyone identify himself or herself as a law enforcement officer. He denies seeing any marked patrol cars or blue lights or take-down lights. He denies seeing any badges. In short, he continued to refer to these officers throughout his testimony as burglars, and

emphatically denies that he knew or had any reason to know that the people in his yard were law enforcement officers. His testimony in that regard is not credible.

He states that he got a rifle and came onto his deck, which was on a level above the entry door where the doorbell was being rung. He claims that he saw a figure appear below in the yard, raising a gun and pointing a weapon in his direction. Again, Mr. Worley denies that there was any identification of the people as law enforcement officers, and Mr. Worley fired the rifle in response to what he alleges was an unprovoked threat of death or serious bodily injury. The evidence of damage to the pistol and the angle of the bullet from Mr. Worley's rifle support his position that Deputy Rushton was aiming his Glock pistol at Mr. Worley when the defendant fired.

Worley #4
Mr. Worley states that the impact of the bullet from the rifle spun the person around. The person then ran towards an embankment, realized that the embankment was too steep to safely traverse, and ran back in the direction of the house. People joined the injured person and they left. Mr. Worley said that he then went out into his yard, picked up the Deputy's weapon, and took it up to one of the empty patrol cars, leaving it inside.

Mr. Worley presented expert testimony in the field of criminology. The gist of the testimony related to whether Deputy Rushton and his fellow deputies followed proper police procedures. Expert testimony was elicited that it is probable that Mr. Worley would not have known that the people in his yard were law enforcement officers. It is the expert's opinion that a "shots fired" call is one that presents a very precarious situation of heightened alert. Once the officers determined that there was no active shooter, the proper procedure, according to the expert, was for the officers to stay a safe distance from the dwelling, cordon off the area, activate blue lights on their vehicles so that they would

be easily identified as law enforcement officers, use bullhorns or similar devices, and call the defendant's home to explain why they were there and to establish a dialogue with him. The defendant's expert did not seem to question the right of a law enforcement officer to draw his weapon and point it when he was presented with a person holding a weapon.

With all due respect to the expert, the evidence refuting Mr. Worley's assertions of what occurred is overwhelming and undermines the expert's conclusions. While there are inconsistencies in details and some deviation between the testimony presented and previous written statements of the prosecution's witnesses, the court's assessment is that the most essential elements of the prosecution's version of the events are consistent and far more rational. Defense counsel did a very thorough job of developing evidence, as well as bringing out the inconsistencies in the prosecution's case and attacking the credibility of its witnesses. Defense counsel has obviously done extensive work and research. However, having observed the witnesses and evaluated their credibility, the court finds that the prosecution's version of what happened is far more believable.

In an effort to avoid an unnecessarily lengthy recital of the facts, the following is a summary of what the greater weight of the evidence established. On the evening of the shooting, the neighbors had reached the point where they felt that they had to call law enforcement. Mr. Worley had been firing a weapon in the yard again, in a residential area, late at night, and creating another very troubling disturbance. Three law enforcement officers arrived on the scene around 4:00 a.m. They first spoke to the complaining party, then attempted to make contact with Mr. Worley. They rang the doorbell and knocked on the door. They repeatedly announced that they were law

Worley
#5

enforcement officers. When no one answered, the deputies did not attempt to force their way into the home. They went back up to the home of the complaining parties. They saw lights come on at the Worley home and returned to it. The lights may have gone off for a period and come back on, and the court recognizes that there is a dispute in the evidence as to exactly when lights were turned on and where they were located. The court believes that is attributable to the traumatic events that were experienced that night.

Mr. Worley asked who was at his home, and he heard the response that these were law enforcement officers. His response was, "I don't give a f ____." The evidence demonstrates very clearly that the officers knocked and announced repeatedly.

Worley #6
Instead of acting as a reasonable person would have done under the circumstances, including such actions as speaking with his mother who was also in the house, calling law enforcement on the phone, or engaging in some dialogue with the people on his yard until he was satisfied that the situation was safe, Mr. Worley's response was to come out on his deck above these officers holding a high powered rifle. The officers yelled, "gun." Deputy Rushton aimed his weapon at Mr. Worley, ordering him to drop the rifle (which he believed at that point was a shotgun). Deputy Rushton was not wearing a military style uniform, but had on clothing indicating he was a law enforcement officer and had his badge displayed.

It does not matter whether or not Deputy Rushton was blinded by a spotlight momentarily. He had every right to point his weapon at Mr. Worley under those circumstances. At the same time, at least one of the other officers was yelling, identifying himself as law enforcement and ordering Mr. Worley to drop the gun. Mr. Worley fired at Deputy Rushton, hitting the pistol and blowing off part of the deputy's

hand. He then fired an additional shot or shots. In the aftermath, he conducted himself as though he was searching for the injured party, not to aid him, but to inflict further harm. He made a statement to the effect of asking, "Where are you, you son of a b_____?" He had absolutely no reasonable belief that anyone was breaking into his home or attempting to break into his home. Shell casings were recovered from the deck. The rifle was in the house. The court does not recall any evidence that Mr. Worley attempted to call law enforcement before, during, or after he shot the deputy. It makes absolutely no sense that three law enforcement officers in a darkened area, responding to a "shots fired" call, would fail to identify themselves as law enforcement officers, loudly and emphatically. The court does not find Mr. Worley to be credible.

Analysis

WAL #7
The motion before the court is an assertion that the State is barred from prosecuting the defendant because he is entitled to immunity under the Act. The defendant has the burden of proving his claim of immunity by the preponderance of the evidence. He has failed to do so.

The critical statute is §16-11-450(A), which reads as follows:

(A) 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, unless the person against whom deadly force was used is a law enforcement officer acting in the performance of his official duties and he identifies himself in accordance with applicable law or the person using deadly force knows or reasonably should have known that the person is a law enforcement officer.

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 granting immunity, and that issue does not appear to have been specifically raised here.

The greater weight of the evidence supports the conclusion that Deputy Rushton was a law enforcement officer acting in the performance of his official duties and identifying himself in accordance with applicable law. The overwhelming evidence is that Mr. Worley reasonably should have known that the person he shot was a law enforcement officer.

Was Deputy Rushton a Law Enforcement Officer?

Worley #8
Mr. Rushton had worked as a deputy, resigned to take a job in the Middle East training law enforcement personnel, and returned to work for the McCormick County Sheriff's Department shortly before this incident. The defendant elicited testimony from Mr. Rushton that he did not remember retaking an oath of office when he returned to employment in McCormick County. However, State's exhibit 1-A is a copy of an oath of office, sworn before Kathryn P. Butler, who was the Clerk of Court and a Notary Public, on November 2, 2009. The court finds that Robert Edward Rushton was appointed as a Deputy Sheriff of McCormick County to serve at the pleasure of the Sheriff, and that he was serving in that capacity at all times in question.

The defendant raises the issue that the oath taken is not the complete oath required for one to be considered a deputy, and the appointment was not approved by a circuit judge. Deputy Rushton signed the following oath on a form entitled "Oath for County and State Officers":

First, I do solemnly swear (or affirm) that I am duly qualified, according to the Constitution of this State, to exercise the duties of the

office to which I have been elected (or appointed), and that I will, to the best of my ability, discharge the duties thereof, and preserve and protect and defend the Constitution of this State and of the United States.

So help me God.

The form indicates that it was to be sent to the Secretary of State's office. There is no evidence that it was not. The only reasonable interpretation is that this is the oath required under Article III, Section 26 of the South Carolina Constitution.

The defendant claims that this oath is inadequate because it does not contain the language required under two statutes. First, there is the assertion that Mr. Rushton's appointment had not been approved by a circuit judge. The defense is correct that §23-13-10 provides for a circuit judge to approve appointment of deputies.

SECTION 23-13-10. Appointment; approval by court; responsibility of sheriff for acts of deputy.

The sheriff may appoint one or more deputies to be approved by the judge of the circuit court or any circuit judge presiding therein. Such appointment shall be evidenced by a certificate thereof, signed by the sheriff, and shall continue during his pleasure. The sheriff shall in all cases be answerable for neglect of duty or misconduct in office of any deputy.

To the extent that part of this statute provides for judicial approval of executive branch appointments, it is a clear violation of the separation of powers doctrine. It simply cannot withstand scrutiny. That being the determination of this court, the failure of a circuit judge to sign a form approving the appointment of a deputy cannot reasonably be construed to mean that the deputy is not a law enforcement officer within the meaning of the Act. To rule otherwise would allow the judicial branch to veto personnel decisions made by the Sheriff, a member of the executive branch.

The more seriously argued position relates to §23-13-20, a copy of which was entered as defendant's exhibit 1-A. It reads, as follows:

SECTION 23-13-20. Bond and oath.

Each deputy sheriff shall, before entering upon the discharge of his duty, enter into bond in the sum of one thousand dollars, with sufficient surety, to be approved by the sheriff of the county, conditioned for the faithful performance of his duties and for the payment to the county and to any person of all such damages as they or any of them may sustain by reason of his malfeasance in office or abuse of his discretion. He shall, in addition to the oath of office now prescribed by Section 26, of Article III, of the Constitution, take the following oath (or affirmation) to wit: "I further solemnly swear (or affirm) that during my term of office as county deputy, I will study the act prescribing my duties, will be alert and vigilant to enforce the criminal laws of the State and to detect and bring to punishment every violator of them, will conduct myself at all times with due consideration to all persons and will not be influenced in any matter on account of personal bias or prejudice. So help me, God." The form of such bond shall be approved by the county attorney and, with the oaths, shall be filed with and kept by the clerk of court for the county. A blanket bond may be used in any county to fulfill the bond requirement of this section upon approval of the County Council and the County Attorney.

WAL
#10
The issue related to the question of bond was touched upon at the hearing. The defendant has failed to prove that there was no blanket bond in effect sufficient to meet the bond requirement.

The term "law enforcement officer" does not appear to be defined under the Act. So, the court is left to interpret the meaning of the words used in the statute. A word search was done to try to discover every section of the S.C. Code and Constitution that might attempt to define the term "law enforcement officer" or "deputy" or "sheriff." There are a couple of definitions in the Code, but they really do not add much to what one would understand through the common usage of the term.

Statutory interpretation is a matter of law. The oath prescribed by the Constitution was taken by Mr. Rushton.

In the recent case of *City of Rock Hill v. Harris*, 2011 WL 204799, the South Carolina Supreme Court discussed the interaction between constitutional provisions and legislative enactments. Clearly, Article V, Section 24 of the Constitution of South Carolina provides the General Assembly with authority to establish certain requirements governing sheriffs and their offices. *Harris* cites language from *Hodges v. Rainey*, 341 S.C. 79, 533 S.E.2d 578 (2000) which stands for the general proposition that the cardinal rule of statutory interpretation is to ascertain and effectuate the intention of the legislature. The general proposition requires a court to refrain from statutory construction and apply the statute according to its literal meaning, where the terms in a statute are clear and unambiguous. *Carolina Power & Light Co. v. City of Bennettsville*, 314 S.C. 137, 139, 442 S.E.2d 177, 179 (1994). The *Harris* court explains further, however, that there is an exception.

Absent ambiguity, the court will look to the plain meaning of the words used to determine their effect. *Hodges*, 341 S.C. at 85, 533 S.E.2d at 581. However, the plain meaning rule is subject to this caveat:

However plain the ordinary meaning of the words used in a statute may be, the courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature or would defeat the plain legislative intention. If possible, the court will construe the statute so as to escape the absurdity and carry the intention into effect.

Id. (quoting *Kiriakides v. United Artists Commc'ns, Inc.*, 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994)).

The *Hodges* case also stands for a proposition that is critical to the court's analysis. Statutes dealing with the same subject matter must be reconciled, if possible, so as to render both operative. When the Act was written, the legislature set forth its legislative intent in §16-11-420, which reads:

§ 16-11-420. Intent and findings of General Assembly.

(A) It is the intent of the General Assembly to codify the common law Castle Doctrine which recognizes that a person's home is his castle and to extend the doctrine to include an occupied vehicle and the person's place of business.

(B) The General Assembly finds that it is proper for law-abiding citizens to protect themselves, their families, and others from intruders and attackers without fear of prosecution or civil action for acting in defense of themselves and others.

(C) The General Assembly finds that Section 20, Article I of the South Carolina Constitution guarantees the right of the people to bear arms, and this right shall not be infringed.

(D) The General Assembly finds that persons residing in or visiting this State have a right to expect to remain unmolested and safe within their homes, businesses, and vehicles.

(E) The General Assembly finds that no person or victim of crime should be required to surrender his personal safety to a criminal, nor should a person or victim be required to needlessly retreat in the face of intrusion or attack.

*WPA
#12*

The court finds that the General Assembly recognized that exceptions had to be made for law enforcement personnel. Those exceptions are not without limitation, and they are addressed in the Act. The legislature left in place the ability to raise the issue of self-defense against a law enforcement officer and to have one's conduct evaluated in that context by a trial where the State bears the burden of proving beyond a reasonable doubt that the accused did not act in self-defense. The precise issue before the court is the immunity provisions which bar the State from any type of prosecution.

It is the court's finding that the General Assembly did not intend for the protections and restrictions related to using deadly force against law enforcement officers to be subject to the strict, technical evaluations argued by the defendant. In trying to

construe different statutes and examine the legislative intent, the court concludes that the failure to take an additional or supplementary oath in § 23-13-20 does not deprive the State of the ability to prosecute here for shooting a deputy, nor does it deprive the victim from asserting that he is a law enforcement officer for purposes of evaluating the applicability of the Act. In the context of interpreting the Act and evaluating it in light of other statutes, the court determines that the oath in §23-13-20 should be read as supplemental to the Constitutional requirement, where the deputy is swearing to uphold the law, and the failure to have those additional words included on a form should not be construed to deprive the State of the ability to prosecute the defendant.

Failure to Prove Reasonable Belief Regarding Law Enforcement Issue

Worley #13
Even if there is some problem in considering Deputy Rushton as a law enforcement officer because of a technical condition he had not fulfilled, the Act does not preclude prosecution. The defendant has not established that he had a reasonable belief that he was not firing upon law enforcement officers. There were three people in the yard (two of whom appear to have admittedly have been law enforcement officers) and they were repeatedly yelling out their identification as such. Mr. Worley's claim is that he did not know who he was shooting toward, but acted in self-defense when he saw a figure point a gun at him. The defendant may raise self-defense and any other applicable defenses, but the determination of the court is that the Act does not preclude prosecution.

No Proof of Entry or Attempted Entry

Regardless of the position taken on the preceding issue, the Act does not prohibit prosecution because none of the people in Mr. Worley's yard were attempting to enter the home. In order for the immunity to attach, §16-11-450(A) requires that Mr. Worley

establish that he was permitted to use deadly force by the provisions of §16-11-440 or "another applicable provision of law."

Section 16-11-440(A) reads, in part, as follows:

§ 16-11-440. Presumption of reasonable fear of imminent peril when using deadly force against another unlawfully entering residence, occupied vehicle or place of business.

(A) A person is presumed to have a reasonable fear of imminent 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, 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.

Worley #14
The court concludes that the defendant has not established by the preponderance of the evidence that Deputy Rushton was doing anything unlawful. Mr. Worley has not proven that Deputy Rushton was entering or attempting to enter the Worley residence, by force or otherwise. He was there with the other officers, identifying himself as law enforcement, ringing the doorbell and knocking on the door.

Section 16-11-440(B) disallows the presumption of subsection (A), thus making the immunity inapplicable, where the person [subsection (1)] against whom the deadly force is used has the right to be in the dwelling; or, [subsection (4)] where the person against whom the deadly force is used is a law enforcement officer who enters or attempts to enter a dwelling in the performance of his official duties, and he identifies himself in accordance with applicable law or the

person using force knows or reasonably should have known that the person entering or attempting to enter is a law enforcement officer.

As to both subsections §16-11-440(B)(1) and (4), again, there is no evidence that Deputy Rushton or any of the other officers were in the residence or attempting to enter it. So, neither subsection would provide immunity from prosecution, in the court's determination.

The failure of evidence regarding entry or attempted entry is fatal to the defendant's argument concerning subsection (B). However, there was a great deal of focus in the testimony concerning subsection (B)(4) dealing with the defendant's assertion that Deputy Rushton either was not a law enforcement officer (an issue that was discussed previously) or that he did follow proper law enforcement procedures. So, the court will address those issues, as well, though it is probably unnecessary and redundant.

The evidence, in the court's view, established that Deputy Rushton was clearly acting in accordance with his official duties and that he identified himself in accordance with applicable law. He was called to the scene and responded with other officers to a call of "shots fired." He spoke with the complaining parties, went to check on the person who was alleged to have fired the shots, and properly reacted when the defendant came out holding a gun. Even the defense's expert supported the assertion that an officer can point his weapon when confronted with someone holding a rifle under these circumstances.

To the extent that the defense expert testified that the deputies did not conduct themselves in accordance with applicable law, the court rejects that

WSP
#15

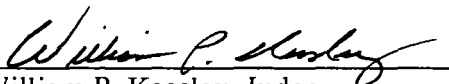
conclusion. The officers repeatedly and consistently identified themselves as law enforcement officers. Law enforcement officers are permitted to “knock and announce,” and the evidence indicates that they did that properly. Even under the defendant’s version of the events, the people in his yard were announcing their presence by repeatedly ringing the doorbell. It is not a situation where anyone claims that there was a fear of people sneaking into a residence at night. Again, they did not enter the residence or attempt to do so. Thus, while this subsection does not provide immunity from prosecution in any event, the conclusion of the court is that the defendant has also failed to prove that he did not know or that he was reasonable in failing to know that the people in his yard, including Deputy Rushton, were law enforcement officers.²

#16 THEREFORE, IT IS ORDERED that the motion to bar prosecution of these cases is denied.

IT IS FURTHER ORDERED that the undersigned judge recuses himself from further involvement in this matter. The attorneys are to notify the Chief Judge for Administrative Purposes, The Honorable R. Knox McMahon, to have a hearing scheduled on the defendant’s motion to reduce bond.

AND IT IS SO ORDERED.

July 5, 2011


William P. Keesley, Judge

² Though the court does not recall it being specifically raised, there is not immunity under §16-11-440(C), either. That provision does not appear to vary in any significant way from the typical self-defense situation. Mr. Worley was not in “another place.” An appurtenant structure would be part of the dwelling, invoking the exclusions related to law enforcement officers. In the trial, Mr. Worley may raise self-defense.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

MAR 18 2013

Appeal from McCormick County
Honorable William P. Keesley, Circuit Court Judge
Appellate Case No. 2012-210646

SC Court of Appeals

THE STATE,

Respondent,

vs.

JOE ROSS WORLEY,

Appellant.

PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Return to Appellant's Motion to Remand on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Desa Ballard and Harvey M. Watson, III, Esquires
Ballard Watson Weissenstein
Post Office Box 6338
West Columbia, South Carolina 29171

Carson Henderson, Esquire
The Henderson Law Firm, PC
109-B Oak Avenue
Greenwood, South Carolina 29646

Billy J. Garrett, Jr., Esquire
The Garrett Law Firm, PC
109 Oak Avenue
Greenwood, South Carolina 29646

I further certify that all parties required by Rule to be served have been served.
This 18th day of March, 2013.

Ellen R. DuBois

ELLEN R. DuBOIS

Legal Assistant

Office of the Attorney General

Post Office Box 11549

Columbia, SC 29211

(803) 734-3727

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from McCormick County
Appellate Case No. 2012-210646

Joe Ross Worley,

Appellant

v.

State of South Carolina,

Respondent.

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MAR 26 2013

SC Court of Appeals

REPLY TO RETURN TO APPELLANT'S MOTION TO REMAND

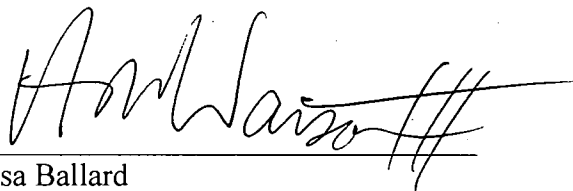
By way of reply to the State's opposition to Appellant's Motion to Remand, Appellant respectfully submits the following:

Despite the State's argument to the contrary, it is clear from the record and file before this Court that Appellant has consistently, and repeatedly, sought every available means by which the record below could be fully preserved and completed. Appellant is pleased that the State has finally, at least partially, come around to the Appellant's contention from the beginning that the record as it currently exists is deficient and needs augmentation to allow for meaningful review.

By way of his motion, Appellant seeks instruction as to the means by which that completion is to be accomplished in a manner consistent with controlling law. Appellant

therefore incorporates by reference his request for full and complete relief to the extent, and for the legal reasons, set forth more fully in his Motion to Remand.

Respectfully submitted,



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March 25, 2013

ATTORNEYS FOR APPELLANT

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM McCORMICK COUNTY

Honorable William P. Keesley, Circuit Judge, 11th Judicial Circuit
Appellate Case No. 2012-210646

Joe Ross Worley,

Appellant

v.

State of South Carolina,

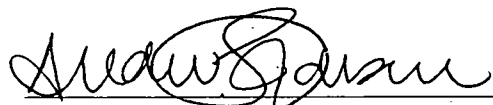
Respondent.

CERTIFICATE OF SERVICE

I, Andrew Johnson, an employee with the Law Offices of Ballard Watson Weissenstein, do hereby certify that on March 25, 2013, I served a copy of the **APPELLANT'S REPLY TO RETURN TO MOTION TO REMAND** in the above-captioned case on the following individuals by United States Mail, with sufficient first-class postage affixed, addressed as follows:

**Mark R. Farthing, Esquire
Assistant Attorney General
Attorney General's Office
Post Office Box 11549
Columbia, SC 29211**

March 25, 2013
West Columbia, South Carolina


Andrew Johnson
Law Clerk

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MAR 26 2013

The South Carolina Court of Appeals

The State, Respondent,

v.

Joe Worley, Appellant.

Appellate Case No. 2012-210646

ORDER

After careful consideration, Respondent's motion to remand for reconstruction of the missing portions of the hearing transcript is granted. Appellant's motion for remand for a de novo hearing is denied. Respondent shall provide this court with a status update on the reconstruction hearing in thirty days.


FOR THE COURT

Columbia, South Carolina

cc:

Desa Allen Ballard
Mark Reynolds Farthing
Harvey MacLure Watson, III
Carson McCurry Henderson
Billy J. Garrett, Jr.

FILED
JN 3/28/13

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS
Appellate Case No. 2012-210646

68997

APPEAL FROM MCCORMICK COUNTY COURT OF GENERAL SESSIONS
WILLIAM P. KEESLEY, CIRCUIT COURT JUDGE

The State,

Respondent,

v.

Joe Worley,

Appellant.

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SC Court of Appeals

MOTION FOR PARTIAL REMAND

This matter is currently on remand to the circuit court for reconstruction of the missing portions of the hearing transcript. (Order dated March 28, 2013). The trial judge held a hearing on June 14, 2013 for the purpose of taking testimony for purposes of attempting a reconstruction of the underlying record, which remains a work in progress. Once the record is reconstructed to the extent the judge believes possible, new initial (and final) briefs and a new Record on Appeal will have to be prepared and submitted to this Court.

Meanwhile, however, Appellant remains in pre-trial custody, without bond, and has been since his arrest in November, 2009. The trial judge denied appellant's motion to bar prosecution

under the Castle Doctrine on June 23, 2011. The appeal from that denial order has been pending since then, before this Court ultimately determined that remand was necessary for reconstruction of the missing portions of the hearing record.

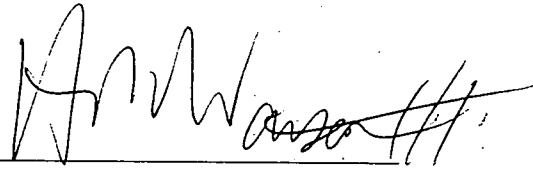
Because of the significant delays which have occurred to date, through no fault of Appellant, he is informed and believes that the trial court (the case is now assigned to Judge Frank Addy for all purposes other than reconstruction of the record) should be permitted to consider whether pre-trial bond may be appropriate. Almost four (4) years have passed since appellant was initially denied pre-trial bond, during which time Appellant has been incarcerated, and circumstances have changed significantly such that consideration of a bond request at this time is warranted. Appellant is informed and believes that he should be entitled to a limited remand¹ of this matter for the purpose of such consideration by the judge now assigned to this matter, specifically as to whether circumstances exist which would permit setting of a pre-trial bond at this time.

By separate motion filed this date with the circuit court, Appellant is asking for a hearing on pre-trial bond, subject to the partial remand from this Court.

The undersigned has not consulted with opposing counsel, but is informed and believes that such consultation would serve no useful purpose as they have opposed every prior motion for the setting of bond.

¹ Appellant does not wish his appeal to be slowed in any respect, and hopes it can be timely processed once the trial court record has been reconstructed. The request for limited remand is for consideration of pre-trial bond only, and should not be permitted to delay the remaining appellate process should the reconstruction of the record be completed while the bond issue is on remand.

Wherefore, Appellant moves for a limited remand to Judge Addy for the purpose of considering a motion for pre-trial bond which is being filed in the lower court contemporaneously with the filing of this motion.



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July 5, 2013

ATTORNEYS FOR APPELLANT

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM McCORMICK COUNTY

Honorable William P. Keesley, Circuit Judge, 11th Judicial Circuit
Appellate Case No. 2012-210646

Joe Ross Worley,

Appellant

v.

State of South Carolina,

Respondent.

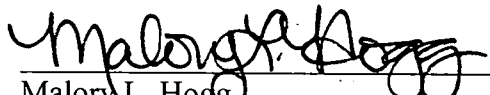
CERTIFICATE OF SERVICE

I, Malory L. Hogg, an employee with the Law Offices of Ballard Watson Weissenstein, do hereby certify that on July 5, 2013, I served a copy of the **APPELLANT'S MOTION FOR PARTIAL REMAND** in the above-captioned case on the following individuals by United States Mail, with sufficient first-class postage affixed, addressed as follows:

Mark R. Farthing, Esquire
Assistant Attorney General
Attorney General's Office
Post Office Box 11549
Columbia, SC 29211

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JUL 08 2013
SC Court of Appeals

July 5, 2013
West Columbia, South Carolina


Malory L. Hogg
Paralegal

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from McCormick County
Honorable William P. Keesley, Circuit Court Judge
Appellate Case No. 2012-210646

THE STATE,

Respondent,

vs.

JOE ROSS WORLEY,

Appellant.

**RETURN TO APPELLANT'S MOTION
FOR PARTIAL REMAND**

Respondent ("the State"), through its undersigned counsel, would respectfully show unto the Court as follows:

Procedural History

In November of 2009, Appellant Joe Ross Worley was arrested and charged with three counts of assault and battery with intent to kill and three counts of possession of a firearm during the commission of a violent crime. In February of 2010, the McCormick County grand jury indicted Appellant for three counts of assault and battery with intent to kill and one count of possession of a firearm during the commission of a violent crime. Subsequently, Appellant sought immunity from criminal prosecution pursuant to S.C. Code Ann. § 16-11-450, and a hearing on the immunity issue was commenced in the McCormick County court of general sessions on May 31, 2011, with the Honorable William P. Keesley, circuit court judge, presiding.

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JUL 15 2013

SC Court of Appeals

Following the hearing, Judge Keesley issued an order on July 5, 2011, denying Appellant's request for immunity from prosecution and recusing himself from further participation in the case. Appellant then promptly moved for reconsideration of Judge Keesley's ruling. Thereafter, on December 8, 2011, Judge Keesley issued an order affirming his earlier ruling and denying Appellant's motion for reconsideration. Appellant then filed a notice of appeal appealing Judge Keesley's ruling on the immunity issue on January 18, 2012.

Additionally, prior to Judge Keesley's ruling on the immunity issue, Appellant repeatedly petitioned Judge Keesley for pre-trial bail. On December 3, 2009, February 23, 2010, and August 11, 2010, Judge Keesley denied Appellant's requests for bail and determined Appellant was a danger to the community before recusing himself from further involvement in Appellant's case through his ruling on the immunity issue.¹ Subsequently, Appellant moved for reconsideration of Judge Keesley's decision to deny bail, and a hearing on Appellant's motion was held on September 23, 2011, in the McCormick County court of general sessions with the Honorable Frank R. Addy, Jr., circuit court judge, presiding. Following the hearing, Judge Addy issued an order denying Appellant's bond request on October 3, 2011.² Subsequently, Appellant filed a notice of appeal dated October 12, 2011, and an amended notice of appeal dated October 27, 2011, appealing Judge Addy's ruling on the pre-trial bond issue.

Thereafter, on December 2, 2011, Appellant filed a "Petition for Certification Pursuant to S.C. Code § 14-8-210(B) or in the alternative Petition for Writ of Habeas Corpus" in the Supreme Court. In the petition, Appellant sought "an order from [the Supreme Court], certifying the instant appeal from the South Carolina Court of Appeals, expediting the matter, and establishing a procedure for consideration of pre-trial bond in cases involving application of the

¹ Copies of Judge Keesley's orders denying bail are attached to this return as Exhibits "A," "B," and "C."

² A copy of Judge Addy's order denying bail is attached to this return as Exhibit "D."

Castle doctrine, codified as the ‘Protection of Persons and Property Act’ at S.C.Code Ann. §16-11-401 et seq. and granting such other relief as may be warranted under the facts.” On December 16, 2011, the State filed a return to Appellant’s petition, and Appellant filed a reply to the State’s return on January 3, 2012.

Subsequently, on January 25, 2012, the Supreme Court issued an order transferring Appellant’s appeal from the denial of bond to the Supreme Court, dismissing the appeal, and dismissing the petition for a writ of habeas corpus.³ On the following day, Appellant filed an Initial Brief of Appellant and Designation of Matter in this Court related to the appeal of Judge Addy’s ruling on the bond issue. Then, on February 2, 2012, Appellant filed a Motion for Reconsideration in the Supreme Court. Subsequently, on May 29, 2012, the Supreme Court issued an order denying Appellant’s motion for reconsideration and, on September 7, 2012, issued remittitur in Appellant’s appeal of the denial of pre-trial bond.

Meanwhile, on April 18, 2012, Appellant filed an Initial Brief of Appellant and Designation of Matter in this Court raising issues related to both Judge Keesley’s order denying the request for immunity from prosecution and Judge Addy’s order denying the request for pre-trial bond. Following the filing of the Initial Brief of Appellant and Designation of Matter, the State filed a Motion to Strike and Require Filing of Amended Initial Brief of Appellant on August 20, 2012. In response, Appellant filed a return opposing the State’s motion, and the State filed a reply to Appellant’s return. Subsequently, on September 7, 2012, Appellant filed a Motion to Supplement Record on Appeal and Expedite Briefing. In response, the State filed a return opposing Appellant’s motion, and Appellant filed a reply to the State’s return.

³ A copy of the Supreme Court’s order is attached to this return as Exhibit “E.”

Thereafter, on December 19, 2012, this Court issued an order granting the State's motion to strike and denying Appellant's motion to supplement the record and expedite briefing.⁴ Through that order, this Court ordered Appellant to file an amended initial brief striking any arguments related to the pre-trial bond request because that matter was not before this Court, striking any reference to matters not presented to the trial judge, and adding proper citation references as required by the South Carolina Appellate Court Rules.

Following the issuance of the order, Appellant filed his Amended Initial Brief of Appellant and Amended Designation of Matter on January 8, 2013. In his amended initial brief, Appellant alleged the record of the trial court proceedings was insufficient for this Court to conduct meaningful appellate review. After reviewing Appellant's amended initial brief, the State filed a Motion to Remand for Reconstruction of the Record and Motion to Strike Improperly-Designated Matter from Amended Designation of Matter on February 7, 2013. As part of that motion, the State asked this Court to remand the matter to the trial court to allow the trial judge to attempt to reconstruct missing portions of the immunity hearing transcript that were lost after the court reporter from the immunity hearing was victimized in a theft. In response, Appellant filed a return to the State's motion, and the State filed a reply to Appellant's return. Thereafter, on March 6, 2013, Appellant filed a Motion to Remand seeking a "remand in total." In response, the State filed a return to Appellant's motion, and Appellant filed a reply to the State's return.

Subsequently, on March 28, 2013, this Court issued an order granting the State's motion seeking a remand for reconstruction of the missing portions of the hearing transcript and denying Appellant's motion seeking a remand for a de novo hearing. Following the issuance of the order, Judge Keesley scheduled a hearing to address the reconstruction issue for May 17, 2013, and the

⁴ A copy of this Court's order is attached to this return as Exhibit "F."

hearing was subsequently rescheduled to and held on June 14, 2013. Following the hearing, Judge Keesley took the reconstruction issue under advisement, and the matter is currently pending before Judge Keesley on remand. Thereafter, on July 5, 2013, Appellant filed a Motion for Partial Remand.

Return to Appellant's Request for a Partial Remand on the Issue of Pre-Trial Bond

In his Motion for Partial Remand, Appellant is not asking this Court to grant him pre-trial release or to grant him an appeal bond. Instead, Appellant asks this Court to remand his case to the circuit court for the limited purpose of allowing him to again raise the issue of pre-trial bond to a circuit court judge. In support of that request, Appellant contends he is not responsible for the delays associated with his appeal and asserts that the circumstances of his case have changed significantly without specifically identifying how those circumstances have changed.

Initially, in regard to Appellant's contentions concerning the source of the delays associated with his appeal, the State notes substantial delays have resulted in Appellant's case based on issues associated with Appellant's initial brief as originally filed, which included references to matter not appearing in the record of the circuit court proceedings and which failed to comply with requirements of the South Carolina Appellate Court Rules. See Henning v. Kaye, 307 S.C. 436, 437, 415 S.E.2d 794, 794 (1992) ("[T]he South Carolina Appellate Court Rules are not mere technicalities but provide the parties and this Court with an orderly mechanism through which to guide appeals in this State. It is incumbent upon counsel to provide material that complies with the Rules and facilitates appellate review."); South Carolina State Highway Dep't v. Meredith, 241 S.C. 306, 311, 128 S.E.2d 179, 182 (1962) ("[C]ounsel is prohibited from embodying in their briefs any fact which does not appear in the record."); see also Rule 208(b)(4), SCACR ("In the initial briefs, these references should be to the page and

line number of the transcript prepared by the court reporter or by the page of the material to be referenced[.]”); Rule 210(c), SCACR (“The Record shall not, however, include matter which was not presented to the lower court or tribunal.”). As a result, this Court was required to order Appellant to strike portions of his brief and to file an amended initial brief complying with our appellate court rules, which resulted in delays in the resolution of the appeal. See Exhibit “F.”

The State further notes that Appellant chose to proceed forward with his appeal aware that the record of the circuit court proceedings was incomplete without seeking to attempt to remedy the incompleteness of the record with the circuit court judge at that time. See State v. Williams, 321 S.C. 455, 464, n. 4, 469 S.E.2d 49, 55 (1996) (“The burden is on appellant to provide a sufficient record for review.”); see also China v. Parrott, 251 S.C. 329, 334, 162 S.E.2d 276, 278 (1968) (instructing “the duty and responsibility” of settling the question of what the appellate record should contain rests upon the trial judge in a case where portions of the notes of the trial proceedings were lost before the court reporter was able to transcribe them). As a result, this Court was required to remand the matter to the circuit court judge after Appellant filed his Initial Brief of Appellant and Amended Initial Brief of Appellant in order for the circuit court judge to attempt to reconstruct the missing portions of the record of the circuit court proceedings. See State v. Serrette, 375 S.C. 650, 654 S.E.2d 554 (Ct. App. 2007) (declining Serrette’s request to remand for reconstruction of the trial transcript and dismissing Serrette’s appeal where “Serrette’s own actions [were] the reason a transcript of the proceedings below [was] not available”); see also People v. Paris, 4 N.Y.3d 41, 48, 823 N.E.2d 827, 832-833 (N.Y. 2004) (“A defendant who wants a reconstruction hearing, however, should be diligent in maximizing the possibility that such a hearing can accomplish its purpose. That means, as a minimum, that defendant should move for a reconstruction hearing promptly after learning that the minutes have

been lost. A defendant should also pursue promptly whatever other means are available to increase the likelihood that proceedings can effectively be reconstructed. This might well include, in a typical case, contacting defendant's trial counsel, the prosecutor and the judge, to jog their recollections and to ask that they preserve whatever notes or other records of the proceedings might exist; and also to ask that defendant's trial counsel furnish appellate counsel, without a formal hearing, the benefit of his or her notes or recollection. A defendant who does not proceed diligently is open to the suspicion that he thinks the likelihood of really finding significant appellate issues remote – and would prefer failure in reconstructing the proceedings to success, hoping to claim prejudice when reconstruction proves impossible.”). Based on these actions, substantial delays have been incurred in this appeal.

In regard to Appellant's contentions concerning a change in circumstances allegedly warranting reconsideration of the pre-trial bond issue, the State notes Appellant's four earlier requests for pre-trial bond were denied by Judge Keesley and Judge Addy based on the danger Appellant posed to the community. See Exhibit “A;” Exhibit “B;” Exhibit “C;” Exhibit “D.” Significantly, in asking this Court to grant a limited remand for reconsideration of the pre-trial bond issue, Appellant has not explained what circumstances have changed that would impact the issue of his suitability for pre-trial bond and, more specifically, has not indicated in particular what circumstances have changed in regard to the circuit court judges' findings that he was not suitable for pre-trial release based on the danger he posed to the community. As a result, it is unclear what allegedly changed circumstances warrant further consideration of the issue of pre-trial bond.

However, notwithstanding the cause of the delays that have been incurred in Appellant's appeal or any alleged changes in the circumstances surrounding Appellant's suitability for pre-

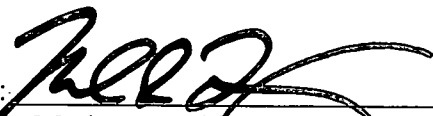
trial release, this Court should deny Appellant's motion for a partial remand because remand is unnecessary for the pre-trial bond issue to be considered by the circuit court judge. The issue currently on appeal in Appellant's case concerns the circuit court judge's denial of Appellant's request for immunity from prosecution pursuant to the South Carolina Protection of Persons and Property Act. Critically, an appeal from the denial of a request for immunity from prosecution does **not** affect the issue of pre-trial bond. See Rule 205, SCACR ("Upon the service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal; the lower court or administrative tribunal shall have jurisdiction to entertain petitions for writs of supersedeas as provided by Rule 241. Nothing in these Rules shall prohibit the lower court, commission or tribunal from proceeding with matters not affected by the appeal."). For that reason, a remand to the circuit court would be unnecessary, and this Court should deny Appellant's request to remand his case for a hearing on an issue not related to and not affected by the matter currently before this Court. See Wilson v. Walker, 340 S.C. 531, 539, 532 S.E.2d 19, 23 (Ct. App. 2000) ("Generally, serving notice of appeal divests the lower court of jurisdiction over the order appealed, **except for matters not affected by the appeal.**" (emphasis added)).

WHEREFORE, Respondent prays that this Court will deny Appellant's request for a limited remand to the circuit court for the purpose of having a motion for pre-trial bond considered; and grant such other and further relief as the Court may deem just and proper.

Respectfully submitted,

ALAN WILSON
Attorney General

MARK R. FARTHING
Assistant Attorney General

By: 
Mark R. Farthing

Office of the Attorney General
Post Office Box 11549
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July 15, 2013

EXHIBIT “A”

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF GENERAL SESSIONS
COUNTY OF McCORMICK	)	
STATE OF SOUTH CAROLINA,	)	
	)	
-vs-	)	ORDER DENYING BAIL
	)	
JOE ROSS WORLEY,	)	Case Numbers J-036561, J-036562,
	)	J-036563, J-036564, J-036565, J-036566
Defendant.	)	

The defendant is before the court for an initial setting of bail on charges of Assault and Battery with Intent to Kill, two counts of Assault with Intent to Kill, and three counts of Possession of a Firearm During the Commission of a Violent Crime. Bail is denied.

The allegations are that this defendant shot at Sheriff's Deputies who were responding to a call from a neighbor about a disturbance. The allegations are that the deputies arrived and went to the door of the home where the defendant was staying. The State claims that the defendant came out with a 30.06 caliber rifle; that the deputies (who were uniformed) identified themselves and ordered the defendant to drop the weapon; that the defendant yelled a profanity laced response to the command and fired the weapon more than once, striking a pistol that Deputy Rushton was holding in his hand. The gunshot caused extensive injuries to Deputy Rushton. The three responding deputies left to see that Deputy Rushton was provided with medical care, and the Sheriff and other officers arrested the defendant at the home. The gun was found inside the residence.

Mr. Worley is 51 years of age. He has never been married, and he lives with his mother, who owns homes in Aiken County and McCormick County. He is a lifelong

resident of this area, having graduated from Aiken High School in 1976. No information was provided as to the defendant's employment or whether he has any history of mental illness.

Mr. Worley's only prior criminal record is for Simple Possession of Marijuana, Failure to Stop for a Blue Light, and DUI. Nonetheless, the court finds that the defendant is a danger to the community and that he must be held without bail.

AND IT IS SO ORDERED.

December 3, 2009

/S/ WILLIAM P. KEESLEY

William P. Keesley, Judge

EXHIBIT “B”

STATE OF SOUTH CAROLINA)
) IN THE COURT OF GENERAL SESSIONS
 COUNTY OF McCORMICK)
 STATE OF SOUTH CAROLINA,)
)
 -vs-) ORDER ON RECONSIDERATION
) OF BAIL
 JOE ROSS WORLEY,) Case Numbers J-036561, J-036562, J-036563,
) J-036564, J-036565, J-036566
 Defendant.)

KATHLEEN P. BUTLER
 CLERK OF COURT
 McCORMICK COUNTY, S.C.

2010 FEB 23 PM 3:42

FILED

On December 3, 2009, the court denied bail on charges of Assault and Battery with Intent to Kill, two counts of Assault with Intent to Kill, and three counts of Possession of a Firearm During the Commission of a Violent Crime. Defense counsel moves to have a reasonable bond set. The assertion is that the situation has changed because the State had indicated in December that the case would be tried during this term of General Sessions Court in McCormick; and, the defense has obtained two experts who will opine that the defendant is not guilty of any crime and is entitled exoneration under theories of self-defense and/or the Castle Doctrine. Having reconsidered the matter, the court orders that the defendant be held without bail on the violent-crime charges.

The allegations are that this defendant shot at Sheriff's Deputies who were responding to a call from a neighbor about a disturbance. The allegations are that the deputies arrived and went to the door of the home where the defendant was staying. The State claims that the defendant came out with a 30.06 caliber rifle; that the deputies (who were uniformed) identified themselves and ordered the defendant to drop the weapon; that the defendant yelled a profanity laced response to the command and fired the weapon more than once, striking a pistol that Deputy Rushton was holding in his hand. The

ENTERED
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gunshot caused extensive injuries to Deputy Rushton. The three responding deputies left to see that Deputy Rushton was provided with medical care, and the Sheriff and other officers arrested the defendant at the home. The gun was found inside the residence.

Mr. Worley is 51 years of age. He has never been married, and he lives with his mother, who owns homes in Aiken County and McCormick County. He is a lifelong resident of this area, having graduated from Aiken High School in 1976. He is retired and cares for his mother. He would agree to live in Aiken County and abide by any restrictions that the court places upon him.

Mr. Worley's only prior criminal record is for Simple Possession of Marijuana, Failure to Stop for a Blue Light, and DUI.

#2 The State indicated that it had planned to call the case for trial, but that the ammunition turned out to be prohibited ammunition which has to be tested in order to determine whether to turn this case over for federal prosecution. The State maintains that SLED has determined that the ammunition is either armor piercing or that it has been modified for a similar purpose.

The court is still convinced that the defendant is a danger to the community and that he must be held without bail.

AND IT IS SO ORDERED.

February 23, 2010

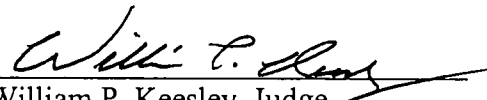

William P. Keesley, Judge

EXHIBIT "C"

STATE OF SOUTH CAROLINA)

COUNTY OF McCORMICK)

STATE OF SOUTH CAROLINA,)

-vs-)

JOE ROSS WORLEY,)

Defendant.)

IN THE COURT OF GENERAL SESSIONS

KATHLEEN E. GUILER
CLERK OF COURT
McCORMICK COUNTY, S.C.ORDER ON RECONSIDERATION
OF BAILCase Numbers J-036561, J-036562,
J-036563, J-036564, J-036565, J-036566

WP
#1

This is the third time that the defendant has appeared before the court for bail. On December 3, 2009 and on February 23, 2010, the court denied bail on charges of Assault and Battery with Intent to Kill, two counts of Assault with Intent to Kill, and three counts of Possession of a Firearm During the Commission of a Violent Crime. The defendant's case has not been called for a jury trial, yet, and he moves to set bail. The motion is denied. The defendant also requests that the court set this case for trial during the next term of General Sessions court. That motion, also, is denied, though the court admonishes the State that this case must be expedited and a decision made as to whether to yield to federal authorities who are considering prosecuting the defendant.

The assertion is that the situation has changed since the court last reviewed bail.

First, the defense claims that investigation has established that the defendant had been shooting at wild animals that had attacked a family pet. He then went to bed and was awakened when deputies arrived. He claims that he thought the house was being burglarized when the shots were fired that struck one of the deputies. Therefore, the defense claims that Mr. Worley was armed at a place where he had a right to be and was acting to protect himself from a perceived threat. The State contends, in addition to the

alleged facts previously presented indicating that the defendant fired at deputies who were outside the house and identified themselves as law enforcement officers, that the defendant was prohibited under federal law from possessing a firearm. The State indicates that an agent with Alcohol, Tobacco, and Firearms (ATF) has investigated this case and made a report that is currently being reviewed by federal prosecutors. The Solicitor stated that he had expected to hear a decision by now from the federal authorities, and the indication is that the State will yield to the federal authorities, if they decide to seek indictments for federal offenses.

Second, the defendant maintains that statutes require that the defendant be tried within two terms. The court does not find that statutory provision to be absolute and finds good cause for the State not having called this case for trial in that the federal authorities are investigating the case. The State indicated in the previous hearing that it had planned to call the case for trial, but that the ammunition turned out to be prohibited ammunition that had to be tested in order to determine whether to turn this case over for federal prosecution. The State maintains that SLED has determined that the ammunition is either armor piercing or that it has been modified for a similar purpose.

Third, the defense claims that the officer who was shot has filed a civil lawsuit in which he asserts negligence. In the defense's view, the assertion of negligence is inconsistent with a claim of a criminal act. The court finds no basis for granting bail on this ground.

With regard to the request that the case be set for the December term of court, that request was made conditionally, being couched in terms of the case being set, if the

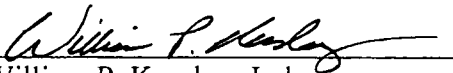
federal authorities do not decide to proceed. The defendant may file a speedy trial motion and have the matter more specifically addressed.

The court has considered all the factors, including the fact that Mr. Worley is a lifelong resident of this area. He has family support. He is retired and cares for his mother. He would agree to live in Aiken County and abide by any restrictions that the court places upon him. His only prior criminal record is for Simple Possession of Marijuana, Failure to Stop for a Blue Light, and DUI.

The court is still convinced that the defendant is a danger to the community and that he must be held without bail.

AND IT IS SO ORDERED.

August 11, 2010


William P. Keesley, Judge

#3

EXHIBIT "D"

STATE OF SOUTH CAROLINA)
COUNTY OF McCORMICK)

IN THE COURT OF GENERAL SESSIONS

2011 SEP 30 AM 9:08

STATE OF SOUTH CAROLINA)
COUNTY OF McCORMICK)

ORDER DENYING BOND

vs.)

JOE ROSS WORLEY)

J-036561, J-036562, J-036563, J-036564
J-036565, J-036566)

2011 OCT -3 AM 9:50
CLERK OF COURT
McCORMICK COUNTY, SC

FILED

THIS MATTER CAME BEFORE THE COURT on September 23, 2011 on Defendant's motion to set bond due to a change in circumstances. I have reviewed the previous orders of the trial court concerning bond, as well as Judge Keesley's order of July 5, 2011 denying Defendant immunity under Section 16-11-401, *et seq.* I have also reviewed Defendant's motion for reconsideration and the available portion of the transcript from the Castle Doctrine hearing of May 31, 2011. Defendant's change of circumstances grounds are based upon the court now having had the benefit of testimony which, per the argument of Defendant, establishes the reasonableness of Defendant's conduct on the night in question. I find as follows:

1. The pertinent facts are not in dispute. However, the inferences to be garnered from the facts are hotly disputed.¹

(a) In the early morning hours of November 2009, deputies with the McCormick County Sheriff's Office responded to a rural area located on Lake Thurmond in response to a report of shots being fired. Apparently there had been prior instances of Defendant firing a weapon and loudly shouting at night which disturbed his neighbors. Defendant admits shooting at a fox earlier that evening in an effort to protect Defendant's cat. Three deputies responded and, after speaking with the neighbors who had made the call, proceeded to Defendant's dwelling which was also occupied by Defendant's aged and partially deaf mother.

(b) Deputy Rushton was one of the responding deputies. He was not in uniform that evening or wearing any clothing which one would associate with being an officer; he did, however, have his badge on his belt. None of the responding deputies had

¹ The court was provided with a partial transcript from the hearing of May 31, 2011. Due to a theft from the court reporter's car, the Defendant's testimony was not available. In this order, any reference to the Defendant's version of events is based upon representations of counsel as opposed to a verbatim record of Defendant's testimony.

activated the blue lights or sirens on their cars when they drove up to Defendant's residence. Testimony indicates that the evening of the incident was extremely dark, and Defendant was presumably sleeping when the deputies knocked and rang the doorbell. The deputies maintain they shouted into the home that they were law enforcement; Defendant denies hearing their announcement of their status, attributing this to the thick insulation on the home. Defendant heard the knocking, armed himself with a rifle, and proceeded onto a balcony on the second story of the home.

(c) Deputy Rushton was pointing his pistol at Defendant as he emerged. Defendant saw this and fired at Deputy Rushton, striking his pistol which shattered from the impact and severely injured Deputy Rushton's hand. A second shot was fired by Defendant which did not strike any deputy. The deputies retreated and Defendant was subsequently taken into custody.

(d) The state maintains that, after knocking on the door and announcing that they were law enforcement, the Defendant shouted, "I don't give a f _ _ _!" (*expletive omitted*). After the shooting, Defendant is alleged to have made another comment implying continued malice toward the deputies. Defendant denies both utterances.

3. In finding that Defendant should be denied bond, the court has previously found that release would pose an unreasonable danger to the community. In fact, Defendant has had the issue of bond brought before the court on three (3) separate occasions, and on each occasion, the court denied bond.² I find there is little concern that Defendant would flee the jurisdiction of the court, so I will confine my analysis to the "danger" justification for denying bond. I further note that Defendant is correct in that the law presumes that any individual charged with a non-capital offense is entitled to bond.

4. In assessing the dangerousness of the Defendant and in considering whether Defendant has demonstrated a sufficient change in circumstances to warrant altering his bond status, it is necessary and proper for this court to consider the Defendant's prior record and the facts and circumstances surrounding the present charge. Furthermore, in assessing the facts and circumstances, it is proper for this court to consider the ultimate question of "why did this

² This court reviewed the prior orders dated December 3, 2009, February 23, 2010, and August 11, 2010. At the hearing of May 31, 2011, Defendant renewed his request for bond before Judge Keesley. Due to Judge Keesley having recused himself from further hearings on this matter, this judge was assigned to hear this fourth (4th) request for bond.

incident occur” or “how did this incident come to pass.” In short, what are the potential motives for the Defendant’s conduct? There exist only two possible motives for why the Defendant shot Deputy Rushton:

(a) Arguably, the Defendant may have shot Deputy Rushton out of pure malice. Essentially, the state’s argument boils down to this: Awakened from his bed early in the morning by the deputies pounding on his door and announcing that they were law enforcement, the Defendant believes that the deputies were coming to get arrest him for having fired the earlier shots. Intent on maintaining his liberty at all costs and out of a depraved indifference to the lives of the deputies, Defendant arms himself, exits onto the porch, and fires at Deputy Rushton intending to kill him. But for the swift retreat of Deputy Rushton and the others, Defendant would have surely killed them all.

(b) Alternatively, the Defendant was sleeping when he was awakened by banging on his door. Aware of the prior burglary attempts on his secluded, rural dwelling, he arms himself out of concern that thieves are attempting to enter his home. Because the house is extremely well insulated, Defendant neither hears the deputies announcing their status as law enforcement, nor does he see any blue lights flashing from their cars or hear any sirens. Exiting onto the second story porch, his attention is immediately fixed on a figure, dressed in plain clothes, pointing a pistol at him. Fearing that he was about to be killed, he makes a split-second decision and fires on what he believes to be a burglar. In short, Defendant argues that he was acting under the reasonable belief that he was shooting at a potential intruder.

5. Scenario A is certainly plausible. This characterization would be supported by the testimony of the deputies that the Defendant’s profane statement after the officers knocked and announced their presence. However, the lack of any motive, substantial prior criminal history, or evidence of ill will toward law enforcement makes this theory less convincing that it otherwise would be had the court been provided with some explanation for Defendant’s actions by the state. No evidence exists of any illegal activity taking place at the dwelling. No evidence exists that Defendant is a member of any nihilistic anti-governmental organizations. No evidence exists of any grudge or hatred toward any of the deputies. In short, aside from the possibility that the Defendant “just snapped” that evening, the court is presented with limited evidence to support the first scenario.

6. Scenario B is also plausible. This characterization would be supported by the testimony of Dr. George Kirkham, Defendant's expert in criminology. His uncontroverted testimony is that by neglecting to call the defendant's home, to activate the blue lights on the officers' cars, to wear a law enforcement uniform, and to take other proper precautions in responding to a "shots fired" call, the McCormick deputies greatly enhanced the potential for a bad outcome that evening. The absence of any evidence of ill will, intoxication, or mental infirmity on the part of the Defendant could cause a trial jury to conclude this scenario is quite plausible.

7. Ultimately, the question of which scenario is correct will be decided by the finder of fact.³ Again, the court desires to weigh the potential scenarios simply to determine the extent to which the Defendant may pose an unreasonable danger to the community. Under the first scenario, the Defendant would obviously be an extreme danger. Under the second scenario, the Defendant poses minimal risk to the community. As noted in the prior orders, the Defendant's prior criminal history is dated and rather minimal; he was convicted for failure to stop in 1977, simple possession of marijuana in 1987, and DUI in 2000.

8. I am also aware of the delays which may be occasioned by the procedural posture of this case. The parties advised the court that a motion for reconsideration of the July 5, 2011 order has been filed by Defendant. In that order Judge Keesley recused himself from further hearings on this matter, so it remains an open question as to whether he will agree to consider the motion for reconsideration. If the motion for reconsideration is not heard, Defendant will be procedurally unable to appeal, and a full rehearing will have to be held or another judge will have to be assigned to rule on that motion.⁴ If the motion for reconsideration is considered and denied, Defendant may immediately appeal.⁵ As noted in footnote 1 of this order, however, the court reporter is unable to furnish a complete transcript, so the appellate court may

³ Assuming, of course, the trial court's Castle Doctrine ruling stands. See paragraph 8, *infra*.

⁴ Again, the problem with the lack of Defendant's transcribed testimony may prevent any assigned judge from ruling on the motion for reconsideration of the July 5, 2011 order.

⁵ See State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011) (holding in footnote 2 that the immunity granted by Section 16-11-410, *et seq.*, is immediately appealable)

elect to remand for a rehearing based upon this ground alone.⁶ Regardless of which procedural scenario actually comes to pass, this case will be delayed.⁷ This is truly regrettable, yet unavoidable.

9. I have fully considered all the facts, circumstances, and applicable law. Having reviewed the order of July 5, 2011 which was forwarded to the court by counsel for the Defendant, I note that the order reflects a finding that the testimony of the deputies was "far more" credible, and the trial court further notes that "[t]he court does not find Mr. Worley to be credible."⁸ Undoubtedly, the deputies could have employed more reasonable methods in responding to the call, and the court believes even the state would have to concede this point. However, this court is cognizant that on three (3) previous occasions the court has ruled that Defendant poses a danger to the community. The July 5, 2011 order similarly finds that the testimony of the Defendant (which this court cannot review due to the absence of a transcript) to be incredible. In light of this finding, and due to the extremely serious nature of the charges, this court finds that Defendant's motion to reconsider the denial of bond due to change in circumstances should be denied. This finding is supported by the testimony of the deputies that the Defendant, by virtue of his profane response to their knock and announce, clearly knew they were law enforcement officers. Despite this fact, Defendant went onto his balcony and shot Deputy Rushton. Defendant then fired a second shot striking no one, but followed this shot with a statement to the effect of "Where are you, you son of a b _ _ _ _?" (*expletive omitted*). The court takes this statement as evidence of continued hostility toward the deputies despite the fact that they were leaving the property. The record also reflects that the Defendant may have been in possession of or using armor-piercing ammunition which is illegal under federal law.⁹

⁶ As a practical matter, I believe this outcome is very likely. The order of July 5, 2011 required the trial court to assess the credibility of the various witnesses called. For this reason, I believe the testimony of the Defendant would be a crucial part of the record on appeal, and a remand would merely delay the trial further. Alternatively, should the appellate court hear and rule on the appeal, because of the deference normally given to credibility determinations by the trial court, a very likely potential outcome would be affirmation of the July 5, 2011 order.

⁷ I am further informed that McCormick County only holds General Sessions court four (4) times per year, so the unavailability of court time may cause even greater delays.

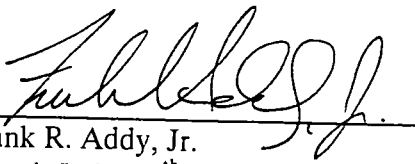
⁸ The court also stated: "With all due respect to the expert, the evidence refuting Mr. Worley's assertions of what occurred is overwhelming and undermines the expert's conclusions." Clearly, the court believed the version of events as proffered by the state's witnesses.

⁹ See order of February 23, 2010.

Clearly, the court's prior findings that the Defendant poses an unreasonable danger to the community is factually supported by the evidence, and Defendant has failed to demonstrate a sufficient change in circumstances to warrant altering the conclusions and denials of bond as explained in the court's three (3) previous bond orders.

WHEREFORE, Defendant's motion for bond is denied.

IT IS SO ORDERED.



Frank R. Addy, Jr.
Circuit Judge, 8th Judicial Circuit

September 28, 2011
Greenwood, South Carolina

EXHIBIT "E"

The Supreme Court of South Carolina

Joe Ross Worley,

Petitioner,

v.

State of South Carolina,

Respondent.

ORDER

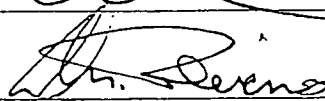
Petitioner has filed an appeal in the Court of Appeals from an order of the circuit court denying bond. Petitioner requests the appeal be certified to this Court, or in the alternative, that this Court issue a writ of habeas corpus. The State has filed a return in opposition to the petition.

We hereby certify the appeal to this Court and dismiss it pursuant to Parsons v. State, 289 S.C. 542, 347 S.E.2d 504 (1986).

The petition for a writ of habeas corpus is denied. Butler v. State, 302 S.C. 466, 397 S.E.2d 87, cert. denied 498 U.S. 972, 111 S.Ct. 442, 112 L.Ed.2d 425 (1990); Parsons, supra.

IT IS SO ORDERED.


C. J.


J.

Donald W. Beatty J.
John R. Bridges J.
Kaye L. Dean J.

Columbia, South Carolina

January 25, 2012

EXHIBIT "F"

The South Carolina Court of Appeals

RECEIVED

The State, Respondent

DEC 19 2012

v.

ATTORNEY GENERAL
OFFICE

Joe Worley, Appellant.

MF R/c

Appellate Case No. 2012-210646

ORDER

After careful consideration of the parties' filings, Respondent's motion to strike Appellant's initial brief is granted. Within twenty days, Appellant shall serve and file an amended initial brief that (1) strikes any arguments regarding the denial of Appellant's bond request because an appeal from the orders relating to the bond are not currently before this Court; (2) strikes any citation to matters not presented to the lower court, including counsel's trial notes, pursuant to Rule 210(c), SCACR; and (3) adds proper citation references pursuant to Rule 208(b)(4), SCACR, which requires initial briefs to "contain references to the transcript, pleadings, orders, exhibits, or other materials which may be properly included in the Record on Appeal [see Rule 210(c)] to support the salient facts alleged" and to cite "to the page and line number of the transcript prepared by the court reporter or by the page of the material to be referenced."

Additionally, after careful consideration of the parties' filings, Appellant's motion to supplement the record and expedite briefing is denied.


FOR THE COURT

Columbia, South Carolina

FILED

AK 12/19/12

cc:

Desa Allen Ballard

✓Mark Reynolds Farthing

Harvey MacLure Watson, III

Carson McCurry Henderson

Billy J. Garrett, Jr.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from McCormick County
Honorable William P. Keesley, Circuit Court Judge
Appellate Case No. 2012-210646

THE STATE,

Respondent,

vs.

JOE ROSS WORLEY,

Appellant.

PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Return to Appellant's Motion for Partial Remand on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Desa Ballard and Harvey M. Watson, III, Esquires
Ballard Watson Weissenstein
Post Office Box 6338
West Columbia, South Carolina 29171

Carson Henderson, Esquire
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109-B Oak Avenue
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Billy J. Garrett, Jr., Esquire
The Garrett Law Firm, PC
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Greenwood, South Carolina 29646

I further certify that all parties required by Rule to be served have been served.
This 15th day of July, 2013.

Ellen R. DuBois

ELLEN R. DuBOIS

Legal Assistant

Office of the Attorney General

Post Office Box 11549

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS
Appellate Case No. 2012-210646

APPEAL FROM MCCORMICK COUNTY COURT OF GENERAL SESSIONS
WILLIAM P. KEESLEY, CIRCUIT COURT JUDGE

The State,

Respondent,

v.

Joe Worley,

Appellant.

**REPLY TO THE STATE'S RETURN TO
APPELLANT'S MOTION FOR PARTIAL REMAND**

This matter awaits completion of a reconstructed record, from a denial of a motion to bar prosecution under the Castle Doctrine, before it may proceed in earnest through briefing and the remainder of the appellate process. Meanwhile, however, Appellant remains in pre-trial custody, without bond, and has been since his arrest in November, 2009. For that reason, Appellant filed a Motion for Partial Remand for the limited purpose of consideration of Appellant's Motion for Bond that was filed recently in the Court of General Sessions.

The State has filed a return to that motion for partial remand that includes a very detailed factual history of the case until this point. The apparent purpose of that detail is to place blame upon Appellant for the delays in this case. The State can certainly take that disputed position, but that issue is irrelevant to this Court's consideration, as it goes to the heart of the issue contained within the motion for bond based on change in circumstances, and is therefore appropriately an issue to be examined by the trial court.

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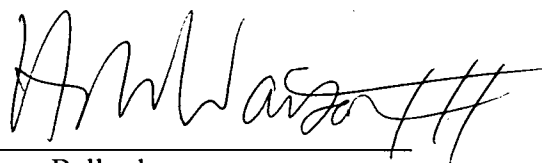
JUL 23 2013

SC Court of Appeals

Instead, the sole issue for this Court's consideration is whether partial remand of this matter is necessary to empower the trial court to consider a renewed bond motion. The trial court's authority to do so, however, is apparently not in doubt to the State, as the State's own return asserts "this Court should deny Appellant's motion for a partial remand because remand is unnecessary for the pre-trial bond issue to be considered by the circuit court judge."

Appellant filed the current motion so that the bond issue could be considered by the trial court. Appellant does not care if that is accomplished via partial remand as requested in its motion, or affirmation from this Court that, as the State contends, the trial court has continuing authority to entertain such a motion for bond already without intervention of this Court.

Appellant therefore seeks an order of this court either partially remanding to the trial court for bond consideration, or in the alternative an order confirming the ability of the trial court to consider the pending motion for bond without necessity of partial remand.



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July 22, 2013

ATTORNEYS FOR APPELLANT

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM McCORMICK COUNTY

Honorable William P. Keesley, Circuit Judge, 11th Judicial Circuit
Appellate Case No. 2012-210646

Joe Ross Worley,

Appellant

v.

State of South Carolina,

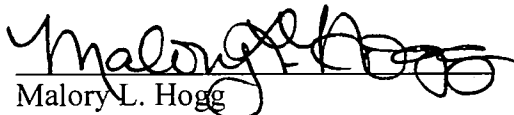
Respondent.

CERTIFICATE OF SERVICE

I, Malory L. Hogg, an employee with the Law Offices of Ballard Watson Weissenstein, do hereby certify that on July 22, 2013, I served a copy of the **REPLY TO THE STATE'S RETURN TO APPELLANT'S MOTION FOR PARTIAL REMAND** in the above-captioned case on the following individuals by United States Mail, with sufficient first-class postage affixed, addressed as follows:

**Mark R. Farthing, Esquire
Assistant Attorney General
Attorney General's Office
Post Office Box 11549
Columbia, SC 29211**

July 22, 2013
West Columbia, South Carolina


Malory L. Hogg
Paralegal

RECEIVED

JUL 23 2013

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from McCormick County
Honorable William P. Keesley, Circuit Court Judge
Appellate Case No. 2012-210646

THE STATE,

Respondent,

vs.

JOE ROSS WORLEY,

Appellant

RECEIVED
AUG 21 2013

SC Court of Appeals

MOTION TO DISMISS APPEAL

Respondent ("the State"), through its undersigned counsel, would respectfully show unto the Court as follows:

I.

In November of 2009, Appellant Joe Ross Worley was arrested and charged with three counts of assault and battery with intent to kill and three counts of possession of a firearm during the commission of a violent crime. In February of 2010, the McCormick County grand jury indicted Appellant for three counts of assault and battery with intent to kill and one count of possession of a firearm during the commission of a violent crime. Subsequently, Appellant sought immunity from criminal prosecution pursuant to S.C. Code Ann. § 16-11-450, and a hearing on the immunity issue was commenced in the McCormick County court of general sessions on May 31, 2011, with the Honorable William P. Keesley, circuit court judge, presiding. Following the hearing, Judge Keesley issued an order on July 5, 2011, denying Appellant's

request for immunity from prosecution and recusing himself from further participation in the case. Appellant then promptly moved for reconsideration of Judge Keesley's ruling. Thereafter, on December 8, 2011, Judge Keesley issued an order affirming his earlier ruling and denying Appellant's motion for reconsideration. Appellant then filed a notice of appeal appealing Judge Keesley's ruling on the immunity issue on January 18, 2012.

II.

In South Carolina, the right to appeal is conferred by S.C. Code Ann. § 14-3-330. State v. Miller, 289 S.C. 426, 426, 346 S.E.2d 705, 705 (1986). Ordinarily, an appeal may only be pursued after a party has obtained a final judgment or has otherwise satisfied the terms of Section 14-3-330. State v. Wilson, 387 S.C. 597, 599, 693 S.E.2d 923, 924 (2010); see Miller, 289 S.C. at 426, 346 S.E.2d at 705 ("In order to exercise his statutory right to appeal, a defendant must come within the terms of the applicable statute."). In criminal cases, judgment for a criminal defendant is not final until a sentence is imposed. State v. Robinson, 287 S.C. 173, 174, 337 S.E.2d 204, 204 (1985); see Berman v. United States, 302 U.S. 211, 212 (1937) ("Final judgment in a criminal case means sentence. The sentence is the judgment."). Thus, a criminal defendant may **not** appeal until **after** a sentence has been imposed. Parsons v. State, 289 S.C. 542, 542, 347 S.E.2d 504, 504 (1986).

III.

Recently, in State v. Isaac, the South Carolina Supreme Court instructed that an order denying a request for immunity from prosecution under the South Carolina Protection of Persons and Property Act does not fall within any category of orders that are immediately appealable under Section 14-3-330. State v. Isaac, Op. No. 27302 (S.C. Sup. Ct. filed August 21, 2013) (Shearouse Adv. Sh. No. 37 at 15, 17). In reaching that conclusion, the Supreme Court

explained that an order denying a request for immunity was not a final order and was not an interlocutory order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction or granting, continuing, modifying, or refusing the appointment of a receiver. Id., (Shearouse Adv. Sh. No. 37 at 18-19). As a result, the Supreme Court held that “the denial of a request for immunity under the Act is not immediately appealable.” Id., (Shearouse Adv. Sh. No. 37 at 21).

IV.

In the case sub judice, Appellant is appealing from Judge Keesley’s order denying his request for immunity from prosecution. However, Appellant’s case has not yet gone to trial, and Appellant has not yet been convicted or sentenced. See Wilson, 387 S.C. at 603, 693 S.E.2d at 926 (recognizing that the general rule is that a criminal defendant cannot appeal until he has been convicted and sentenced). Accordingly, Appellant’s appeal is an improper interlocutory appeal from an order that is not immediately appealable and should be dismissed, and Appellant’s case should be remanded for trial. See Isaac, (Shearouse Adv. Sh. No. 37 at 23) (instructing that the denial of a defendant’s request for immunity pursuant to the South Carolina Protection of Persons and Property Act is not subject to immediate appeal, dismissing Isaac’s appeal, and remanding for trial); see also State v. Hubbard, 277 S.C. 568, 569, 290 S.E.2d 817, 817 (1982) (“The appellants have not yet gone to trial. An appeal in a criminal case must attend the final judgment rendered on the indictment. No final judgment has occurred in this case and the order appealed from is interlocutory. Therefore, we dismiss the appeal and remand the case for trial.” (citations omitted)).

WHEREFORE, Respondent prays that this Court will dismiss Appellant’s appeal as an improper interlocutory appeal from an order that is not immediately appealable; remand the case

to the circuit court for trial; hold this appeal in abeyance pending a ruling on Respondent's motion; and grant such other and further relief as the Court may deem just and proper.

Respectfully submitted,

ALAN WILSON
Attorney General

MARK R. FARTHING
Assistant Attorney General

By:



Mark R. Farthing

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

August 21, 2013

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from McCormick County
Honorable William P. Keesley, Circuit Court Judge
Appellate Case No. 2012-210646

THE STATE,

Respondent,

vs.

JOE ROSS WORLEY,

Appellant.

PROOF OF SERVICE

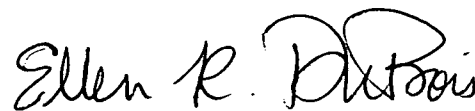
I, Ellen R. DuBois, certify that I have served the within Motion to Dismiss Appeal on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Desa Ballard and Harvey M. Watson, III, Esquires
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Post Office Box 6338
West Columbia, South Carolina 29171

Carson Henderson, Esquire
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109-B Oak Avenue
Greenwood, South Carolina 29646

Billy J. Garrett, Jr., Esquire
The Garrett Law Firm, PC
109 Oak Avenue
Greenwood, South Carolina 29646

I further certify that all parties required by Rule to be served have been served.
This 21st day of August, 2013.

A handwritten signature in black ink that reads "Ellen R. DuBois". The signature is written in a cursive style with a large, looped "D" for "DuBois".

ELLEN R. DuBOIS

Legal Assistant

Office of the Attorney General

Post Office Box 11549

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The South Carolina Court of Appeals

The State, Respondent,

v.

Joe Worley, Appellant.

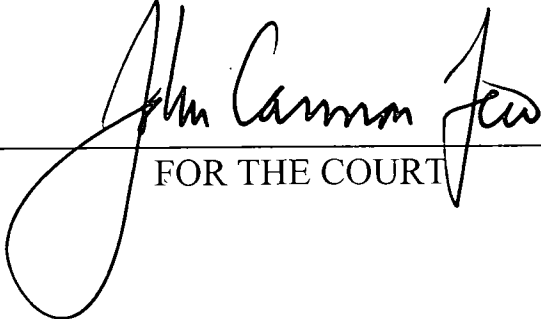
Appellate Case No. 2012-210646

ORDER

Appellant has filed a notice of appeal from the denial of his motion for immunity pursuant to the Protection of Persons and Property Act (the Act).¹ Because the denial of a request for immunity under the Act is not immediately appealable, this appeal is dismissed. *See State v. Isaac*, Op. No. 27302 (S.C. Sup. Ct. filed Aug. 21, 2013) ("[T]he denial of a defendant's request for immunity under the Act is an interlocutory order not subject to immediate appeal . . .").

This court notes that this appeal has been remanded for the reconstruction of the missing portions of the immunity hearing transcript. That reconstruction will no longer be necessary, so the remand order is rescinded. At trial, the parties should proffer to the court any testimony relevant to the immunity motion that is not presented to the jury.

Finally, because this appeal has been dismissed, Appellant's motion for partial remand to request a pre-trial bond hearing is moot.



FOR THE COURT

¹ S.C. Code §§ 16-11-410 to -450 (Supp. 2012).

Columbia, South Carolina

cc:

Desa Allen Ballard

Mark Reynolds Farthing

Harvey MacLure Watson, III

Carson McCurry Henderson

Billy J. Garrett, Jr.

FILED

21 August 2013

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS
Appellate Case No. 2012-210646

6954

APPEAL FROM MCCORMICK COUNTY COURT OF GENERAL SESSIONS
WILLIAM P. KEESLEY, CIRCUIT COURT JUDGE

The State,

Respondent,

v.

Joe Worley,

Appellant.

RECEIVED
AUG 26 2013

**MOTION FOR REHEARING
AND/OR AMENDMENT**

SC Court of Appeals

Appellant Joe Worley moves this Court for an order rehearing, reconsidering and amending its order issued in this case *sua sponte* on August 21, 2013. While Appellant agrees that the decision of the Supreme Court in *State v. Isaac*, Opinion No. 27302 (August 21, 2013) determines that the existing appeal is interlocutory, thus warranting the eventual dismissal of the appeal, the Court's order incorrectly concludes that reconstruction of the record for the immunity hearing previously held is not necessary. Further, in reaching that conclusion, it is respectfully submitted that the order provides advisory rulings on novel issues of law, the consequences thereof being deprivation of Appellant's opportunity to litigate those issues at trial or correct error in a potential future appeal following entry of a final, appealable order.

HML

In support of his motion, Appellant would show the following:

1. This is an appeal from an order denying Appellant the immunity provided by the "Protection of Persons and Property Act" at S.C. Code Ann. § 16-11-401 *et seq.* (Supp. 2012) (hereinafter "the Act"). Based on precedent existing at the time of the trial court's ruling, Appellant was required to take an immediate appeal of that order denying immunity under the Act. *See State v. Duncan*, 392 S.C. 404, 709 S.E.2d 662 (2011).
2. During the appellate process, Appellant discovered missing portions of the transcript of the pretrial hearing conducted on the issue of statutory immunity. After Appellant attempt to supplement the record with his own reconstruction of the missing testimony, the State moved for remand for reconstruction of the missing testimony. That motion was granted. (Order dated March 28, 2013).
3. The trial judge held a hearing on June 14, 2013 for and took testimony and exhibits for purposes of attempting a reconstruction of the underlying record, which remains a work in progress.
4. The Supreme Court's ruling in *Isaac* does not preclude an appeal of the determination previously made whereby Appellant was denied immunity pursuant to the Act, but rather only delays consideration of that issue raised until after final judgment.
5. The transcript in particular, but the record of the previously held immunity hearing pursuant to the Act held below as a whole, will still be necessary for proper appellate review after the trial is concluded. This Court's direction to "proffer to the court any testimony relevant to the immunity" cannot be followed unless or until the record of

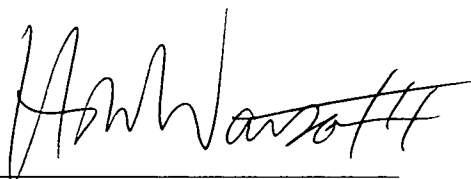
proceedings before Judge Keesley is completely reconstructed, as relevant testimony has already been proffered.

6. Numerous issues remain unanswered by the Supreme Court's decision in *Isaac*, including the manner in which the trial judge should deal with a pretrial ruling which denies immunity under the Act. Those issues have not yet been litigated in any case, and no precedent exists dictating the results, including the *Isaac* opinion itself.
7. This Court's order, however, directing the manner in which denial of immunity pursuant to the Act should be accommodated at a forthcoming trial, does not result from any adjudication of the procedural issues, nor is it the obvious or explained manner for proceeding inevitable conclusion from the Supreme Court's decision in *Isaac*. As such, it is an advisory opinion
8. Further, by its terms the Court's order appears to require an alternate method of reconstructing the record by abruptly terminating the current reconstruction process that continues, despite the Court's receipt of updates regarding that process having been provided previously to advise this Court of the progress made in that regard.
9. The Supreme Court's decision in *Isaac* neither justifies nor compels either action called for in the order. Trial court issues remaining for determination at trial should be addressed by the trial judge pursuant to his authority and discretion, and not dictated preemptively in an order dismissing the appeal.
10. This Court's order of dismissal should not be issued until the reconstruction of the record by Judge Keesley is complete, or until Judge Keesley determines that sufficient reconstruction is not possible.

11. The undersigned has not consulted with opposing counsel, but is informed and believes that such consultation would serve no useful purpose.

Wherefore, Appellant moves for an order:

- A. Amending this Court's order of August 21, 2013 to delete any instructions to the trial judge as to the procedure by which trial court proceedings are to be conducted; and
- B. Holding dismissal of the appeal in abeyance until final action by Judge Keesley on the reconstruction of the record.



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August 23, 2013

ATTORNEYS FOR APPELLANT

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appellate Case No. 2012-210646

APPEAL FROM MCCORMICK COUNTY COURT OF GENERAL SESSIONS

WILLIAM P. KEESLEY, CIRCUIT COURT JUDGE

Joe Ross Worley,

Appellant

v.

State of South Carolina,

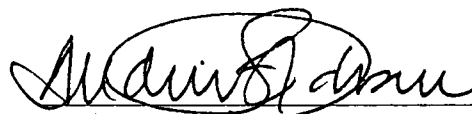
Respondent.

CERTIFICATE OF SERVICE

I, Andrew L. Johnson, an employee with the law firm of Ballard Watson Weissenstein, do hereby certify that on August 23, 2013, I served a copy of the **Motion for Rehearing and/or Amendment** in the above-captioned matter on the following individual by United States Mail, with sufficient first-class postage affixed, addressed as follows:

**Mark R. Farthing, Esquire
Assistant Attorney General
Attorney General's Office
Post Office Box 11549
Columbia, SC 29211**

August 23, 2013
West Columbia, South Carolina


Andrew L. Johnson
Law Clerk

RECEIVED

AUG 26 2013

SC Court of Appeals

The South Carolina Court of Appeals

The State, Respondent,

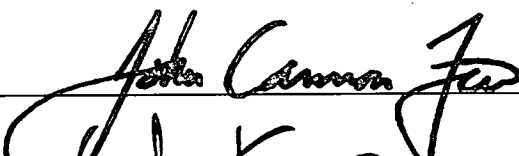
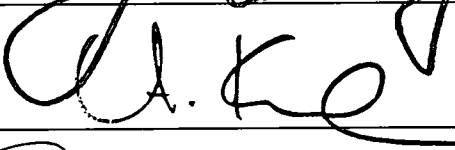
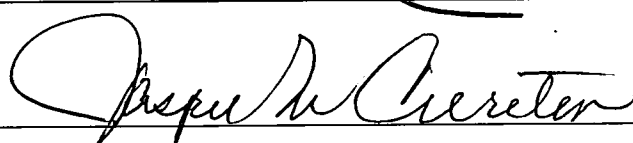
v.

Joe Worley, Appellant.

Appellate Case No. 2012-210646

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

 C.J.
 J.
 A.J.

Columbia, South Carolina

cc:

Desa Allen Ballard
Mark Reynolds Farthing
Harvey MacLure Watson, III
Carson McCurry Henderson
Billy J. Garrett, Jr.
William P. Keesley

FILED
10/21/13

THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM McCORMICK COUNTY

Court of General Sessions

Honorable William P. Keesley, Circuit Judge, 11th Judicial Circuit
Case No. J-036561, J-036562, J-036563, J-036564, J-036565, J-036566

S.C. Ct. App. Order filed October 21, 2013

State of South Carolina,

Respondent,

v.

Joe Ross Worley

Petitioner.

PETITION FOR WRIT OF CERTIORARI

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Harvey M. Watson, III

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RECEIVED

NOV 22 2013

SC Court of Appeals

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ATTORNEYS FOR PETITIONER

Other Counsel of Record

Mark R. Farthing
Post Office Box 11549
Columbia, South Carolina 29211

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A. <u>Reconstruction of the missing testimony was underway and virtually completed. The Court of Appeals halted that process, prejudicing future efforts to present a sufficient record to afford eventual meaningful review by the appellate court.</u>	
B. <u>The Court of Appeals responded to State v. Isaac by not just delaying appellate review of Petitioner's appeal, but by ending the appropriate process that would allow for such eventual appeal</u>	
II. THE COURT OF APPEALS ISSUED AN ADVISORY OPINION REGARDING THE MANNER IN WHICH THE TRIAL COURT SHOULD PROCEED TO TRIAL FOLLOWING IMMUNITY DENIAL THAT CONFLICTS WITH PRIOR DECISION OF THE SUPREME COURT.	
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Conclusion	

CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing on the merits issue was made and finally ruled on by the Court of Appeals on October 21, 2013.

QUESTIONS PRESENTED

- I. HAS THE COURT OF APPEALS STOPPED EFFORTS TO PROTECT PETITIONER'S SUBSTANTIAL CONSTITUTIONAL RIGHT TO A MEANINGFUL APPELLATE REVIEW, AND THEREBY CREATED NOVEL QUESTIONS AS TO THE APPROPRIATENESS OF AN ORDERED DELAY IN RECONSTRUCTION OF THE RECORD?
- II. HAS THE COURT OF APPEALS ISSUED AN ADVISORY OPINION REGARDING THE MANNER IN WHICH THE TRIAL COURT SHOULD PROCEED TO TRIAL FOLLOWING IMMUNITY DENIAL THAT CONFLICTS WITH A PRIOR DECISION OF THE SUPREME COURT?

STATEMENT OF THE CASE

Pursuant to Rule 242, SCACR, Petitioner Joe Ross Worley moves for an order granting a writ of certiorari to the Court of Appeals regarding the Order of the Court of Appeals on August 21, 2013 (rehearing denied, October 21, 2013) in *State v. Joe Ross Worley*. In the alternative, Petitioner seeks a writ of prohibition vacating that portion of the Court of Appeals' order which provided advisory instructions for how the trial of this matter should be conducted.

Petitioner was arrested on November 9, 2009 and later charged as a result of his firing of a rifle in the middle of the night at a then unknown person. (Appendix p. 1-2). Petitioner remains incarcerated, without bail, for now more than three years during these proceedings.

Petitioner raised as a defense to his pending charges the immunity from criminal prosecution afforded by the "Protection of Persons and Property Act" at S.C. Code Ann. § 16-11-401 *et seq.* (hereinafter "the Act"). The Honorable William P. Keesley held a pre-trial hearing on the applicability of immunity provided by the Act on May 31, 2011 and June 1, 2011. On July 5, 2011, Judge Keesley issued an Amended¹ Order on Motion to Bar Prosecution, denying Petitioner's assertion of immunity pursuant to the Act. (Appendix p. 1-16). In that order, Judge Keesley recused himself from further proceedings in the action. Thereafter, however, by order filed December 8, 2011, Judge Keesley issued an Amended Order on Reconsideration of the Defendant's Motion to Bar Prosecution, affirming his denial of immunity. (Appendix p. 17-40). Based on this

¹ The initial order was issued on June 24, 2011, but later amended to correct scrivener's errors.

Court's mandate that such appeals must be taken before trial², Petitioner timely filed a notice of appeal with the Court of Appeals on January 20, 2012. (Appendix p. 102).

Petitioner filed his amended initial brief with the Court of Appeals on January 9, 2013. (Appendix p. 129-164). In response, Respondent filed a Motion to Remand, seeking remand to the trial court for reconstruction of the record below which was incomplete by virtue of an incomplete hearing transcript³. (Appendix p. 169). Petitioner filed a return agreeing with the request for remand in principle, but arguing against the nature of remand with limitations as requested by Respondent. (Appendix p. 218). Petitioner subsequently filed his own Motion for Remand, clarifying the nature and extent of remand that Petitioner believed necessary in light of the failure to possess a full record upon which his appeal of the denial of immunity could be heard, and in response to Respondent's attempts to request restrictions on the manner of reconstruction. (Appendix p. 222). The Respondent filed a return to that motion, (Appendix p. 231), and Petitioner filed a Reply. (Appendix p. 260).

By Order of the Court of Appeals on March 28, 2013, the case was remanded back to the trial court for reconstruction of the missing testimony which was necessary for inclusion in the record on appeal. (Appendix p. 168). On June 14, 2013, a hearing was held for the purpose of reconstructing missing portions of the record. (Appendix p. 41). Following the hearing, Judge Keesley circulated a draft order for comment by all parties, and the Court of Appeals was updated on the progress of reconstruction. (Appendix p. 277).

² State v. Duncan, *infra*.

³ Petitioner's own testimony from the pretrial hearing, including back up tapes, paper and electronic recording, was stolen while in the possession of the court reporter. (Appendix p. 101).

On August 21, 2013, this Court issued its opinion in State v. Isaac, changing the manner in which appeals from a denial of immunity pursuant to the Act, such as is at issue in the matter *sub judice*, are handled. 405 S.C. 177, 747 S.E.2d 677. That opinion distinguished instances of a grant of immunity, which remain immediately appealable pursuant to State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011), from *denials* of immunity. The logical conclusion of Isaac was that orders denying immunity under the Act (which would be appeals by the person charged with a crime), are orders that may be appealed only *after* conclusion of the criminal charges against the defendant. Isaac at p. 185, 681.

The day the Isaac opinion was issued, Respondent filed a Motion to Dismiss Petitioner's Appeal. (Appendix p. 263). Before Petitioner could respond, the Court of Appeals dismissed the appeal the very same day, citing that day's Isaac opinion, but gratuitously instructing the parties how to handle the missing record when the case was tried⁴. (Appendix p. 269). Petitioner filed a Motion for Rehearing and/or Amendment. (Appendix p. 272). That petition was denied by order dated October 21, 2013. (Appendix p. 271). Judge Keesley ceased his efforts to issue an order on the remand after the Court of Appeals dismissed Petitioner's appeal and denied rehearing. (Appendix p. 279).

It is respectfully asserted that this Court should issue a writ of certiorari to review the order of the Court of Appeals on the following grounds:

- A. The order suspends indefinitely necessary and partially completed efforts to reconstruct the missing testimony, which is required to protect Petitioner's

⁴ It is unclear whether the Court of Appeals' order dismissing the appeal was done *sua sponte*, or in response to Respondent's motion. It is unknown, at last to Petitioner, which came first.

substantial constitutional right to allow for eventual meaningful appellate review of a denial of immunity;

- B. A novel question exists as to whether an active reconstruction of the record, already underway pursuant to Court of Appeals' order, can be halted when a new decision is issued that changes the timing for an appeal of the sort already upon on review at the time the law changes.
- C. The Court of Appeals issued an advisory opinion regarding the manner in which the trial court should proceed with trial in light of State v. Isaac following immunity denial; and
- D. Novel questions exist about the means by which trial can proceed following a denial for immunity, especially in the context of a record already known to be incomplete, when reconstruction is best accomplished sooner rather than later.
- E. In the alternative, Petitioner seeks a writ of prohibition vacating (or preventing the trial court from being bound by) the advisory opinion issued *sua sponte* by the Court of Appeals when dismissing the appeal.

ARGUMENT

Petitioner filed an appeal from an order denying Petitioner the immunity provided under the "Protection of Persons and Property Act" at S.C.Code Ann. § 16-11-401 *et seq.* (Supp. 2012) ("the Act"). Based on precedent existing at the time of the trial court's ruling, Petitioner was required to take an immediate appeal of that order denying immunity under the Act. See State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011). During the period in which Petitioner's motion to reconsider in the trial court was pending, Petitioner discovered portions of the transcript of the pretrial hearing conducted on the issue of statutory immunity were missing. (Appendix p. 101). Critically, Petitioner's own testimony⁵ constitutes the bulk of the missing portion of the transcript.

Petitioner agrees that the decision of the Supreme Court in State v. Isaac, 405 S.C. 177, 747 S.E.2d 677 (2013) clearly establishes now that his existing appeal is interlocutory, thus warranting the holding of the present appeal in abeyance until the conclusion of the criminal charges when it may be heard. However, the Court of Appeal's order doing so incorrectly directs that reconstruction of the record related to the previously held immunity hearing should be somehow be abandoned, yet still take place at trial, in the advisory manner directed by the order. None of these issues were before the Court of Appeals, yet were dictated *sua sponte* by the Court of Appeals in the order dismissing the appeal.

I. THE COURT OF APPEALS STOPPED EFFORTS TO PROTECT PETITIONER'S SUBSTANTIAL CONSTITUTIONAL RIGHT TO A MEANINGFUL APPELLATE REVIEW, AND THEREBY CREATED A

⁵ Of significant importance is the obligation of the criminal defendant, who carries the burden of proof under the Act, to explain to a court why he felt the need to defend himself. How that comports with the right to remain silent pursuant to the Fifth Amendment to the U.S. Constitution is, as yet, unknown.

NOVEL QUESTION AS TO THE APPROPRIATENESS OF AN
ORDERED DELAY IN RECONSTRUCTION OF THE RECORD.

The record of the previously held immunity hearing pursuant to the Act held below as a whole is necessary for proper appellate review, whenever that occurs. See Rule 210(h), SCACR (“the appellate court will not consider any fact which does not appear in the Record on Appeal.”); State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) (“When an appellate court rules on an issue not preserved for appellate review, the portion of the appellate court's opinion pertaining to the unpreserved issue should be vacated.”). Additionally, due process considerations apply, since an individual and his liberty interests are affected by the determination regarding immunity pursuant to the Act, and therefore the Petitioner must receive certain procedural protections, including “the right to meaningful judicial review.” Dangerfield v. State, 376 S.C. 176, 179, 656 S.E.2d 352, 353-54 (2008).

- A. Reconstruction of the missing testimony was underway and virtually completed. The Court of Appeals halted that process, prejudicing future efforts to present a sufficient record to afford eventual meaningful review by the appellate court.

South Carolina jurisprudence recognizes the trial court's authority to set the record for appeal. State v. Ladson, 373 S.C. 320, 324, 644 S.E.2d 271, 273 (Ct. App. 2007). When a transcript has been lost or destroyed, an appellate court may remand to have the record reconstructed by the trial court. Whitehead v. State, 352 S.C. 215, 221, 574 S.E.2d 200, 203 (2002). Although the trial court may accomplish that reconstruction through various means. Adams v. H.R. Allen, Inc., 397 S.C. 652, 726 S.E.2d 9 (Ct. App. 2012). Regardless of effort by the trial court, however, an appellate court must have a sufficient record, including a sufficient transcript as a part thereof, to allow for a

“meaningful appellate review.” State v. Ladson, 373 S.C. 320, 321, 644 S.E.2d 271 (Ct. App. 2007) (“Because we find the reconstructed record insufficient for meaningful review of direct appeal issues, we reverse and remand for a new trial.”).

The Court of Appeals ordered reconstruction of the record on March 28, 2013. (Appendix p. 168). A hearing was held thereafter in the trial court just for that sole purpose, during which witnesses testified and documentary evidence was proffered. (Appendix p. 41-100). The parties and presiding judge exchanged information after the hearing, and Judge Keesley circulated an initial draft order for reconstruction of the record on August 6, 2013. (Appendix p. 277). Pursuant to its directive, the Court of Appeals received an update on the status of the reconstruction on August 14, 2013. (Appendix p. 281). An appropriate attempt at seeking to protect Petitioner’s right to eventual meaningful review was nearing completion. (Appendix p. 277).

B. The Court of Appeals responded to State v. Isaac by not just delaying appellate review of Petitioner’s appeal, but by ending the appropriate process that would allow for such eventual appeal.

The Supreme Court’s ruling in *Isaac* came down on August 21, 2013, just one week after the parties had provided the Court-ordered update to the Court of Appeals on the reconstruction process. (Appendix 281). The decision in Isaac still allows for the appeal of denied immunity pursuant to the Act, but merely delays such an appeal until after final judgment the case. State v. Isaac, 405 S.C. 177, 185, 747 S.E.2d 677, 681 (2013). However, the Court of Appeals order rescinding its remand for reconstruction in this matter goes further than merely turning over proceedings back to the trial court for eventual, potential appeal after final judgment.

Instead, the order states that “reconstruction will no longer be necessary”, which is simply incorrect. The Court of Appeals halted a very much necessary process shortly before its conclusion with an erroneous statement of the law. (Appendix p. 269). It has been stated that “justice delayed is justice denied” but in the specific context of record reconstruction, the Court of Appeals has already affirmatively stated that substantial delay between original event and reconstruction creates an “uphill struggle” that eventually may be untenable. State v. Ladson, 373 S.C. 320, 322, 644 S.E.2d 271, 272 (Ct. App. 2007). Already more than two and a half years have lapsed between the pre-trial immunity hearing and the present⁶, and unknown further delays may lie between now and final judgment on the pending criminal charges, while all the while Petitioner’s supposed right to meaningful review diminishes. It would be inappropriate, to an extent justifying this Court’s action, to allow the near completed reconstruction process to be terminated at this time as directed by the Court of Appeals.

II. THE COURT OF APPEALS ISSUED AN ADVISORY OPINION REGARDING THE MANNER IN WHICH THE TRIAL COURT SHOULD PROCEED TO TRIAL FOLLOWING IMMUNITY DENIAL THAT CONFLICTS WITH PRIOR DECISION OF THE SUPREME COURT.

Numerous issues remain unanswered by the Supreme Court’s decision in Isaac, including the manner in which the trial judge should deal with a pretrial ruling which denies immunity under the Act, especially when there exists a known-to-be-incomplete record of pre-trial proceedings mandated by the Act as interpreted by the Supreme Court in State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011).

⁶ Most of the delay has been caused, ironically, by Petitioner’s obligation to appeal Judge Keesley’s order as required by Duncan, and his own efforts to provide reconstructed testimony without the necessity of a remand. Thus by seeing to expedite the appeal which was required by Duncan, irreparable damages has already been done to Petitioner’s ability to defend himself by presenting a sufficient appellate record.

A. The Court of Appeals order is advisory.

The Court of Appeals' order includes language directing that the "parties should proffer to the court any testimony relevant to the immunity motion that is not presented to the jury." (Appendix p. 269). That portion of the order, directing the manner in which denial of immunity pursuant to the Act should be accommodated at a forthcoming trial, does not result from any adjudication of the procedural issues, nor is it the obvious or explained manner for proceeding from the Supreme Court's decision in Isaac. As such, it is an advisory opinion. Tellingly, the Court of Appeals' order is recognition that novel issues regarding denial of immunity pursuant to the Act require the Supreme Court's consideration and guidance.

B. The Court of Appeals Order conflicts with a prior decision of Supreme Court.

Further, as written, the Court of Appeals' order would require Petitioner to defend himself at trial on the actual criminal charges before the jury, while simultaneously making further effort in parallel, related non-jury setting to present and preserve grounds for immunity. That advisory opinion invades the province of the trial court and its authority to direct the manner of trial, but also contradicts the mandates of Duncan and its determination that immunity issues pursuant to the Act can, and must, be determined pre-trial. It also jumbles, or perhaps overlooks, Petitioner's right to remain silent at trial with the obligation, imposed upon Petitioner by the Court of Appeals' order, that he offer testimony as to why the Act should provide immunity.

Certiorari is necessary to prevent further prejudice to Petitioner. This Court has to provide guidance in a sea of uncertainty for the trial process created by the Isaac decision.

C. A writ of prohibition is appropriate in light of the Court of Appeals order.

Alternatively, a writ of prohibition should be issued to vacate that portion of the Court of Appeals' order which provided guidance to the trial judge as to how the trial of the criminal matter should occur. The trial judge needs to know that s/he is not bound by the Court of Appeals' advisory opinion.

Petitioner realizes that a writ of prohibition is extraordinary.

"With regard to the function and scope of the writ, it has been settled in this state from an early period that it will only lie to prevent an encroachment, excess, usurpation, or improper assumption of jurisdiction on the part of an inferior court or tribunal, or to prevent some great outrage upon the settled principles of law and procedure; but, if the inferior court or tribunal has jurisdiction of the person and subject-matter of the controversy, the writ will not lie to correct errors and irregularities in procedure, or to prevent an erroneous decision or an enforcement of an erroneous judgment, or even in cases of encroachment, usurpation, and abuse of judicial power or the improper assumption of jurisdiction, where an adequate and applicable remedy by appeal, writ of error, certiorari, or other prescribed methods of review are available."

Berry v. Lindsay, 256 S.C. 282, 288, 182 S.E.2d 78 (1971) (citing State Board of Bank Control v. Sease, 188 S.C. 133, 198 S.E. 602 (1938)).

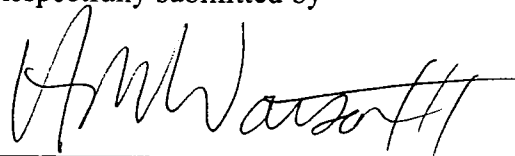
Without the intervention of this Court, there is no remedy available to Petitioner to prevent the further prejudice of his rights. If the trial judge is bound by an advisory opinion issued by the Court of Appeals *sua sponte*, on an issue which was not pending before that Court, the trial judge's own judicial responsibility will have been usurped. State v. Sheppard, 391 S.C. 415, 420, 706 S.E.2d 16, 18 (2011) ("The conduct of a criminal trial is left largely to the sound discretion of the trial judge"); State v. Kromah, 401 S.C. 340, 349, 737 S.E.2d 490, 494-95 (2013) ("The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by

probable prejudice.). “[U]nscrambling an egg” will not be possible, and “when justice cannot be meted out exactly, we do that which is next best – try to bring an end to the dispute.” Roundtree Villas Ass’n, Inc. v. 4701 Kings Corp., 282 S.C. 415, 419, 321 S.E.2d 46, 48 (1984). The appropriate end is to finish the reconstruction, or at minimum prohibit the Court of Appeals from interfering with the same.

Conclusion

In this most unusual circumstance, this Court’s intervention is required, whether by Writ of Certiorari or by Writ of Prohibition.

Respectfully submitted by



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ATTORNEYS FOR PETITIONERS

November 20, 2013

THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM McCORMICK COUNTY

Court of General Sessions

Honorable William P. Keesley, Circuit Judge, 11th Judicial Circuit
Case No. J-036561, J-036562, J-036563, J-036564, J-036565, J-036566

S.C. Ct. App. Order filed October 21, 2013

State of South Carolina,

Respondent,

v.

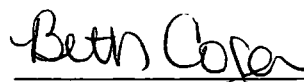
Joe Ross Worley

Petitioner.

CERTIFICATE OF SERVICE

I, Beth Cogan, an employee of Desa Ballard, PA d/b/a Ballard Watson Weissenstein, do hereby certify that I have this date, served one (1) copy of the **Petition for Writ of Certiorari** in the above-captioned matter on the following people by placing the same document in the United States Mail, with sufficient first-class postage affixed and addressed as follows:

Mark Farthing
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211


Beth Cogan, Paralegal

November 20, 2013

RECEIVED

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SC Court of Appeals

The Supreme Court of South Carolina

The State, Respondent,

v.

Joe Worley, Petitioner.

Appellate Case No. 2013-002477

Lower Court Case Nos. 2010-GS-35-00049, -00050,
-00051, and -00052,

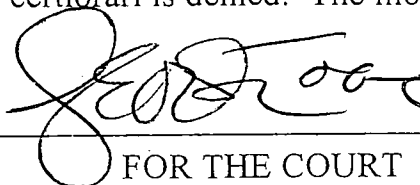
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JUN 26 2014

SC Court of Appeals

ORDER

This matter is before the Court by way of a petition for a writ of certiorari to review the Court of Appeals' order dismissing petitioner's appeal. The State has filed a motion to dismiss the petition. Petitioner has filed a return in opposition to the motion. The petition for a writ of certiorari is denied. The motion to dismiss is denied as moot.



C.J.

FOR THE COURT

Columbia, South Carolina

June 25, 2014.

cc:

The Honorable Jenny Abbott Kitchings

Mark Reynolds Farthing, Esquire

Desa Allen Ballard, Esquire

Harvey MacLure Watson, III, Esquire

Carson McCurry Henderson, Esquire

Billy J. Garrett, Jr., Esquire

The Honorable Gwendolyn D. Chiles



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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FAX: (803) 734-1839
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July 01, 2014

The Honorable Gwendolyn D. Chiles
133 S. Mine St Suite 102
McCormick SC 29835-8357

REMITTITUR

Re: The State v. Joe Worley
Lower Court Case No. 2010GS3500052, 2010GS3500051,
2010GS3500050, 2010GS3500049
Appellate Case No. 2012-210646

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

V. Claire Allen, Deputy
CLERK

Enclosure

cc: Desa Allen Ballard, Esquire
Mark Reynolds Farthing, Esquire
Harvey MacLure Watson, III, Esquire
Carson McCurry Henderson, Esquire
Billy J. Garrett, Jr., Esquire

STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM MCCORMICK COUNTY

R. Lawton McIntosh, Circuit Court Judge

THE STATE,

V.

JOE ROSS WORLEY,

APPELLANT

APPELLATE CASE NO. 2014-001497

MOTION TO HOLD APPEAL IN ABEYANCE
AND

MOTION TO REMAND FOR RECONSTRUCTION OF PRE-TRIAL HEARING ON
APPELLANT'S MOTION FOR IMMUNITY FROM PROSECUTION PURSUANT TO THE
PROTECTION OF PERSONS AND PROPERTY ACT (S.C. CODE ANN. § 16-11-410 et. seq.)

Pursuant to Rule 240 of the South Carolina Appellate Court Rules, undersigned counsel requests an order requiring the parties to reconstruct Appellant's hearing before the Honorable William P. Keesley regarding immunity from prosecution pursuant to the Protection or Persons and Property Act (S.C. Code Ann. § 16-11-410 et. seq.) held on May 31, 2011 through June 1, 2011. While this motion is pending, Appellant asks this Court to hold the timelines for filing his initial brief and designations in abeyance.

In support of his motion, Appellant would present the following:

1. In the early morning hours of November 15, 2009, Appellant shot from the second story balcony of his house at an adult male standing in his yard pointing a handgun at

ORIGINAL

RECEIVED

MAY 04 2016

RESPONDENT

SC Court of Appeals

him. The adult male was McCormick County Sheriff's Deputy Robert Rushton.¹ Appellant's bullet struck Ruston's gun, destroying it, and caused significant injury to Rushton's hand. Rushton and two other deputies were at Appellant's rural lake-house responding to a call from Appellant's neighbor, Alan Sheffield, regarding gunshots fired earlier in the night that Sheffield attributed to Appellant. None of the officers had activated their cars' blue lights or attempted to contact Appellant's residence prior to knocking on his door in the middle of the night. Rushton, who had only recently returned to civilian policing after working as a private contractor in Iraq, was wearing "military style" pants and a dark green collar shirt with no embroidered badge or other police markings on it.

PROCEDURAL HISTORY

2. On February 22, 2010, the McCormick County grand jury indicted Appellant for three counts of assault and battery with intent to kill and one count of possession of a firearm during the commission of a violent crime.

3. Appellant sought immunity from prosecution under the Protection of Persons and Property Act. On May 31, 2011 and June 1, 2011, a "Stand Your Ground" hearing was held before the Honorable William P. Keesley. Solicitor Donald V. Myers, Assistant Solicitor Ervin J. Maye and Assistant Solicitor H. Franklin Young represented the State. Carson M. Henderson and Billy J. Garrett represented Appellant. *See Exhibit A (Partial Transcript of Immunity Hearing).*

¹ Defense challenged at trial whether Rushton qualified as a law enforcement officer under the immunity statute as he had not taken one of the constitutional oaths required of Sheriff's deputies and had never posted a bond.

4. On July 5, 2011, Judge Keelsley denied Appellant immunity in a written order.² Appellant moved for reconsideration of the order. On December 8, 2011, Judge Keesley issued an order affirming the denial of immunity. *See Exhibit B (Order Denying Immunity on Reconsideration)*.

5. Pursuant to then-existing procedures Appellant filed a timely notice of appeal. *See State v. Duncan*, 405 S.C. 177, 747 S.E.2d 677 (2013). In preparation for the appeal, Appellant ordered transcripts from Court Reporter Rema Thomas. Thomas informed Appellant that several tapes containing testimony and arguments from Appellant's immunity hearing were stolen during a car break in and, thus, were unable to be transcribed. *See Exhibit C (Court Reporter's Memorandum)*.

6. The lost tapes contained an indeterminate portion of the opening arguments by both defense counsel and the State on day one of the immunity hearing. Unknown portions of Alan Sheffield's testimony were also missing. Crucially, all of Appellant's testimony, which occurred during day two of the hearing, was missing. Finally, it also appears that portions of the closing arguments of defense counsel and the State may be missing.

7. Despite large portions of the immunity hearing testimony being unavailable, Appellant filed an Initial Brief and Designation of Matter on April 18, 2012. In the brief, defense counsel attempted to reconstruct the missing portions of Appellant's testimony based upon the notes and recollection of trial counsel. Among other grounds, Appellant raised whether "[b]ecause an agent of the State failed to preserve evidence of critical testimony from the hearing

² The order was first issued on June 24, 2011, but later amended to correct scrivener's errors. *See Exhibit B*.

regarding immunity, does Appellate Court lack sufficient record to conduct meaningful appellate review?” *See Exhibit D (Amended Initial Brief of Appellant)*.

8. On August 20, 2012, the State filed a Motion to Strike and Require Filing of Amended Initial Brief of Appellant. Appellant filed a return opposing the State’s motion and the State filed a reply to Appellant’s return. On September 7, 2012, Appellant filed a Motion to Supplement Record on Appeal and Expedite Briefing. The State filed a return opposing the motion and Appellant filed a reply to the State’s return.

9. On December 19, 2012, this Court issued an order granting the State’s motion to strike and denying Appellant’ motion to supplement the record and expedite briefing. Accordingly, Appellant filed an Amended Initial Brief of Appellant and Amended Designation of Matter on January 8, 2013 conceding that the missing testimony was critical to a “full and fair consideration of the matters” on appeal and that the portion of the record remaining was insufficient to allow for meaningful review. *See Exhibit D (Amended Initial Brief of Appellant)*.

10. On February 7, 2013, the State filed a Motion to Remand for Reconstruction of the Record and Motion to Strike Improperly-Designated Matter from Amended Designation of Matter. The State argued that:

[i]n light of Appellant’s representations and the fact that portions of the pre-trial immunity hearing transcript were lost and unable to be transcribed, the State believes it is necessary for the matter to be remanded to the trial court to allow the trial judge to attempt to reconstruct the missing portions.

The State also advocated that “such a remand would ensure this Court can be provided the most complete and accurate record on appeal that can be obtained prior to undertaking appellate review of the issues raised in this case.” *See Exhibit E (State’s Motion to Remand excluding attachments)*.

11. On February 15, 2013, Appellant filed a Reply to the State's motion to remand. On March 6, 2013, Appellant filed a motion to remand to the circuit court for a *de novo* hearing. *See Exhibit F (Return to Motion to Remand and Motion to Remand)*.

12. On March 28, 2013, this Court granted the State's motion to remand for reconstruction of the missing portions of the hearing transcript. In the same order, this Court also denied Appellant's motion for remand for a *de novo* hearing on the issue of immunity. *See Exhibit G (Order Granting Remand for Reconstruction)*.

13. On June 14, 2013, a reconstruction hearing was held before Judge Keesley. Solicitor Donald V. Myers, Assistant Solicitor Ervin J. Maye and Assistant Solicitor H. Franklin Young represented the State. Desa A. Ballard, Carson M. Henderson, and Billy J. Garrett represented Appellant. *See Exhibit H (Reconstruction Hearing Transcript and Exhibits)*.

14. On August 21, 2013, while the motion for reconstruction was still under consideration by Judge Keesley, the South Carolina Supreme Court issued its decision in *State v. Isaac*, 405 S.C. 177, 747 S.E.2d 677 (2013), holding that the denial of a defendant's request for immunity under the Protection of Persons and Property Act is not subject to immediate appeal. That same day, this Court issued an order rescinding the remand to Judge Keesley and dismissing Appellant's appeal. **Judge Keesley never determined whether the missing portions of the immunity hearing record could be adequately reconstructed.** This Court instructed the parties to "proffer to the court any testimony relevant to the immunity motion that is not presented to the jury." *See Exhibit I (Order Rescinding Remand for Reconstruction)*. Appellant's motion for reconsideration was denied.

15. On November 20, 2013, Appellant filed a petition for writ of certiorari with the Supreme Court seeking to reinstate the reconstruction. The petition was still pending when Appellant proceeded to trial.

16. On December 16-20, 2013, Appellant proceeded to trial before the Honorable R. Lawton McIntosh and jury. Solicitor Donald V. Myers, Assistant Solicitor Ervin J. Maye and Assistant Solicitor H. Franklin Young represented the State. Desa A. Ballard, Carson M. Henderson, and Billy J. Garrett represented Appellant.

17. Pursuant to this Court's instructions, defense counsel proffered into evidence the (1) transcript of the reconstruction hearing, (2) notes from the trial judge, solicitor, defense attorneys, and clerk of court, (3) the police report and court reporter's memorandum regarding the car break-in; and (4) correspondence between court administration and defense counsel. *See Exhibit J (Excerpt of Trial Transcript, relevant exhibits included with Exhibit H).*

18. At trial, Appellant was convicted on all charges. On June 30, 2014, Appellant was sentenced by Judge Macintosh to a combined sentence of twenty years imprisonment.

19. On May 7, 2014, the State filed a motion to dismiss Appellant's petition for writ of certiorari. On June 25, 2014, the South Carolina Supreme Court issued an ordering denying Appellant's petition for a writ of certiorari and denying the State's motion as moot. *Exhibit K (Remittitur and Order Denying Petition for Writ of Certiorari).*

ARGUMENT

20. When a trial transcript has been lost or destroyed, the Court may remand to have the record reconstructed so as to allow for meaningful appellate review. *Whitehead v. State*, 352 S.C. 215, 574 S.E.2d 200 (2002); *China v. Parrott*, 251 S.C. 329, 162 S.E.2d 276 (1968); *Koon v. State*, 358 S.C. 359, 367, 595 S.E.2d 456, 460 (2004); *Dolive v. J.E.E. Developers, Inc.*, 308

S.C. 380, 383, 418 S.E.2d 319, 321 (Ct. App. 1992); *State v. Ladson*, 373 S.C. 320, 325, 644 S.E.2d 271, 273-274 (Ct. App. 2007).

21. In the present case, important portions of the immunity hearing transcript were lost due to theft. Appellant, age 58, is potentially serving the equivalent of a life sentence. A complete transcript of the immunity hearing is necessary for appellate counsel to effectively represent him, and for this Court to give meaningful appellate review of his conviction.

22. Moreover, both the State and the defense have repeatedly affirmed in earlier proceedings before this Court that the reconstruction of the missing testimony and arguments from the immunity hearing is essential to a “full and fair” appellate review of the trial court’s denial of immunity. *See Exhibits D, E, and F.*

23. Appellant respectfully requests an order for the reconstruction of the missing portions of appellant’s immunity hearing transcript in order to perfect the direct appeal in the case. *State v. Ladson*, 373 S.C. at 325, 644 S.E.2d at 273-274. While this motion is pending, Appellant asks this Court to hold the timelines for filing his initial brief and designations in abeyance.

WHEREFORE, in order to allow meaningful appellate review, Appellant respectfully requests that this Court hold Appellant’s appeal in abeyance and remand his case to the McCormick County Court of General Sessions for reconstruction of the missing portion of Appellant’s immunity hearing and to hold the timelines for filing the initial brief of Appellant in abeyance during the pendency of this motion.

Respectfully submitted,

Suran B. Hackett for

John H. Strom
Appellate Defender

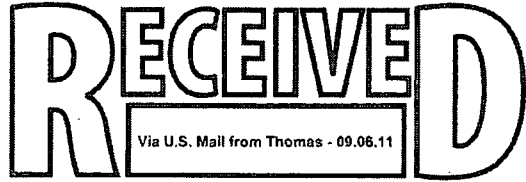
ATTORNEY FOR APPELLANT

This 4th day of May, 2016.

Exhibit A

STATE OF SOUTH CAROLINA)
)
 COUNTY OF MCCORMICK)

COURT OF GENERAL SESSIONS



State of South Carolina,)
)
)

PLAINTIFF,)
)
)

-VS-)
)
)

Joe Ross Worley,)
)
)

DEFENDANT.)
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2010-GS-35-049, 050, 051, 052

TRANSCRIPT OF RECORD

BEFORE THE HONORABLE WILLIAM P. KEESLEY, JUDGE

MAY 31, JUNE 1, 2011

MCCORMICK, SOUTH CAROLINA

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 CIRCUIT COURT REPORTER

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1 Tuesday, May 31, 2011

2 (Partial Transcript of
3 Record. See Court Reporter's certification.)

4 THE COURT: Call your next witness,
5 please.

6 MR. GARRETT: Thank you, Your Honor. I
7 call Mr. Rushton to the stand.

8 THE COURT: All right, come around,
9 please.

10 (Whereupon, the witness was
11 sworn.)

12 MR. GARRETT: Thank you, Mr. Rushton.

13 COURT REPORTER: What's his first name,
14 please.

15 THE COURT: State your name for the
16 record.

17 MR. RUSHTON: My name is Robert E.
18 Rushton.

19 COURT REPORTER: Thank you.

20 ROBERT E. RUSHTON, having
21 first been duly sworn, testified as follows:

22 DIRECT EXAMINATION

23 BY MR. GARRETT:

24 Q Mr. Rushton, you made an oath when you
25 came onto the McCormick County Sheriff's Department,

Robert E. Rushton - Direct

7

1 did you not?

2 A I did.

3 Q I'd let to get you to review that oath.

4 (The witness reviews the
5 document presented to him.)

6 Q Is that your oath?

7 A The best that I can remember. It was
8 years ago.

9 Q How long ago was it when you took your
10 oath of office?

11 A I couldn't tell you exactly which year it
12 was.

13 Q Okay.

14 A It's been quite some time.

15 Q Help us understand a little bit about your
16 employment with the McCormick County Sheriff's
17 Department. When did you go to work for them?

18 A I couldn't tell you the exact year it was.

19 Q Okay. Have you been with them ten years,
20 five years, four years?

21 A I believe it was somewhere around six
22 years, and then I had to resign for about four years
23 before I came back.

24 Q So you worked for about six years, then
25 you resigned, and you were gone for four years?

Robert E. Rushton - Direct

8

1 A Yes, sir.

2 Q Officer Rushton, where were you gone
3 during those four years?

4 A Iraq.

5 Q All right. And what were you doing in
6 Iraq?

7 A I was an international police advisor.

8 Q And in Iraq, do you all have certain
9 protocols or procedures, or were you all teaching
10 the Iraqi police department how to be police
11 officers or --

12 A It depended on where we were stationed at
13 as to whether or not we were doing classroom
14 teaching or doing advising at stations.

15 Q All right. So you were there four years.
16 How many different stations, duty locations, did you
17 have?

18 A It would be hard to give an honest answer,
19 because at one station, at one location I was
20 assigned, I may have had as many as 12 police
21 stations.

22 Q All right. So a rather diverse group of
23 things you had to do in Iraq, I'm assuming?

24 A Very diverse.

25 Q All right. And when did you come back to

Robert E. Rushton - Direct

9

1 the county, to McCormick?

2 A I believe my rehire date was November the
3 first of 2009.

4 Q And this would be, what, 14 days prior to
5 this accidental shooting?

6 A Yes.

7 Q All right. And did you go through any
8 retraining or retesting or anything else before you
9 went back on the active force with the McCormick
10 County Sheriff's Department?

11 A I did. I had to catch up all the training
12 hours that I had missed for the previous four years.

13 Q Okay. And when did you catch those hours
14 up?

15 A Monday through Friday in the Sheriff's
16 Office.

17 Q All right. So you had spent the first two
18 weeks back on working in the Sheriff's Office with
19 training, retraining --

20 A Yes, sir.

21 Q -- getting prepared? All right. And when
22 did you give your new oath of office after having
23 resigned from the prior?

24 A I don't recall coming back over and giving
25 a new oath.

Robert E. Rushton - Direct

10

1 Q So prior to this hearing, you haven't
2 given an oath of office to act as a law enforcement
3 officer for the County of McCormick, State of South
4 Carolina, is that correct?

5 A My understanding is the first oath I took,
6 I took forever.

7 Q But you resigned, is that correct? You
8 resigned?

9 A I resigned my position at the Sheriff's
10 Office to go to Iraq.

11 Q All right. And what was your badge
12 number, the old number?

13 A 104.

14 Q What's your badge number when you come
15 back?

16 A 113.

17 Q So they changed your badge number, is that
18 correct?

19 A Actually, before I left to go to Iraq, but
20 my badge number changed numerous times over the
21 years.

22 Q All right. And so you can be gone for
23 four years, and what do you do, reapply? How do you
24 get back to work?

25 A I did fill out a new application and came

Robert E. Rushton - Direct

11

1 back.

2 Q Okay. So you were no longer employed.

3 You had terminated your services with the McCormick
4 County Police Department at the time, when you were
5 in Iraq?

6 A Yes, sir.

7 Q Not the Police Department, the Sheriff's
8 Department?

9 A Yes, sir.

10 Q And so you made the application. And at
11 some point in time, who told you that you would be a
12 deputy?

13 A When I came back?

14 Q Yes, sir. Do you remember that?

15 A I don't remember if it was Investigator
16 Collier or Sheriff Reid. I don't remember which one
17 it was.

18 Q So there was no actual sit-down where they
19 said, "Well, here's your badge, and here's your duty
20 weapon," and that kind of thing?

21 A I did come in to speak with the sheriff
22 prior to that, in the interview process.

23 Q Were you given a badge?

24 A Not that day.

25 Q Were you ever given a badge?

Robert E. Rushton - Direct

12

1 A Yes.

2 Q And when they handed you the badge, you
3 didn't take an oath of office?

4 A As I stated, I assumed that the first oath
5 of office I took was to protect the citizens of this
6 county, and it was still good.

7 Q But you didn't take an oath?

8 A No.

9 Q All right.

10 A Not that I recall.

11 Q Now, you say you caught up on your
12 training?

13 A Yes.

14 Q And who determined what training you
15 needed to get caught up?

16 A Investigator Collier was also the training
17 officer for the Sheriff's Office.

18 Q Okay.

19 A He had contacted the Academy, and they
20 informed me of what I needed.

21 Q All right. And so you had in-service
22 hours then --

23 A Yes.

24 Q -- for approximately two weeks?

25 A Yes.

Robert E. Rushton - Direct

13

1 Q Did you have any field training or field
2 experience?

3 A During that two weeks?

4 Q During the two-week time, yes.

5 A ~~Other than firearms. That was the only~~
6 thing.

7 Q All right. So you had to requalify with
8 your firearm?

9 A Yes.

10 Q All right. And then what about vehicle
11 training? Did you do any vehicle training?

12 A No.

13 Q Other than the in-service training, do you
14 recall the courses that you actually took?

15 A As far as in the in-service training?

16 Q Well, the two weeks that you called your
17 retraining.

18 A You would have had the criminal domestic
19 violence updates that I had to go back through and
20 the legal updates. Exactly what each one pertained
21 to, I couldn't tell you exactly what every one of
22 them said.

23 Q Okay, domestic updates. And what else?

24 A Just the basic legal updates.

25 Q Legal updates -- law?

Robert E. Rushton - Direct

14

1 A Yes.

2 Q All right. So obviously if the law has
3 changed since you were last at the Academy or last
4 working during those four years, they had to update
5 you on that?

6 A Yes.

7 Q All right.

8 A Laws change all the time.

9 Q It makes sense. All right, now, how much
10 -- did they take you out and do any -- did you have
11 to go under some other officer or work in the field
12 for any period of time prior to that night? I'm
13 talking about patrolling.

14 A No.

15 Q Was that the first night back?

16 A Yes.

17 Q Is it different working out of Iraq than
18 in McCormick County as a police officer?

19 A As far as my job description?

20 Q No, just the environment.

21 A It's totally different.

22 Q Did you go through any type of
23 psychological discussions or training when you got
24 back to help you differentiate between your role as
25 Iraqi police officer vis-à-vis a McCormick Sheriff's

Robert E. Rushton - Direct

15

1 officer?

2 A I was never an Iraqi officer. I would
3 tour and advise and train in classrooms when
4 necessary. ~~But as far as going out here and for~~
5 going out into Iraqi and patrolling the streets and
6 things as a policeman --

7 Q Right.

8 A -- I did not do that, but I was on
9 maneuvers with the military.

10 Q So the military -- the United States
11 military -- would sometimes have police advisors go
12 out with them into areas?

13 A Yes.

14 Q That would be areas where the Iraqis would
15 not have sufficient police to cover those?

16 A No, we were there -- if we went out with
17 them, we went with them to advise and critique the
18 Iraqi police. Then we would go back to the station
19 and tell them where we saw their problems.

20 Q To help train them?

21 A Yes.

22 Q So you trained them?

23 A Yes.

24 Q So you were a trainer?

25 A No, mentor and advise.

Robert E. Rushton - Direct

16

1 Q Mentor and advise. So you would not call
2 yourself a trainer of police officers?

3 A Not in that scenario. But in the
4 classrooms, where we did scenarios in the classroom,
5 it was a controlled environment. It's a lot
6 different.

7 Q A lot different, all right. Well, let's
8 talk about the procedure you employed.

9 MR. GARRETT: Judge, I'd like to mark
10 that, if I may. It's the oath of office.

11 THE COURT: Mark it before you enter it
12 into evidence.

13 MR. GARRETT: Okay. While we're doing
14 that, Judge, let me go ahead and mark this one, as
15 well.

16 THE COURT: I said mark it. Just mark it
17 for ID, I guess. I don't know exactly how this is
18 going to proceed.

19 MR. GARRETT: Okay.

20 COURT REPORTER: Defendant's One for
21 identification.

22 (Defendant's Exhibit Number
23 One A, Westlaw, oath, deputy sheriff, was marked for
24 identification purposes.)

25 THE COURT: Do you have another document?

Robert E. Rushton - Direct

17

1 MR. GARRETT: I do.

2 THE COURT: Let's mark that. Did you show
3 it to them?

4 MR. GARRETT: I did, Your Honor. They
5 have seen it.

6 THE COURT: Mark that, as well.

7 MR. GARRETT: Your Honor, at this time I'd
8 move to submit the oath of office into the record.

9 THE COURT: It's marked for
10 identification.

11 MR. GARRETT: I move at this time to
12 introduce it. It's an oath that he didn't take.
13 It's one that the law requires that he take.

14 THE COURT: Well, I'm a little bit
15 confused. If I mark it into evidence and the trial
16 proceeds, then --

17 MR. GARRETT: This is pre-trial, Judge, I
18 think. I'm not sure what part --

19 MR. MYERS: Can he it as a Court's exhibit
20 for the purpose of this?

21 THE COURT: I just told him to mark it for
22 ID. That way, it would be preserved for any review.
23 As I understand it -- and I may be wrong -- what I
24 saw in that case that was cited to me this morning,
25 if I were to rule against the defendant, it's

Robert E. Rushton - Direct

18

1 immediately appealed.

2 I don't want there to be any
3 confusion. As long as you all are verifying that
4 we're going to have separate exhibit numbers for the
~~5 pre-trial than we do for the trial --~~

6 MR. GARRETT: Yes, sir. We'll stipulate
7 that.

8 MR. MYERS: Yes, sir, we'll agree with
9 that.

10 MR. GARRETT: Okay. What's easier for
11 you?

12 COURT REPORTER: The date. I'll put the
13 dates on this one, and I'll just make it One A and
14 One B.

15 THE COURT: I'll do whatever she wants to
16 do. They're both in evidence for the purposes of
17 the pre-trial hearing.

18 COURT REPORTER: Okay, but I do need to
19 put the stickers on.

20 THE COURT: Yes, ma'am.

21 (Defendant's Exhibit Number
22 One A, Westlaw, oath, deputy sheriff; and
23 Defendant's Exhibit Two A, Gun, photos, four pages,
24 were marked for identification.)

25 COURT REPORTER: So we have Defendant's

Robert E. Rushton - Direct

19

1 One A and 2A from 5/31/11 that are in admitted for
2 identification purposes.

3 THE COURT: Thank you, ma'am.

4 EXAMINATION CONTINUED

5 BY MR. GARRETT:

6 Q Now, I'll just show you this -- this is
7 Two A -- and just ask you to review that to see if
8 you recognize that.

9 A Glock 23 40-caliber pistol. I can't
10 completely tell, but I believe it's the one I was
11 carrying the night of February 15.

12 Q All right. This is your duty weapon that
13 you had that evening?

14 A Yes.

15 Q And who provided this duty weapon for you?

16 A The McCormick County Sheriff's Office.

17 Q All right.

18 COURT REPORTER: Who?

19 MR. RUSHTON: McCormick County Sheriff's
20 Office.

21 Q All right. Did you have any more than one
22 weapon?

23 A No.

24 Q And would you agree that the weapon shows
25 the impact of the 30.06 bullet into the handle that

Robert E. Rushton - Direct

20

1 caused the damage to your wrist?

2 A Yes.

3 Q And the bullet entry -- the entry of the
4 bullet would be right there?

5 ~~A Yes.~~

6 Q About where your middle finger would have
7 been?

8 A Yes.

9 Q Now, the car that you were driving that
10 night, who provided that car?

11 A McCormick County Sheriff's Office provided
12 it.

13 Q All right. And did you take any training
14 or any special training on how to respond to that
15 car to emergency and/or non-emergency circumstances?

16 A I have in the past.

17 Q All right. When you got back, did you
18 refresh on that issue?

19 A I do not recall.

20 Q So you think you may refreshed on that in
21 those two weeks?

22 A I do not recall.

23 Q All right. And you mentioned gun
24 training.

25 A Yes, sir.

Robert E. Rushton - Direct

21

1 Q And tell me about the county-issued
2 uniforms that are required to be issued.

3 A There is not one that's required to be
4 issued.

5 Q There's no required issue uniform for the
6 County of McCormick?

7 A Not that I'm aware of.

8 Q So McCormick County doesn't have uniform
9 that you as a deputy or as a law enforcement officer
10 are required to wear under the law?

11 A Not that are required -- I mean, not that
12 I know.

13 Q On the night in question, what were you
14 wearing?

15 A I was wearing a 5-11 polo tactical shirt.

16 Q A polo type shirt?

17 A Polo type shirt, similar to what I have
18 now. It was green in color with long sleeves.

19 Q Okay. Would it be drab, or would it be --

20 A It was more of a forest green.

21 Q Sir?

22 A More of a forest green.

23 Q Forest green, all right.

24 A And I was wearing a pair of khaki-colored
25 very similar to what I have on now --

Robert E. Rushton - Direct

22

1 Q Okay.

2 A -- 5-11 tactical pants.

3 Q Tactical pants?

4 A Yes.

5 Q What else?

6 A I had my duty belt with my holster, badge,
7 radio, cell phone, handcuffs attached to the belt.
8 I had my microphone on. The 5-11 shirts actually
9 have a place where I can put it, and my radio mike
10 was clipped on right in front of me.

11 Q Okay. I see you've got a badge right
12 there on this particular shirt. Did you have a
13 badge on the shirt that you got shot in that night?

14 A No, I didn't.

15 Q All right. The shirt that you had, did
16 you buy that shirt, or was it provided to you by the
17 McCormick County Sheriff's Department?

18 A I had purchased that shirt.

19 Q Personally?

20 A Yes.

21 Q So, again, you can just wear whatever you
22 want to wear?

23 A My uniforms had not come in at the time.

24 Q So you made a -- who made the procedural
25 decision at the Sheriff's Department to allow you to

Robert E. Rushton - Direct

23

1 go out that evening without the proper uniform?

2 A As I stated, the Sheriff's Department does
3 not have a set uniform.

4 Q Well, what were you waiting on that you
5 didn't have that you said you were waiting on?

6 A I had just said that my uniforms that had
7 been ordered had not come in.

8 Q All right. But what is the uniform?

9 A I don't know.

10 Q That would be the uniform, the shirt that
11 you have today?

12 A Yes.

13 Q Can I just advise the Court for the record
14 so the Court Reporter will note, would that be a
15 gray shirt?

16 A Yes.

17 Q And that shirt has a badge or emblem of a
18 sheriff's badge on it, is that correct?

19 A Yes.

20 Q In addition to that, I see you're wearing
21 a belt, and you have your badge on your belt on the
22 pants?

23 A Yes.

24 Q You've got tactical pants on?

25 A Yes, I do.

Robert E. Rushton - Direct

24

1 Q And what type of shoes are you wearing?

2 A 5-11 footwear. They're 5-11 boots, the
3 boots for law enforcement.

4 Q You've got law enforcement boots. And
5 what about a cap or a police officer's hat?

6 A I was not wearing any.

7 Q You don't wear any?

8 A I was not at that time.

9 Q Do you ever?

10 A I have one, but I'll wear it if it's
11 raining or something. But I was not wearing one
12 that night.

13 Q Is it part of the uniform?

14 A No.

15 Q What color is the hat you would normally
16 wear?

17 A It's black with the word "Sheriff" written
18 in white letters.

19 Q Why would you have a black hat with white
20 across there saying "Sheriff"?

21 A In case it's raining.

22 Q In case it's raining. You're not trying
23 to let people know that you are a sheriff?

24 A The badge speaks for itself, identifying
25 myself.

Robert E. Rushton - Direct

25

1 Q If the badge is enough, then you wouldn't
2 really need a Sheriff's Department hat, would you?

3 A I bought it because in inclement weather,
4 I wouldn't get as wet.

5 Q I've seen police officers on the road when
6 they've got an orange vest on or a vest on that says
7 "Sheriff's Department." Do y'all have any of those
8 vests in McCormick County?

9 A Yes, we do.

10 Q And do you have any other vests like that
11 that you can wear to identify yourself as a
12 sheriff's deputy?

13 A Some of our ballistic vests would have an
14 outer shell that may have "Sheriff" or "Sheriff's
15 Department" or "Police" or "Police Department"
16 written on them.

17 Q When would you wear a ballistic vest?

18 A It depends on the situation. Some
19 officers wear it the entire time they're on duty.
20 Some don't wear it at all.

21 Q What about you?

22 A I don't wear one.

23 Q Ever?

24 A When I was in Iraq.

25 Q You haven't worn one since you've been

Robert E. Rushton - Direct

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1 home?

2 A Once.

3 Q And after this, you haven't worn one?

4 A I didn't have one in the previous
5 incident.

6 Q On that night, you didn't have one?

7 A No.

8 Q What other clothing -- you talked about
9 these vests, and you talked about the hat. What
10 other implements of clothing do you have or are
11 available to you to wear at the department?

12 A I'm not really sure. Maybe my jacket.

13 Q Tell me about your jacket.

14 A It's just a dark navy-blue jacket. The
15 outer shell has a badge on it for the emblem. But
16 once I take the outer shell off, there is black
17 fleece underneath it with nothing written on it.

18 Q Does it have a sheriff's badge on it?

19 A On the outer shell, but not the inner
20 shell.

21 Q The outer shell. And is it similar to the
22 badge you have on there?

23 A I believe so.

24 Q All right. Would you agree with me that
25 if you had a light-colored shirt on versus a dark-

1 colored shirt on, if you had the mike on you that
2 night, you could probably see that clearer?

3 A That particular night, the way the
4 floodlights in the yard lit up, there was no
5 mistaking me.

6 Q Let me ask you about that. Are you sure
7 that's a floodlight?

8 A It's a square light, and I've called it a
9 floodlight my entire life.

10 Q Okay. Is it possible that that is a
11 spotlight as opposed to a floodlight?

12 A Very possible.

13 Q Y'all have been down there to investigate.
14 Has anybody looked at up into that to see whether or
15 not it's in fact a 300-watt spotlight, not a 500-
16 watt floodlight?

17 A I personally did not.

18 Q All right. Nobody prohibited you from
19 doing that, though, is that correct?

20 A I wasn't about to climb up there. I was
21 in there to go into the residence. And the only way
22 to tell would be to go into the residence and come
23 all the way out and look at it.

24 Q All right, let's talk about your procedure
25 that you used that evening. Just walk me through

Robert E. Rushton - Direct

28

1 it. Are you under somebody else's command that
2 night? Are you by yourself? Are you in your own
3 command? What's the deal?

4 A There was myself, Deputy Nick Moore,
5 Deputy Melissa McAllister. We all actually arrived
6 right about the same time.

7 Q Well, hold on before we get to there. I'm
8 just talking about I'm trying to find out, who was
9 the supervisor of that group?

10 A Emmanuel Crowder.

11 Q Emmanuel?

12 A Yes.

13 Q And what time had y'all started working
14 that evening?

15 A I came in at 6 p.m. that evening. Melissa
16 and Nick came in at 6 p.m. that evening.

17 Q Okay. What about Emmanuel?

18 A I believe he came in around 3 p.m.

19 Q And what time does Emmanuel get off?

20 A He got off about 3 a.m.

21 Q And what time do you get off normally on
22 that shift?

23 A It would have been 6 a.m.

24 Q So you work from six to six?

25 A Yes.

1 Q All right. And Emmanuel works from three
2 to three?

3 A Three.

4 Q And then who supervises during the three
5 to six when Emmanuel is not there?

6 A There's not per se a supervisor on duty.

7 Q All right. But on this occasion, Emmanuel
8 was your supervisor?

9 A He was the supervisor of that shift, yes.

10 Q All right. Who called -- just kind of
11 walk me through it. Where were you at that evening?
12 Where had you been earlier that evening?

13 A I had been all over the county.

14 Q All right. So you were doing general
15 duty, general duty patrol?

16 A Yes.

17 Q Were you in your car by yourself, or were
18 you with someone else?

19 A I was by myself.

20 Q All right. And I'm assuming the other
21 two, Nick Moore and Melissa, were also?

22 A They were by themselves.

23 Q By their selves. What's your car number?

24 A Five twenty-four.

25 Q And is your call number the same thing as

Robert E. Rushton - Direct

30

1 your car number?

2 A No, it's not.

3 Q What's your call number?

4 A One thirteen.

5 Q And what's Melissa's call number?

6 A One twelve.

7 Q ~~And what's~~ Nick Moore's call number?

8 A I believe his is 107.

9 Q All right. Tell me, did you call from
10 dispatch at some point in time?

11 A Somewhere after 4 a.m., yes.

12 Q Okay. You got a call from dispatch. I'm
13 assuming y'all have some dispatch logs and what not?

14 A Yes, they call the radios, too.

15 Q Have you ever studied the dispatch logs
16 for that night?

17 A No, I have not.

18 Q Would it surprise you if I told you there
19 was an 18 or 19 minutes' period of time after y'all
20 got on the scene versus the time y'all contacted
21 Sheriff Reid here, who was on the place at that
22 time, that there appears to be nothing on the
23 dispatch log?

24 A I wouldn't know.

25 Q Do you have any idea why that would be?

Robert E. Rushton - Direct

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1 A I wouldn't know.

2 Q So somebody told you to go there, to the
3 location?

4 A Yes.

5 Q Who would it have been that told you to go
6 to the location?

7 A I believe it would have been Joyce
8 Fairfax, the dispatcher that works at night.

9 Q Okay. Did she call out the dispatch, and
10 is she responsible to assign jobs, or does she just
11 called it in and y'all decided who would go?

12 A Dispatchers may not know exactly where
13 each deputy is at in the county. Sometimes they
14 will give out just a general call, and which deputy
15 is closest will respond to it.

16 Q Is that what you did?

17 A I had no idea where the other two deputies
18 were at that night, so I just responded.

19 Q You didn't have anything particular to do
20 at the moment?

21 A There was nothing going on at 4 a.m.

22 Q All right. So you responded?

23 A Yes.

24 Q All right. And I'm assuming -- where were
25 you at when you got the call? Do you know about